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INDIAN CASES

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PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

November 30, 1926.

Present:—Lord Atkinson, Lord Carson, and Sir John Wallis.

MA MI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KALLANDER AMMAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 60, 63—Secondary evidence of contents of document—Evidence of person who has not read document, whether admissible—Muhammadan Law—Divorce, pronouncement of.

Under s. 63 of the Evidence Act oral evidence of the contents of a document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of s. 60 of the Act. [p. 2, col. 1.]

Under the Muhammadan Law a husband can effect a divorce whenever he desires. He may do so by words without any written document, and no particular form of words is prescribed. If the words used are "express" or well-understood as implying divorce, such as *talak*, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. [p. 2, col. 2]

Appeal from the decree of the High Court, Rangoon, reversing that of the District Court, Pegu.

Sir *G. R. Lowndes, K. C.*, and Mr. *R. W. Leach*, for the Appellants.

Messrs. *A. M. Dunne, K. C.*, and *E. B. Raikes*, for the Respondent.

JUDGMENT.

Sir John Wallis.—This is an appeal from the decree of the High Court at Rangoon reversing the decree of the District Court of Pegu. The suit was brought by the respondent Kallander Ammal, to recover the whole, or in the alternative, a part of the estate of her deceased husband, Sheik Moideen, who died intestate on the 29th February, 1920.

In her plaint she claims to be the sole heir of her deceased husband, and alleges that the first defendant, Ma Mi, falsely claims to have been his lawful wife, and that the second defendant, Mohamed Eusoof falsely claims to be the legitimate son of the deceased Sheik Moideen by one Ma Kin; and that neither of them has any claim to any portion of or interest in the estate of the deceased. Notwithstanding which, as she alleges, the defendants have been withholding the property of the deceased from her. The defendants filed a joint written statement in which they denied that the plaintiff was heir to the estate, and pleaded that prior to his death the deceased divorced the plaintiff according to Muhammadan Law, and that the said divorce was communicated to the plaintiff, and the plaintiff thereafter ceased to be the wife of the deceased if she was legally married to him at any time. They also pleaded that as widow and son of the deceased they were his only heirs and legal representatives.

The District Judge framed four issues of which the second, "Was there a valid divorce between plaintiff and Moideen?" alone was tried. On this issue the District Judge found that there was ample evidence to prove that the deceased executed a *talaknama* or a divorce document about two years before his death in Burma, where he resided, and sent it to his wife in India where she was residing, and he accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court at Rangoon, who held that there was no legal evidence on record of the contents of the divorce document, as the evidence tendered in the absence of the document itself was not secondary evidence within the meaning of s. 63 of the Indian Evidence

Act. They accordingly held that a divorce by *talaknama* or writing was not proved; and being further of opinion that no oral divorce was proved by the evidence on record, they allowed the appeal and decreed the plaintiff's suit.

At the trial, several of the witnesses deposed to having heard the *talaknama* read out, and to having seen it executed by the deceased, but the writer of the document was not called, and none of the witnesses had read it so as to be able to speak *de visu* to its contents. Their Lordships are of opinion that in this state of things the learned Judges of the High Court were right in holding that the statements of the witnesses were not secondary evidence within the meaning of s. 63 of the Act, which so far as material, is as follows:—

"Secondary evidence means and includes—

* * * *

oral accounts of the contents of a document given by some person who has himself seen it."

In their Lordships' opinion the learned Judges were right in holding that this means that the oral evidence of the contents of the document must be given by some person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of s. 60 as to oral evidence generally:—

"Oral evidence must, in all cases whatever, be direct; that is to say—if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it."

The question whether the document was a *talaknama* or deed of divorce was a fact which could be seen by reading it, and, therefore, in accordance with the general principle embodied in the section could only be spoken to by a witness who had himself read it.

In this state of the evidence the learned Judges in their Lordships' opinion rightly held, in the absence of any legal evidence of the contents of the document in question that a divorce by *talaknama* or written document, as found by the District Judge, was not proved.

They then proceeded to consider whether there was any evidence on record sufficient to prove that the deceased, on the occasion when the document was drawn up and executed, used words which would, in themselves, be sufficient to constitute an oral divorce under Muhammadan Law. According to that law, a husband can effect a divorce whenever he desires. He may do so by words without any *talaknama* or written document, and no particular form of words is prescribed. If the words used are "express" or well-understood as implying divorce, such as *talak*, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. On an examination of the evidence the learned Judges came to the conclusion that there was no sufficient evidence of any such oral divorce, and they accordingly reversed the judgment of the lower Court and gave the plaintiff a decree.

There is no doubt the evidence of two witnesses on the record that the deceased on this occasion uttered three times the word "*talak*," which, if uttered once, would be sufficient to constitute an oral divorce, and that he also told the witnesses that the document was a *talaknama* or divorce document. As to this, the learned Judges have held that the evidence as to the use of the word *talak* by the deceased was not reliable, and that it was not proved that the deceased told the witnesses that he had divorced his wife, or indeed that he had any intention of effecting a divorce otherwise than by the execution and transmission of the document which has not been proved.

Their Lordships see no sufficient reasons for differing from these findings, which are sufficient to dispose of the case.

It may be observed, in the first place, that the District Judge confined himself to holding that there had been a divorce by written document. Not only did he not find an oral divorce by the pronouncement of *talak* but in his summary of the evidence of the two witnesses who spoke to the use of the word *talak*, he omitted this portion of their evidence nor did he anywhere refer to it in the course of his judgment. In these circumstances, it cannot be inferred that the District Judge would have been prepared to find an oral divorce upon the evidence of these two witnesses if he had considered

it necessary to record a finding on this question.

As regards the pronouncement of *talak*, it is only spoken to by two witnesses out of several. As to the first witness, P. N. Manika Meera, the learned Judges were of opinion that the witness was silent on this point until a very leading question was put to him in examination-in-chief. Putting aside this objection to his evidence, which is not clearly established, it is worthy of observation that the next witness, Mohamed Ali, who went to the house with him and left at the same time, says nothing about an oral divorce by the pronouncement of *talak*, and was not even questioned about it. A formal pronouncement of a divorce by the use of the word *talak* would naturally take place in the presence of all the persons who had been summoned, and this witness must have heard it equally with Manika Meera. It is also significant that Abdul Rahim, otherwise known as Ko Po O, who is found to have been the most reliable of the defendants' witnesses, says nothing about it.

The only corroboration of Manika Meera's evidence is to be found in the evidence of Madar Sar, a petty bazaar keeper and a dependant of the defendants. Their Lordships agree with the High Court that the evidence of these two witnesses is not sufficient to support a finding of an oral divorce by the pronouncement of *talak*.

As regards the other statements said to have been made by the deceased, their Lordships agree with the learned Judges, that the evidence does not sufficiently establish what the deceased actually said to enable them to say whether the words used amounted to a statement that the deceased had divorced his wife, or merely indicated his intention of divorcing her by the execution and transmission of the *talaknama*.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed with costs, and will humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Waterhouse & Co.*

Solicitors for the Respondent:—Messrs. *T. L. Wilson & Co.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 588 OF 1926.

January 14, 1927.

Present :—Mr. Justice Dalip Singh.

RAM BILAS—PLAINTIFF—PETITIONER

versus

SHEO NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 44—Error of law—Revision.

An error of law is not a good ground for revision. [p. 4, col. 1.]

Petition for revision of the decree of the Senior Sub-Judge, Rohtak, dated the 30th April, 1926, reversing that of the Sub-Judge, Fourth Class, Sonepat, District Rohtak, dated the 19th December, 1925.

Mr. *Parkash Chandra*, for Mr. *Shamair Chand*, for the Petitioner.

Mr. *Bishan Nath*, for Mr. *Anant Ram*, for the Respondents.

JUDGMENT.—In this revision the plaintiff sued some of the legal representatives of one Molar deceased on a *bahi* account. It was objected by the defendants impleaded that there were other legal representatives of Molar who were necessary parties to a suit of this description. On this objection the plaintiff first of all applied for time to implead the remaining legal representatives. On the 23rd July, 1925, the Pleader for the plaintiff stated he would not implead the other legal representatives of Molar deceased, because the suit was time-barred as against them. It was ordered that the other heirs of Molar deceased could not be made a party to the case. The trial Court then held that the suit could proceed against the present defendants alone and gave a decree for the sum claimed against the property of Molar deceased in the hands of the defendants.

On appeal, the learned Senior Sub-Judge held no single legal representative of Molar could be called upon to pay the whole of the debt due from Molar. He also held that as the estate of Molar deceased was not fully represented by the present defendants, the suit was not properly constituted. He held, in other words, that the other legal representatives were necessary parties and dismissed the suit leaving the parties to bear their own costs throughout.

In revision it is urged that the lower Appellate Court's order dismissing the suit was wrong as all the legal representatives

were not necessary parties. Counsel argues that on the analogy of s. 43 of the Contract Act, the same principle should be applied to the case of several legal representatives. Section 43 of the Contract Act has no bearing on this point. No other law or authority has been cited before me by Counsel for the petitioner. He contends, however, that the estate of Molar to the extent to which it has come into the hands of the present defendants is fully represented by them, and that, therefore, the argument of the lower Court is not valid. On the other hand, the Counsel for the respondents contends that the argument of the lower Court is correct. He has also cited no law or authority on the point. The point is not free from difficulty, but the revision fails on the short ground that an error of law, assuming that there is such an error in the judgment of the lower Appellate Court, is not a ground for revision. I, accordingly, dismiss it and I make no order as to costs.

R. L *Petition dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 65-B OF 1926.
December 8, 1926.
Present:—Mr. Findlay, J. C.
BALA AND OTHERS—DEFENDANTS—APPELLANTS
versus
GIRDHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 14, applicability of—Suit incidentally affecting order passed by Government Officer.

Before Art. 14 of Sch. I to the Limitation Act can apply to a suit, it must be necessary under the law to set aside the order sought to be impeached in the suit. The Article will not apply if the incidental effect merely of the plaintiff's suit will be to nullify an order passed by a Government Officer. [p. 4, col. 2.]

Appeal against the decree of the Additional District Judge, Yeotmal, dated the 24th November, 1925, in Civil Appeal No. 80 of 1925

Messrs. *S. A. Ghadgay* and *Atmaram Bhagwant*, for the Appellants.

Messrs. *B. R. Pendharkar* and *W. B Pendharkar*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents, Girdhar, Umakant and Laxman, brought the present suit against the defendants-appellants, Bala, Gangaram, Vithu, Daji and Narain, in the Court of the Additional Subordinate Judge, Second Class, Kelapur, for a declaration that the defendants Nos. 3 to 7 were not the permanent tenants of the field in suit and that the order of Mr. Vaidya, Sub-Divisional Officer, dated 28th November, 1923 (*cf.* Ex. P.-3), was incorrect. Plaintiff No. 1, Girdhar, is the managing proprietor of the village in question, whilst the other two plaintiffs and defendants Rajanna and Sohanna are other co-sharers of *Mauza* Adegaon. The Judge of the first Court held that the plaintiffs' allegation that the field was leased for the first time in 1897-98 to four persons named was not established; that the field was held by Annapurna Bai in the years 1893-94, 1894-95 and 1895-96 and by Mahadeo and Ragho in 1897-98, and that the defendants not having been in possession since 1895 were not permanent tenants, their possession having originated after the years 1895-96. Decree was accordingly passed in favour of the plaintiffs.

Bala, Gangaram, Vithu, Daji and Narain appealed to the Court of the Additional District Judge, Yeotmal. The learned Additional District Judge held that after the 1st of June, 1895, *viz.*, in the years 1895-96, one Annapurna Bai was in possession of the field, and this finding necessarily implied that the defendants were not permanent tenants.

The first point urged on behalf of the appellants was that the present suit was barred under Art. 14, Sch. I of the Limitation Act, and that s. 77 of the Berar Alienated Villages Tenancy Law of 1921 did not apply to the case. The latter part of this proposition is obvious and was admitted on behalf of the respondent No. 1. I do not, however, think that Art. 14 applies to the case. An incidental effect of the plaintiffs obtaining the declaration they want may be that Mr. Vaidya's order referred to above is nullified, but before Art. 14 referred to can apply, the order referred must needs be one which must under law be set aside. This latter proposition cannot be postulated of the present case and the principle of the decisions in *Naboghan Badhai* v. *Raghu Nath Babu* (1) and *Prodyot Kumar Tagore* v. *Bal Gobinda Ditchhit* (2) is, in my opinion, clearly ap-

(1) 30 Ind. Cas. 61; 19 C. W. N. 1303; 21 C. L. J. 646.
(2) 86 Ind. Cas. 6; 41 C. L. J. 31; A. I. R. 1925 Cal. 518.

plicable here. I am of opinion that Art. 120 of the First Schedule to the Limitation Act governs this case and thus the present suit is clearly within time.

It has next been urged on behalf of the appellants that the evidence justifies the presumption that their predecessor-in-title was in possession of, at any rate, part of the field in suit in 1895. If this were so, I should have expected to find mention of the fact in the *lagwans* for 1894-95 and 1895-96] (Exs. P.-7 and P.-8.). Both the documentary and the oral evidence, however, justifies the finding that defendants' predecessor was not in possession in 1895-96. Mere assertion by witnesses, some of whom were obviously too young to have personal knowledge of the fact that defendants or their father had been in possession for 30 or 35 years, is of little or no value and it is peculiarly significant that defendant No. 1, Bala, as D. W. No. 1, as well as others of the defendants' witnesses admitted that Annapurna Bai had previously held the field. All the weight of the evidence on record is against the idea that Annapurna Bai only held the field before 30 or 33 years ago. In any event there is a *prima facie* satisfactory and reasoned finding of fact arrived at by both the lower Courts on this point and that finding of fact cannot, in the circumstances, be questioned on second appeal.

These findings govern the appeal which is dismissed. Appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1098 OF 1924.

December 14, 1926.

Present:—Mr. Justice Iqbal Ahmad.

HANUMAN RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

DIPAN RAI—PLAINTIFF—RESPONDENT.

Mortgage by conditional sale—Interest after default—Presumption.

In the absence of anything to the contrary in a mortgage-deed, it cannot be presumed that the parties to the deed intended that the debt advanced by the mortgagee should cease to carry interest after a default is made by the mortgagor in discharging the mortgage-debt. The ordinary presumption is that a creditor who has advanced a debt on interest intends that debt to carry interest till the same is paid off. [p. 6, col. 1.]

Mahadeo Prasad v. *Dhiraj Singh* (2), followed.

Balwant Singh v. *Gayan Singh* (1), not followed.

Second appeal against the decree of the District Judge, Ghazipur, dated the 10th April, 1924.

Mr. *Surendra Nath Varma*, for the Appellants.

Mr. *Peary Lal Banerji*, for the Respondent.

JUDGMENT.—This is a defendants' appeal and arises out of a suit for redemption of a mortgage, dated the 26th of April, 1869, executed by the plaintiff's father in favour of one Dhanraj Rai, predecessor-in-title of the defendants.

The suit was decreed by the trial Court conditional on the payment of a sum of Rs. 542-8-0 within a certain time by the plaintiff to the defendants. Both the parties were dissatisfied with the decree, with the result that the defendants appealed and the plaintiff filed a cross-objection in the lower Appellate Court. The lower Appellate Court dismissed the appeal filed by the defendants and, allowing the cross-objection in part, modified the decree of the trial Court and decreed redemption on payment of Rs. 93.

The only point urged in support of the appeal by the learned Counsel for the appellants is that on the true interpretation of the terms of the mortgage-deed, the defendants are entitled to interest at the stipulated rate, not only up to the time fixed for payment by the mortgage-deed, but up to the date of the redemption of the mortgage. This contention of the appellants was upheld by the trial Court, but the lower Appellate Court held that it was "not equitable to allow the creditor to pile up the interest when he has already benefited considerably by the usufruct," and as such refused to allow to the defendants *post diem* interest on the mortgage-debt.

I am unable to agree with the conclusion arrived at by the lower Appellate Court. The terms of the mortgage-deed are set out in detail in the judgment of the trial Court and are as follows:—

"Whereas a sum of Rs. 75 is due to Janki Pande on account of a decree in execution of which my property is put up for sale and as money is required for payment of that decree, I have herewith borrowed the aforesaid sum from Sheo Dan Rai and paid up the decree. I covenant that I have

delivered possession of the property to the aforesaid creditor so that the aforesaid creditor may remain in possession over the aforesaid mortgaged property and pay the rent and other cess thereon and may appropriate the usufruct in lieu of interest on Rs. 5 and the remaining Rs 8-8 (interest on the remaining Rs. 70) would be paid by me. When at the end of *Jeth* 1278 *Fasli*, I pay the whole money, I will take back the property. In case I fail to do so by even one day, the creditor will treat this deed as a sale absolute, and will remain in possession as owner. In case I fail to pay interest also, the creditor will have a right to take foreclosure proceedings, hence I have executed this deed of mortgage and in case of non-fulfilment an absolute sale."

It would appear from the terms of the deed set out above that no provision was made by that deed as to what was to happen, if at the end of *Jeth* 1278 *Fasli*, the mortgagor did not discharge the mortgage-debt. There is nothing in that deed to show that the contract, express or implied, between the parties was that the interest was to cease to run after the expiry of the period fixed for payment of the mortgage-money. Notwithstanding the failure of the mortgagor to redeem the mortgage in *Jeth* 1278 *Fasli*, the relation between the parties continued to be that of the mortgagor and the mortgagee, and in the absence of any clear stipulation to the contrary to be found in the mortgage-deed, it must be presumed that that relation continued on the very terms on which that relation came into existence at the time of the execution of the mortgage. One of these terms was that the money advanced by the mortgagee was to carry interest at a certain rate. In the absence of anything to the contrary, it cannot be presumed that the parties intended that the debt advanced by the mortgagee should cease to carry interest after a default was made by the mortgagor in discharging the mortgage-debt. The ordinary presumption is that a creditor, who has advanced a debt on interest intends that debt to carry interest till the same is paid off. To hold that the mortgage-debt ceased to carry interest after *Jeth* 1278 *Fasli*, will be to insert in the mortgage-deed certain terms which are not there. The reason assigned by the learned Judge for disallowing *post diem* interest is one that does not appeal to me. It was nobody's case that the interest stipulated by the parties in 1869 was penal. The rights of the parties to a mortgage transaction must be governed and controlled by the terms of the mortgage-deed. In my judgment, there was no equity in favour of the plaintiff entitling him to claim redemption of the mortgage without paying the interest after 1278 *Fasli*. It was no fault of the mortgagee, if the interest went on accumulating because of the default of the mortgagor to pay the debt, which he could have and was bound to pay long before the institution of the suit.

For the reasons given above, in my judgment, the decision of the trial Court was correct and ought to be restored.

The learned District Judge in support of the view taken by him has referred to the case of *Balwant Singh* v. *Gayan Singh* (1). As against that decision the learned Counsel for the appellant has relied on the case of *Mahadeo Prasad* v. *Dhiraj Singh* (2). The latter case, in my opinion, cannot be distinguished from the case that I have to decide. In that case, as in the present, there was no express stipulation for payment of *post diem* interest and in that case, as in the present, there was a stipulation that, on failure of the payment of the mortgage-debt at the stipulated time by the mortgagor, the mortgagee will become the absolute owner of the property. There, as in the present case, the mortgage was a mortgage by conditional sale and as such, the decision of the present appeal must be governed by the decision in the case of *Mahadeo Prasad* v. *Dhiraj Singh* (2). In the first place, it appears to me that the decision in the case of *Balwant Singh* v. *Gayan Singh* (1) was limited and confined to the particular terms of the deed, that the Court had to consider in that case, and even if it be regarded that the view taken in that case is at variance with the view taken in the case of *Mahadeo Prasad* v. *Dhiraj Singh* (2), I think I am justified in following the other Division Bench ruling of this Court and this I do.

The result is that I allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs including in this Court fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 21 Ind. Cas. 253; 11 A. L. J. 829; 35 A. 534.

(2) 77 Ind. Cas. 122; 20 A. L. J. 752; 44 A. 775; A. I. R. 1923 All. 7.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1034 OF 1924.

July 13, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Cammiade.

LAKHI NATH BERA AND OTHERS—DEFENDANTS—APPELLANTS

versus

NABADWIP CHANDRA NANDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 23, 103, 105, 106, 178—Record of Rights—Presumption as to correctness—Rebuttal—Burden of proof—Landlord and tenant—Right to cut trees—Kabuliyat, *covenant in, effect of.*

It is for the person who challenges an entry in the Record of Rights to show that it is incorrect. [p. 8, col. 1.]

When the Record of Rights has once been finally published it cannot be attacked on the ground that certain procedure adopted by the Revenue Authorities in arriving at the final conclusion does not support the entry as finally published. If the party aggrieved by that entry takes objection under the provisions of s. 105 or 106 of the Bengal Tenancy Act, the objection might be considered by the Revenue Officer. But when a Record of Rights is challenged in a Civil Court the party challenging this record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the Revenue Officer. It is well-known that the Settlement Authorities may come to certain conclusions at one time of the proceeding which they may modify during the course of the preparation of the record. But the record which is finally published is that with which the Civil Court is concerned. [p. 8, cols. 1 & 2.]

Where a *kabuliyat* contains a covenant by the tenant not to cut or appropriate trees, that covenant does not amount to evidence of a custom that the tenants are not entitled to cut or appropriate trees. [p. 8, col. 2.]

Where a tenant covenants not to appropriate trees standing on his holding, he would be bound by that covenant even if there be a custom that the tenants in the locality are entitled to appropriate trees. [p. 9, col. 1.]

Appeal against the decree of the Additional District Judge, Midnapore, dated the 22nd of September, 1923, modifying that of the Munsif, Third Court, Midnapore, dated the 7th of August, 1922.

Mr. *Amarendra Nath Bose*, Babus *Arun Chandra Bose* and *Jati Nath Ghose*, for the Appellants.

Mr. *Sarat Chandra Roy Chowdhury*, Babus *Apurba Charan Mukherjee* and *Rama Prasad Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants. The suit was brought by the plaintiffs against the defendants who were sued under O. I, r. 8, Civil Procedure Code, as representing all the residents of *Mouza* Balpai Bamanbarh. The suit was for a declaration that the defendants had no right to cut down or to appropriate trees on their holdings. A further declaration was asked for to the effect that the plaintiffs as landlords had the right to cut down and appropriate trees on the holdings of the tenants of the *Mouza*. The Record of Rights is in favour of the defendants and the plaintiffs, therefore, prayed that it should be declared that the Record of Rights was incorrect.

The trial Court made a decree to this effect that the tenants of Balpai Bamanbarh had no right to cut and appropriate trees on their *jote* without the consent of the plaintiffs-landlords and that the Record of Rights was incorrect. The tenants appealed against that decision and the Additional District Judge has varied the decree of the Munsif and he declared "that the defendants have got no right to the trees and they cannot cut and appropriate the same except on marriage occasions on payment of Rs. 1-4 for each tree and except for cremation without payment of price but with the landlords' (plaintiffs') permission subsequently obtained and except cutting and appropriating branches of trees for fuel purpose. That the plaintiffs have got right to the trees subject to those aforesaid restrictions and that Settlement Record is declared erroneous." The defendants appealed against that decree to this Court.

A preliminary objection has been taken that the appeal is not properly constituted, as *pro forma* defendant No. 21 who was one of the landlords has not been properly impleaded in the appeal and the appeal was dismissed as against him. We do not think that that defendant was one of the necessary parties to the appeal. He was one of the landlords who did not join with the plaintiffs because he had interest in several *jotes* and his interest was adverse to the claim of the co-sharer landlords. Thereupon he was made a *pro forma* defendant. As he made no claim and no decree was passed in his favour he was not a necessary party in the appeal which was brought by the tenants-defendants against the plaintiffs-landlords.

The main question that has been urged on behalf of the appellants may be stated shortly thus:—That the Additional District Judge has erroneously refused to give effect to the presumption of the correctness of the Record of Rights which the law raises under

s. 103-B, sub-s. (3) of the Bengal Tenancy Act; secondly, that the learned Judge has used certain *kabuliyats* executed by different tenants for the purpose of using them as establishing a custom as alleged by the plaintiffs; thirdly, that the Additional District Judge has wrongly refused to take into consideration judgments produced as evidence by the defendants in their favour on the ground that they did not appertain to the *mouza* in question whereas he has taken similar judgments with regard to different *mouzas* into consideration in order to support the plaintiffs' claim; and lastly, it is said that there is no finding that the plaintiffs have by custom the right to cut down trees on the holdings of the tenants. It has also been urged that the *kabuliyats* which the plaintiffs have filed cannot be relied on by the plaintiffs as being in contravention of s. 178 (3) (*b*) of the Bengal Tenancy Act.

With regard to the Record of Rights the Additional District Judge states that the plaintiffs challenged the entry as incorrect, the defendants must thereupon show that the Record of Rights is based on a sound basis. This statement is obviously erroneous. It is for the person who challenged an entry in the Record of Rights to show that it is incorrect.

The next thing that the learned Judge has done is to take into evidence a decision of the attesting officer which was arrived at before the final publication of the Record of Rights in order to consider the question whether the Record of Rights is erroneous or not. This also in our judgment is wrong. When the Record of Rights has once been finally published it cannot be attacked on the ground that certain procedure adopted by the Revenue Authorities in arriving at the final conclusion does not support the entry as finally published. If the party aggrieved by that entry takes objection under the provisions of s. 105 or s. 106 they might be considered by the Revenue Officer. But when a Record of Rights is challenged in a Civil Court the party challenging this record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the Revenue Officer. It is well-known that the Settlement Authorities may come to certain conclusions at one time of the proceeding which they may modify during the course of the preparation of the record. But the record which is finally published is that with which the Civil Court is concerned. The learned Judge does not refer to any other evidence on which he could hold that the presumption of the correctness of the Record of Rights has been rebutted. On the other hand, he has held that no presumption can be made under it, which is again wrong.

The next point is with regard to the *kabuliyats*. These *kabuliyats* might be evidence as to the existence of the custom of the defendants' appropriating the trees or of the landlords' cutting down the trees if there had been any mention of such custom in these *kabuliyats*. Some of them, it is said, do not contain any reference to the custom as claimed by the plaintiffs. If there were such reference to any custom they might be admissible as evidence if they could otherwise be admissible under the law as to existence or non-existence of the custom pleaded. But if they simply contain a covenant by the tenant not to cut or appropriate trees, that covenant does not amount to evidence of any custom. The parties to the *kabuliyat* may be bound by the terms of it, but it would not be of any effect as regards a third party. Here we may observe, with reference to the argument based on s. 178 (3) (*b*) of the Bengal Tenancy Act, that the Additional District Judge does not seem to have been right with regard to his reading of s. 23 of the Bengal Tenancy Act. Section 178 (3) (*b*) provides that "nothing in any contract shall take away or limit the right of an occupancy *raiyat* to use land as provided by s. 23." The learned Additional District Judge holds that it does not refer to the question of cutting down trees. We are unable to accept his view. One of the uses of the land is to cut down trees and the last sentence of s. 23 provides that if there is a local custom to the contrary the *raiyat* shall not be entitled to cut down trees. Section 178 (3) (*b*) refers to the use of the land. If an occupancy *raiyat* covenants that he will not be entitled to cut down trees, where there is no custom to the contrary, that contract will not take away his right to cut down trees. It is otherwise with regard to the right of appropriating trees. If there is a custom that *raiyats* can appropriate trees on their holdings, s. 178 (3) (*b*) is no bar to the *raiyats*' entering into a covenant with the landlords that they would not appropriate trees cut down. That is the

only effect which can be given to the *kabuliyats* of the tenants. Our conclusion, therefore, is that if any tenant has covenanted not to appropriate any trees he would be bound by that covenant even if there be a custom that the tenants on the locality are entitled to appropriate trees.

The third point is as regards the rejection of the judgments filed by the defendants. This cannot also be supported. If the judgments filed by the plaintiffs be taken as evidence of the custom the judgments filed by the defendants to disprove any such custom may also be accepted and the question must be decided upon the entire evidence.

With regard to the fourth point we do not find that any conclusion has been arrived at by the Additional District Judge. The plaintiffs asked for a declaration that they had the right to cut down trees as will appear from the recital of the plaintiffs' claim in the first paragraph of the judgment. This matter must also be enquired into. The declarations that were given to the plaintiffs were neither asked for by the plaintiffs nor by the defendants. Some of the declarations seemed to be so vague that they would not be workable, *e.g.*, on marriage occasions the defendants would be entitled to cut down trees on payment of Rs. 1-4 for each tree. What sort of tree it is not mentioned, nor is it mentioned whether they are entitled to cut down trees for timber or for fuel. It is unnecessary to criticize in detail the declarations made by the Additional District Judge.

We, therefore, set aside his judgment and decree and send back the appeal for being re-heard on all the questions that have been stated in our judgment.

Costs of this hearing will abide the final result.

Z. K. *Decree set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1025 AND 1062 OF 1924.

December 14, 1926.

Present :—Mr. Justice Dalal and Mr. Justice Pullan.

SRI THAKURJI—PLAINTIFF—APPELLANT

versus

Musam nat JAIKALI KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—Gradual and sudden accretion, rules applicable to.

Under the terms of the Bengal Alluvion and Diluvion Regulation, 1825, land which gradually accedes to another estate becomes annexed to it. Where, however, a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment and adds it to another estate without destroying its identity, the land on being clearly recognized becomes the property of the original owner and the same rule applies where land is taken away by a river gradually but is restored suddenly. [p. 10, col. 1.]

Second appeal against the decree of the First Additional District Judge, Gorakhpur, dated the 29th of February, 1924.

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *Sankar Saran*, for the Respondents.

JUDGMENT.—These two appeals arise out of a dispute between the riparian owners of villages situated on opposite banks of the river Rapti. Appeal No. 1025 is between the owners of the village of Shergarh and those of the village of Domingarh, and Appeal No. 1062 is between the owners of the village of Haraiya on the one side and the owners of the villages of Domingarh and Bahrampur on the other. But no contest now remains between the owners of the village of Haraiya and those of Bahrampur because they compromised the matter in the lower Court. The findings of fact in this case are that up to the year 1300 *Fasli* the plaintiffs-appellants were in possession of the disputed plots which then lay on the south-west side of the river. From the year 1300 to the year 1323 *Fasli* the land came by gradual accretion into the possession of the owners of the village of Domingarh on the north-east side of the river. In the year 1324 *Fasli* by a sudden change of the channel of the river the land was restored to the south-western side, namely, its original position in the villages belonging to the plaintiffs-appellants. There is also a finding that no claim of adverse possession has been established on behalf of the respondents, and a further finding that the custom of *Dhar Dhur* is not proved to exist in connection with these villages. On these findings the lower Courts have come to the conclusion that the land came into the possession of the defendants-respondents by gradual accretion and so became their property, and that they have not lost the land by the sudden change of the river in 1324 and they are, therefore, still the owners. The lower Courts believe that their finding

is in accordance with s. 4 of Regulation XI of 1825, but on this point we are not prepared to agree with the decision. Under the terms of that Regulation land which gradually accedes to another estate becomes annexed to it. That is the general principle. An exception is made in the case where a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment and joins with another estate without destroying its identity. It appears to us that the Courts below have read so far only and they have not considered what actually happens in the case of a sudden accretion of this nature. The rule goes on to say "In such cases the land on being clearly recognised shall remain the property, of its original owner." In the present case the original owners are, undoubtedly, the plaintiffs-appellants. That is a finding of fact which cannot now be assailed. There is nothing in the Regulation which lays down what is to happen in a case where land is taken away by the river gradually and restored suddenly. In our opinion the clause which we have quoted above will still apply in such a case and the land will go back to the original owner. We consider this is the legal as well as the equitable view to be taken in a case such as this. We, therefore, allow these appeals with costs but in the case of Appeal No. 1062 the compromise will have effect.

Z. K. *Appeals allowed.*

MADRAS HIGH COURT.

APPEAL SUIT No. 1169 of 1924.

September 8, 1926.

Present:—Mr. Justice Ramesam and Mr. Justice Reilly.

SWAMINATHA ODAYAR—DEFENDANT—APPELLANT

versus

SUBBARAMA IYER AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55—Vendor and purchaser—Vendor's lien—Pro-note executed by purchaser in favour of third person—Novation—Vendor's lien, whether extinguished—Limitation Act (IX of 1908), s. 19—Acknowledgment—Admission in deposition—No denial of continuance of liability, effect of—Benamidar—*Pro note, suit on, by* benamidar, *whether maintainable.*

Where at the instance of a vendor, the purchaser executes as part consideration for the sale, a promissory note in favour of a third person and a new contract is effected between the purchaser and such third person, a complete novation is effected by the substitution of the vendee's liability, in place of the vendor's liability to the third person and there is, therefore, a contract to the contrary within the meaning of s. 55, Transfer of Property Act. The vendor's lien for unpaid purchase-money to the extent of the promissory note is thereby extinguished even if the payee under the pro-note is only a *benamidar* for the vendor, inasmuch as the latter is disabled from suing on the pro-note. [p 12, col. 2; p. 13, col. 1.]

In order that a statement in a deposition may constitute an acknowledgment of a liability so as to save limitation under s. 19 of the Limitation Act, it need not be express; it may be implied as a matter of inference from the facts and surrounding circumstances of the case. [p. 13, col. 2.]

Maniram Seth v. *Seth Rupchand* (12) and *Kandasami Reddi* v. *Suppammal* (10), relied on.

Per *Reilly, J.*—An admission of liability in the past with no denial that the liability continues may imply an admission that the liability continues. Whether there is such an implied admission is a matter of evidence, not of legal presumption. Before deciding the question whether there is such an implied admission, the Court must examine the context of the admission of a liability in the past and the circumstances in which it was made and consider whether the maker of the admission had any need or incentive in the circumstances to deny the continuance of the liability, if he would do so, and whether he had an opportunity of denying it. [p. 14, col. 2.]

Per *Ramesam, J.*—A person whose name does not appear in a promissory note as payee cannot sue on it alleging that the payee was a *benamidar* for himself. [p. 12, col. 1.]

Reoti Lal v. *Manna Kunwar* (1), followed.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in O. S. No. 15 of 1922.

Messrs. *S. Varadachariar* and *Rajagopala Iyengar*, for the Appellant.

Messrs. *T. M. Krishnaswami Iyer* and *K. Narasimha Iyengar*, for the Respondents.

JUDGMENT.

Ramesam, J.—The facts out of which this appeal arises are in the main undisputed and may be shortly stated. The 1st plaintiff obtained some lands under a Will. On 16th August, 1917, he entered into an agreement to sell the said lands to the defendant for Rs. 15,250 and on that day obtained a cash advance of Rs. 1,250 towards the consideration. On the 24th of August a further sum of Rs. 220 was paid towards the consideration. On the 5th September, 1917, a sale-deed was executed, a further sum of Rs. 1,780 being paid in cash. There remained an amount of Rs. 12,000 due towards the consideration. The sale deed provided that Rs. 6,000 was to be paid before the Sub-Registrar and the other Rs. 6,000 was to be paid to the 1st plaintiff's mother Sitalakshmi Ammal who is the 2nd plaint-

iff. Accordingly, on the same day the defendant executed a promissory note for Rs. 6,000 in favour of the 2nd plaintiff. Soon after the 1st plaintiff refused to register the sale-deed contending that it was nominal. The defendant obtained compulsory registration of the sale-deed. But the Rs. 6,000 was not paid before the Sub-Registrar. The defendant then filed a suit O. S. No. 269 of 1919 in the Court of the District Munsif of Valangiman for possession of the lands sold. The 1st plaintiff who was the only defendant in that suit contended that the sale-deed was a nominal transaction. The District Munsif dismissed the suit. On appeal by the plaintiff therein (the present defendant) the Subordinate Judge of Kumbakonam decreed the suit. He also passed a decree for the payment of Rs. 6,000 which was originally intended to be paid before the Sub-Registrar, to the defendant therein (the present 1st plaintiff). This was on 21st January, 1921. There was a second appeal to the High Court which was dismissed on the merits of that suit. One of the grounds in second appeal was that the learned Judge ought to have recorded a distinct finding in regard to the six thousand rupees promissory note and made provision for its payment also. On this ground the learned Judges who disposed of the second appeal said :—

"As regards the sum of Rs. 6,000 payable to the defendant's mother it is admitted a promissory note has been executed and that a suit is pending. There is no necessity to provide for payment to her in this suit especially as she is not a party."

In the interval between the disposal of the appeal by the Subordinate Judge and the disposal of the second appeal the present suit was filed on 11th February, 1922, to recover the sum due on the promissory note (Ex. B). It is alleged in the plaint that the 2nd plaintiff was not a party to the contract, that the promissory note was executed by the defendant in the name of the 2nd plaintiff but really for the benefit of the 1st plaintiff. It is also alleged that the promissory note was not delivered to the 1st plaintiff at the date of the execution, that the note was kept with one Nataraja Pillai as an intermediary and that it was obtained from Nataraja Pillai long after the appeal judgment of the Subordinate Judge in the former suit. This last allegation is denied by the defendant. The Subordinate Judge said nothing on this point. He found that the 2nd plaintiff is a mere *benamidar* for the 1st plaintiff, that the suit was not barred and decreed the suit. He also found that the plaintiff is entitled to the vendor's lien for unpaid purchase-money and gave a decree for sale. The defendant appeals. It may be observed at the outset that the burden of proving that the promissory note was not delivered on the date of the execution is on the plaintiffs. No attempt has been made to prove the allegation and I think it must be found that the promissory note was delivered to the 1st plaintiff on the date of the execution and that the story about its being kept with Nataraja Pillai is a myth.

One point argued by the appellant is, that as a result of the former litigation it must be taken as having been impliedly decided in it that the 2nd plaintiff was the person entitled to the beneficial interest in Ex. B. I do not think so. Any question relating to the note arose for the first time only after the Subordinate Judge found that the sale-deed was not nominal. We do not know what happened before the Subordinate Judge at the time of delivering the judgment in that suit. The High Court merely abstained from expressing any opinion on this matter for the reason that a separate suit had been filed and that the present 2nd plaintiff was not a party to that litigation. It cannot be said that any conclusion is necessarily implied in the course taken by the learned Judges.

The next important point argued by the appellant is, that the 2nd plaintiff is the only person competent to sue on Ex. B, and, therefore, the vendor's lien was extinguished. On the other hand, it is contended for the respondents that there is nothing to show that the 2nd plaintiff ever accepted the note and, therefore, the right to the balance of the purchase money remained with the 1st plaintiff and with it the vendor's lien. It is admitted by the defendant in his former deposition now filed as Ex. E that the 2nd plaintiff was not present when Ex. A was executed. Until, therefore, the 2nd plaintiff accepts the note, the note has not become operative. Seeing that the defendant has performed what was required of him by the 1st plaintiff at the time of the transaction one would expect that, if the 2nd plaintiff refused to accept the note, the 1st plaintiff would have communicated such a fact within a reasonable time to the defendant and demanded the balance of the

purchase-money as on a failure of consideration. It is doubtful whether in such a case the vendor's lien was at first extinguished, and if so, would revive. But it is unnecessary to express any opinion on that matter. No such notice was given by the 1st plaintiff and he behaved throughout as if he was content that the right in the note should remain in the 2nd plaintiff. It is really unnecessary to consider whether the 1st plaintiff was the person beneficially interested in the note. Probably, he was and is, though, at the same time, it must be remarked that no formal evidence has been adduced by the plaintiffs on the matter as they ought to have done. But whoever the persons entitled to the beneficial interest may be, the only person that is entitled to sue on it is the 2nd plaintiff, though it may be that after the money was recovered she would have to pay it to the 1st plaintiff. It was held in *Reoti Lal* v. *Manna Kunwar* (1) that a person whose name does not appear in the promissory note cannot sue on it alleging that the payee was a *benamidar* for himself. [See also *Subramanya Tevan* v. *Arunachala Tevan* (2).] Mr. T. M. Krishnaswami Iyer appearing for the respondents contended that the note itself not having been delivered to the payee who was not present at the time was a void note. I cannot agree with this contention. The 1st plaintiff purported to act as agent of the 2nd plaintiff in taking the note and it was open to the 2nd plaintiff to ratify his act, though until it is so ratified the 2nd plaintiff does not step into the transaction. In the present case, the 2nd plaintiff is willing to have a decree in her favour if the Court finds that the 1st plaintiff is not entitled to sue. This ratification is good enough. I must, therefore, hold that the 2nd plaintiff is the only person entitled to sue on Ex. B. The question that arises on this finding is, whether the vendor's lien is lost. The following propositions are undisputed :—

1. A mere direction by the vendor to the vendee to pay the whole or a part of the purchase-money to a third person does not extinguish the lien [*vide Siva Subramania Aiyar* v. *Subramania Aiyar* (3)].

2. If such direction is followed by mere payment of the third person but not by a fresh contract by the vendee with the third person so as to effect a complete novation, the lien is not lost [*vide Thygaraja Mudaliar* v. *Seshappier* (4).]

3. Where it was intended that the vendee should execute a mortgage-deed and extinguish the lien but the mortgage-deed was not completed by registration and remained a simple bond, the lien is not extinguished [*vide Ranganayaki Ammal* v. *Parthasarathy Ayyangar* (5).]

4 Where the vendor obtained a promissory note not from the vendee but from a third person at the instance of the vendee and the third person did not pay, even then, if the third person's note or bond was only an additional security to the vendee's liability and not in substitution of it, the lien is not lost [*cf.*, *Balagurumoorthy Chetty* v. *Nagulu Chetty* (6)].

5. Where the vendor himself takes a promissory note or bond and where the right in it was assigned by him to a third person or where his right was attached in execution of a decree and purchased by a third person [*vide Sambasiva Iyer* v. *Venkatarama Iyer* (7)] the vendor's right to the lien passes to the third person under s. 8 of the Transfer of Property Act and is available to the assignee or purchaser.

But if in this last case the vendor took a negotiable instrument and the instrument is not assigned but endorsed under the Law Merchant, it is doubtful if s. 8 of the Transfer of Property Act will apply and the endorsee will be entitled to the lien. It is unnecessary to express an opinion on that matter now.

But where a complete novation is effected and a new contract between the vendee and a third person was effected in substitution of the vendee's liability to the vendor this amounts to a contract to the contrary within the meaning of s. 55 of the Transfer of Property Act and the lien is extinguished. I am willing to concede that even in such a case if the document taken is not a negotiable instrument but only a bond and if it is taken

(1) 65 Ind. Cas. 785; 44 A. 290; 20 A. L. J. 126; A. I. R. 1922 All. 70.
(2) 18 M. L. J. 186.
(3) 37 Ind. Cas. 429; 39 M. 997; 31 M. L. J. 530; (1916) 2 M. W. N. 306; 20 M. L. T. 375; 4 L. W. 415 (F. B.)
(4) 54 Ind. Cas. 458; 10 L. W. 518; 27 M. L. T. 94.
(5) 54 Ind. Cas. 503; 10 L. W. 550.
(6) 69 Ind. Cas. 473; 14 L. W. 191; 41 M. L. J. 267; (1921) M. W. N. 602.
(7) 95 Ind. Cas. 447; (1926) M. W. N. 569; 51 M. L. J. 95; A. I. R. 1926 Mad. 903.

benami for the benefit of the vendor so that he may still sue on it the arrangement being known to the vendee and the vendor's lien remains provided he is not prejudiced. But where the document taken is a negotiable promissory note so as to disable the vendor from suing even if he is the person beneficially interested in the money after its recovery the lien must be held to be lost as ostensibly the payee of the note is the only person entitled to sue. The note might have been endorsed not to the vendor but to any third person. To say that the note in the hands of the payee has got the lien attached to it involves anomalous positions. Anyhow, there is nothing to show that the vendee knew the *benami* nature of the note. I, therefore, hold that the 2nd plaintiff is not entitled to the vendor's lien in this case.

As the suit was filed more than four years after the execution of Ex. A the question next arises whether the suit is barred by limitation. The plaintiffs rely upon the defendant's deposition Ex. E, as an acknowledgment to save limitation. The material passage in the deposition runs thus:—

"I was directed to pay Rs. 6,000 to defendant's mother Sitalakshmi Ammal in Ex. B. I executed a pro-note in her favour on the date of Ex. B immediately after Ex. B was written and delivered the said pro-note to Subbarama Iyer. I owed Rs. 6,000 more under Ex. B.

* * * * * *

Defendant did not tell me why he wanted me to pay Rs. 6,000 to his mother. I have not received any notice from defendant's mother about the pro-note I executed in her favour. I did not enquire if the pro-note I executed to defendant's mother for Rs. 6,000 did or did not reach her. She was not present when I executed the note and delivered it to defendant."

The appellant contends that this does not amount to an acknowledgment. A case decided by Miller, J., and reported in *Ranganayakalu Aiya* v. *Subbayan* (8) was relied on for the respondents' contention that this deposition amounts to an acknowledgment. This decision of Miller, J., has been adversely commented on in various later decisions. In *Subramania Iyer* v. *Veerabadra Pillai* (9) Napier, J., observed:—

"It may not necessarily always be that deduction to be drawn."

In *Kandasami Reddi* v. *Suppammal* (10) Ayling, J., after quoting the last sentence of Napier, J., referred to *Andiappa Chetty* v. *Devarajulu Naidoo* (11)—"Each case must be treated on its own merits," and then said:—

"From the language used and the circumstances in which the acknowledgment is made, it must be decided whether it amounts to an implied acknowledgment of subsisting liability."

Earlier in the judgment he observed after citing the decision of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (12): "I can see no ground whatever for holding that their Lordships were considering anything but the circumstances of that case or intended to lay down any rule of legal inference."

Mr. Rajagopala Iyengar in replying for the appellant contended that the acknowledgment in a deposition must be expressed and not implied. He relied on *Venkata* v. *Parthasarathi* (13). But the authorities cited in this decision in *Venkata* v. *Parthasarathi* (13) in the language of Ayling., J., already cited and the decision in *Maniram Seth* v. *Seth Rupchand* (12) show that it need not be express and may be a matter of inference. It can be implied from the facts and the surrounding circumstances and not implied as a matter of law as Miller, J., seemed to have thought. This is also the view of Schwabe, C. J., and Krishnan, J., in *Official Assignee of Madras* v. *Subramania Aiyar* (14).

When we look at the circumstances of this case, we find that the defendant when he was examined as his first witness in the former suit was anxious to show that the sale-deed was not nominal and that some consideration was paid for it. If any payment was made towards the promissory note, he would have stated it. If no payment was made, his position in that case

(8) 2 Ind. Cas. 522; 5 M. L. T. 71.

(9) 70 Ind. Cas. 593; 41 M. L. J. 217 (1921) M. W. N. 475; 14 L. W. 148.

(10) 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; A. I. R. 1922 Mad. 104; 32 M. L. T. 166.

(11) 12 Ind. Cas. 378; 36 M. 68 10 M. L. T. 251; (1911) 2 M. W. N. 225; 21 M. L. J. 1024.

(12) 33 C. 1047; 4 C. L. J. 94; 8 Bom. L. R. 501; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130; 33 I. A. 165 (P. C.).

(13) 16 M. 220; 3 M. L. J. 35; 5 Ind. Dec. (N. S.) 860.

(14) 77 Ind. Cas. 740; 46 M. L. J. 1; 33 M. L. T. 235; 19 L. W. 331; A. I. R. 1924 Mad. 286; (1924) M. W. N. 19.

was one of willingness to pay the amount due on the note and the amount to be paid before the Sub-Registrar. The whole tenor of the deposition was that while he was willing to perform his side of the contract the vendor would not allow him to do so and prevented him from making further payments by the attitude he took. The deposition clearly implies that the note was real and subsisting and on account of fault of his, no further payments were made towards it, but that he is willing to pay it if the other side was willing to receive it. I think there is an acknowledgment of subsisting liability in this case. This case is stronger than the decision of Schwabe, C.J., and Krishnan, J., above mentioned, where an omission in a written statement to deny the allegation in a plaint is all that we have. This case is similar to the decision in *Maniram Seth* v. *Seth Rupchand* (12) where also it was an inference from the circumstances. Mr. Rajagopala Iyengar relied on the case of *Muthukumara Mudaliar* v. *Chockalinga Mudaliar* (15). Neither from the report nor from the printed papers it is clear why the former deposition was made and I do not think that case helps us in deciding the present case.

In the result, I hold that the suit is not barred by limitation. The decree of the lower Court will be vacated and a personal decree will be passed for the amount sued for in favour of the 1st plaintiff, as the 2nd plaintiff consents to such a decree.

The order as to costs in the Court below will stand. In appeal, each party will bear its own costs.

Reilly, J.—So far as this suit is a suit on the promissory note, Ex. B, the learned Subordinate Judge has found that it is not time-barred because it is saved by an acknowledgment made by defendant in his deposition, Ex. E, in the previous suit, which contains a statement that he executed the note without any denial that the liability under the note was then subsisting. The Subordinate Judge has relied on *Subbaramania Iyer* v. *Veerabadra Pillai* (9). One of the reasons for the decision of the learned Judges in that case was a *dictum* of Miller, J., in *Ranganayakulu Aiya* v. *Subbayan* (8):—

"An acknowledgment of liability existing at a past date without any allegation that the liability has since ceased, is presumed to be an acknowledgment of liability existing when the statement is made."

That, Miller, J., stated, as the effect of the decision of the Privy Council in *Maniram Seth* v. *Seth Rupchand* (12). With the greatest respect I do not think it can be doubted that Miller, J., read more into the decision in *Maniram Seth's case* (12) than can be found in it and stated his proposition too widely. I entirely agree with Ayling, J.'s interpretation of *Maniram Seth's case* (12) in *Kandasami Reddi* v. *Suppammal* (10) which has been approved in *Official Assignee of Madras* v. *Subramania Aiyar* (14). In some cases an admission of liability in the past with no denial that the liability continues may imply an admission that the liability continues. Whether there is such an implied admission is a matter of evidence, not of legal presumption. Before deciding the question whether there is such an implied admission we must examine the context of the admission of a liability in the past and the circumstances in which it was made and consider whether the maker of that admission had any need or incentive in the circumstances to deny the continuance of the liability, if he would do so, and whether he had an opportunity of denying it. When the admission of a liability in the past is made in a deposition given in Court we must be particularly careful to consider whether the witness had an opportunity of denying the continuance of the liability, remembering that a witness under examination is not always at liberty to say all that he may wish to say or all that he may think it necessary to say in order to protect his own interests but has to answer the questions put to him. With this warning in mind let us examine what defendant said in his deposition in the previous case. The important words appear to me to be

"I was directed to pay Rs. 6,000 to defendant's mother, Sitalakshmi Ammal, in Ex. B (the sale-deed). I executed a pro-note in her favour on the date of Ex. B immediately after Ex. B was written and delivered the said pro note to Subbarama Iyer."

Now, in that suit the present defendant was trying to show that the sale was a real transaction, which the present plaintiff denied. Defendant was anxious to show that he had done his part in the

(15) 73 Ind. Cas. 952; 17 L. W. 674; A. I. R. 1923 Mad. 634.

matter and was explaining in his deposition all that he had done in making part payments and in other ways. He had just mentioned that he had made three such payments. And he went on after the part of his deposition now in question to explain why he did not pay the remaining Rs. 6,000 of the purchase-money, as intended, before the Sub-Registrar. In the circumstances it is clear that it was very much to his interest, when he mentioned this promissory note, to mention also any payment which he had made under it. And it must be noticed that the part of his deposition which I have quoted was made in examination-in-chief. Defendant's Vakil, who had just elicited his evidence about part payments made, must have been fully aware that evidence that any payment had been made towards the discharge of the promissory note would strengthen his case, and it cannot be supposed that he would not have given defendant an opportunity of mentioning any such payment. In the circumstances I think it is clear that defendant's statement that he executed the promissory note coupled with the failure to mention any payment towards the discharge of it was an implied admission that the liability under the note was then subsisting. I agree, therefore, in finding that defendant made an acknowledgment within the meaning of s. 19 of the Limitation Act, which saves the suit on the note from being time barred.

Curiously enough, Mr. Krishnaswami Iyer for the plaintiffs has been at pains to argue before us that the promissory note, Ex. B, though it is in part the basis of plaintiff's suit, is not valid because it was never delivered to plaintiff No. 2, the payee named in it. In the plaint it is stated that Ex. B was not delivered to either plaintiff but was left with one Nataraja Pillai. In the defendant's written statement it is alleged that Ex. B was delivered to plaintiff No. 1 on behalf of the plaintiff No. 2, who is his mother. The only oral evidence on this question is that of defendant, whose deposition, Ex. E, in the previous suit was admitted by consent. In that deposition defendant states that he delivered the promissory note to plaintiff No. 1 immediately after the sale-deed was written. Plaintiff No. 1 did not go into the witness box to deny this. Nataraja Pillai was not examined, and it appears that, though he had given evidence in the previous suit, plaintiffs omitted to apply, perhaps advisedly, that his deposition should be admitted as evidence in this suit. On the record as it stands the only reasonable finding is that the promissory note, Ex. B, was delivered by defendant to plaintiff No. 1 on the date of its execution, which is the date of the sale-deed. The sale-deed, Ex. A, recites that plaintiff No. 1 had directed defendant to pay the Rs. 6,000 which is represented by this promissory note to plaintiff No. 2, his mother. It is admitted that plaintiff No. 2 was not present when the sale-deed and the promissory note were executed. In the circumstances it may clearly be inferred that plaintiff No. 1, when he took delivery of the promissory note from defendants, represented himself as his mother's agent in this matter. There is no evidence when plaintiff No. 1 handed the note over to plaintiff No. 2; but it must be held to have reached her eventually because she and plaintiff No. 1 jointly have produced it in this suit. And the fact that she has sued on the note shows that she ratified plaintiff No. 1's action in taking delivery of it as her agent. Whether plaintiff No. 2 as payee of the note was only a *benamidar* for plaintiff No. 1, as now represented by them, or not, the contention that the note is not valid because it was never delivered to the payee fails.

But in spite of the existence of the promissory note, Ex. B, plaintiff No. 1 contends that he is still entitled to enforce his charge under s. 55 (4) (*b*) of the Transfer of Property Act for the part of the purchase-money for which Ex. B was executed, and the learned Subordinate Judge has found that he is so entitled. On this part of the case Mr. Krishnaswami Iyer for plaintiff, as I understand him, has argued alternatively (1) that the promissory note, Ex. B, is invalid and, therefore, the statutory charge for unpaid purchase-money has never been affected by it, (2) that, even if Ex. B is valid, the statutory charge persists concurrently with the liability under Ex. B, and (3) that on plaintiffs giving up their claim under Ex. B, as they are prepared to do, the charge, if it was ever defeated or affected by Ex. B, revives and can be enforced. The first of these contentions has been disposed of by the finding that Ex. B is valid. In regard to the second contention it is true that, when the vendor of immove-

able property takes a promissory note from the vendee in his own favour for the whole or part of the purchase-money or when he directs the vendee to pay the whole or part of the purchase-money to a third party, the vendor does not thereby lose the charge for unpaid purchase-money given by s. 55 (4) (*b*) of the Transfer of Property Act. In neither of those cases, it will be seen, does the vendee put himself under liability to any one but the vendor. But, when the vendee at the instance of the vendor executes a promissory note for the purchase-money or part of it in favour of a third party, the position is altered. The vendee in that case puts himself at the mercy of the third party, even if that party is only a *benamidar* for the vendor. If in those circumstances the vendor's charge on the property for the amount of the promissory note remained, the vendee would be liable to be sued for the same purchase-money by two parties independently. In my opinion, there is no doubt that, if by agreement between the vendor and vendee the vendee puts himself under an enforceable liability to a third party for the whole or part of the purchase-money, then in respect of the whole purchase-money or the part of it, as the case may be, there is a "contract to the contrary" within the meaning of s. 55 of the Act and the vendor's statutory charge on the property is so far defeated. A contract between the vendor and vendee by which a third party obtains the right to exact by suit the purchase-money or part of it from the vendee is inconsistent with the vendor retaining a charge to enforce payment to him of the same purchase-money. The right to sue for the purchase-money cannot reside in one person and the right to enforce the security for its payment in another. The position, in my opinion, is the same so far as the vendee is concerned, whether the third party is a *benamidar* for the vendor or not, unless it is shown that the vendee was aware that the third party was only a *benamidar* for the vendor and knowingly dealt with the vendor under the *benamidar's* name, in which case there would be no "contract to the contrary" within the meaning of s. 55 of the Act. If the third party to whom the vendee puts himself under an enforceable liability for the purchase-money is a *benamidar* for the vendor but the vendee is unaware of that, I do not see how the nature of the document which the vendee executed in favour of the third party, whether it be a bond or a promissory note, can affect the question whether the vendor's charge is extinguished. Though the vendor may sue the vendee on a bond of which he is the real obligee but which runs in favour of a *benamidar*, the *benamidar* may sue on it in his own name without making the vendor a party and the vendee cannot resist his suit. A contract between the vendor and the vendee by which the vendee makes himself liable to be sued for the purchase-money by a third party, whom he does not know to be a mere *benamidar* for the vendor, or by the assignee of that third party is, in my opinion, essentially inconsistent with the retention by the vendor of his charge to secure the payment of the purchase-money even when it may be open to the vendor to prove that the third party is a mere *benamidar* for him and to sue the vendee on his obligation to the third party. It is the nature of the contract between the vendor and the vendee to which he must look, and that is not affected by the existence of an undisclosed *benamidar*. In this case it is not pleaded that defendant was aware that plaintiff No. 2 was a *benamidar* for plaintiff. In regard to Mr. Krishnaswami Iyer's third contention, when once there is a "contract to the contrary" within the meaning of the section and the vendor's charge is so defeated, I do not see how the statutory charge can be revived. There appears to be no provision in the Act which could have that effect. Nor, in my opinion, is the position altered if the vendor takes a promissory note executed by the vendee in favour of a third party for the purchase-money or part of it but afterwards fails to hand it over to the payee; so far as the vendee is concerned the "contract to the contrary" has been made, and it cannot be rescinded by the vendor. This last point, though mentioned in the argument, does not really arise for decision in the present case as it has been found that the promissory note, Ex. B, was delivered to plaintiff No. 2, who sues on it.

I agree, therefore, that plaintiff No. 1 has no charge on the property sold for the Rs. 6,000 now in question but that plaintiff No. 2 is entitled to a personal decree against defendant for the amount due under the promissory note, Ex. B, and that, as she is willing that the decree be made in favour of plaintiff No. 1, it should be so made. The Subordinate Judge has made only an

ordinary mortgage-decree for sale in favour of plaintiff. That should be set aside and a personal decree made against defendant in favour of plaintiff No. 1, in its stead with costs in the lower Court. I agree that in this Court each party should bear his own costs.

V. N. V. *Decree modified.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 54 OF 1925.
January 6, 1927.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Broadway.

MADAN MOHAN SINGH—APPELLANT
versus
DAULAT RAM AND OTHERS—RESPONDENTS.

Hindu Law—Debts—Ancestral property, liability of, for debts of father.

Ancestral property is liable for the debts of a Hindu father unless it can be shown that they were contracted for immoral or illegal purposes.

Letters Patent Appeal against the order of Mr. Justice LeRossignol, passed in Civil Miscellaneous Appeal No. 2983 of 1924, dated the 23rd January, 1925.

Mr. *Nawal Kishore*, for the Appellant.

JUDGMENT.—In execution of a decree against one Prem Chand the decree-holders, Daulat Ram and others, asked for the attachment and sale of a certain house.

Madan Mohan Singh, the minor son of Prem Chand, instituted a suit praying for a declaration that the said house was a part of the ancestral property of the family and was not liable to be attached and sold in execution of the decree as the debt in respect of which it had been passed had not been contracted for any family purpose.

As no charge of immorality was brought against Prem Chand, the learned Senior Subordinate Judge rejected the plaint. Against the order rejecting the plaint Madan Mohan Singh has preferred an appeal to this Court which is pending. He also prayed for an order staying execution of the decree. Mr. Justice LeRossignol having refused to stay execution, this appeal has been preferred under the Letters Patent. Admittedly the ancestral property is liable for the debts of Prem Chand unless it can be shown that they were contracted for immoral purposes. No charge of immorality has been made against him as yet and I would, therefore, dismiss this appeal.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2186 of 1926.
January 4, 1927.
Present:—Mr. Justice Dalip Singh.

LACHHMAN DAS—DEFENDANT—APPELLANT
versus
BAGHU RAM—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Partition suit—Preliminary decree—Order directing that property should be sold—Appeal—Court-fee payable—Necessary parties, failure to implead, effect of.

After a preliminary decree had been passed in a partition suit, the Court on the application of one of the co-sharers directed that the property being incapable of partition should be sold. Against this order one of the co-sharers appealed but he did not make the co-sharers other than the one on whose application the order had been passed parties to the appeal:

Held, (1) that the case fell within the purview of Art. 17 (*vi*) of Sch. II of the Court Fees Act and that the memorandum of appeal required a Court-fee of Rs. 10; [p. 18, col. 1.]

(2) that the other co-sharers were necessary parties to the appeal and that in their absence the appeal could not proceed. [*ibid.*]

Miscellaneous second appeal from the order of the District Judge, Lyallpur, dated the 12th June, 1926, affirming that of the Subordinate Judge, Third Class, Chiniot, District Jhang, dated the 18th February, 1926.

Mr. *Fakir Chand*, for the Appellant.

Mr. *R. C. Soni*, for the Respondent.

JUDGMENT.—This was a partition suit in which a preliminary decree was passed. Thereafter on the application of one of the co-sharers Baghu Ram who together with his three brothers owned ½ share in the property the Court directed that the property which was 9 feet 5 inches long and 8 feet wide and consisted of a house with a *thara* in front was not capable of being partitioned and hence should be sold. The appellant appealed to the District Judge and did not make the other co-sharers (brothers of Baghu Ram) respondents in the appeal. The District Judge held that these persons were necessary parties and the appeal as presented was bad in law. He refused to take action under O. XLI, r. 20 holding that the appellant ought to have known that the rights

of the other co-sharers were also affected and should, therefore, have made them parties. He also held that the size of the property showed that the trial Court was right in holding that the property was incapable of partition. The defendant-appellant has appealed to this Court. Two preliminary objections have been taken (1) that the Court-fee should have been Rs. 10 as the case falls under Art. 17 (*vi*) of Sch. II of the Court Fees Act. Secondly, that even in this Court the appellant has not made the other co-sharers parties. In reply Counsel for the appellant has asked for further time to put in Court-fees and has further stated that Baghu Ram is the only necessary party and that he could not make the others parties to this appeal when he (the appellant) had not made them parties in the lower Appellate Court. I do not consider that any further time should be allowed in this case for the appellant to make up the proper Court-fees. The point is clear and there was really no excuse for the appellant not paying the proper Court-fee. There was also no real ground for the appellant not to have made the co-sharers parties in this appeal. They clearly were necessary parties and the mere fact that they were not made parties in the first appeal would not justify the appellant in not making them parties in this appeal when the fact had directly been brought to his notice. Moreover, I consider that the Appellate Court was right in holding that the other co-sharers should have been made parties and there was no justification for the plaintiff not making them parties and I consider that the Court cannot be held to have wrongly exercised the judicial discretion vested in it under O. XLI, r. 20, and I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 35 OF 1926.

December 15, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Banerji.

RAMCHANDRA BANSAL AND ANOTHER—APPLICANTS

versus

LALMAN AND OTHERS—OPPOSITE PARTIES.

Procedure—Preliminary decree, ex parte—Final decree—Notice, whether necessary.

Where a preliminary decree is passed in the absence of the opposite party, notice ought to be issued to him before the final decree is passed.

First appeal from the order of the Subordinate Judge, Jhansi, dated the 4th of January, 1926.

Mr. *S. C. Das*, for the Appellants.

Mr. *G. Agarwala*, for the Respondents.

JUDGMENT.—In our opinion this appeal must be allowed. Circumstances alter cases. We are not attempting to lay down an invariable rule that in every case where there is a preliminary decree, notice ought to be issued to the other side before the final decree is passed. But in a case where the other side is absent and the preliminary decree is *ex parte*, we do lay down the rule. It appears that there is nothing in the Code especially dealing with the matter where, in a case like a partnership or a similar matter, the liability to pay a sum of money depends on the decision of a preliminary point, for example, the existence of the partnership, the issue to be decided in the preliminary decree is quite different from the issue to be decided in the final decree. If the preliminary decree is in favour of the claimant and accounts have to be adjusted, then it is quite clear that the matter takes an entirely different aspect and complexion, and that the person whom it is sought to make liable is just as entitled to notice of the judicial proceeding which is to settle the question of the amount as he is in an ordinary suit. There is nothing in the rules enabling the Court to decide *ex parte* without further notice which is inconsistent with this rule, and on that ground we are bound to hold that the Commissioner had no jurisdiction at all to find the amount without having issued previous notice to the defendant. We must allow the appeal, set aside the final decree and direct the Court below to carry out the order appertaining accounts according to law, after due notice to both parties.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1717 OF 1926.
December 14, 1926.
Present:—Mr. Justice Zafar Ali.

PIR BAKHSH—PLAINTIFF—APPELLANT

versus

CHANAN DIN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 116—Sale set aside—Suit to recover purchase-money—Limitation, commencement of—Appeal, dismissal of, effect of.

An original decree is not suspended by presentation of an appeal against it nor is its operation interrupted where the decree on appeal is one of dismissal.

Where a sale is set aside and an appeal against the decree setting aside the sale is dismissed, limitation for a suit by the vendee to recover the purchase-money from the vendor begins to run from the date of the decree setting aside the sale and not from the date when the appeal against the decree is dismissed.

Martand Mahadev v. *Dhondo Moreshwar* (1) and *Hukam Chand Boid* v. *Pirthichand Lal* (2), followed.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 8th March, 1926, affirming that of the Subordinate Judge, Fourth Class, Lahore, dated the 12th November, 1925.

Mr. *Muhammad Amin*, for the Appellant.

Mr *Guranditta Mal*, for the Respondent.

JUDGMENT.—There is a preliminary objection to this second appeal, namely, that it is barred by time inasmuch as copy of the judgment of the lower Appellate Court was not filed within the prescribed period. The appellant's explanation supported by his affidavit and by a copy of an entry in the register of applications for copies is that he had obtained a copy of the judgment but found on the day on which he presented his memorandum of appeal that it was lost. This explanation appears to be true and there can be no doubt that the loss of the copy was accidental. This was sufficient cause for not filing a copy of the judgment within the prescribed period, and I, therefore, extend the time under s. 5 of the Indian Limitation Act.

On the merits also the question is whether the plaintiff-appellant's suit was within time. The lower Appellate Court has held that it was not. The facts are briefly as below.

The plaintiff purchased a piece of land on the 18th January, 1917, and went into possession. A nephew of the vendor brought a suit for a declaration that the sale would be inoperative as against his reversionary rights after the death of the vendor. This suit was dismissed by the trial Court, whose order was upheld by the District Judge, but on second appeal it was decreed by Mr. Justice Abdul Raoof on the 17th June, 1919. The vendee lodged a Letters Patent Appeal from that decree, but it was dismissed.

The present suit to recover the purchase-money, etc., from the vendor was instituted on the 7th August, 1925, *i. e.*, more than six years after the date of the decree passed by Mr. Justice Abdul Raoof. The lower Appellate Court has held that the suit was governed by Art. 116 of the Indian Limitation Act, according to which the period of limitation was six years, and that it was barred by time, because the limitation ran from the date of the decree of Mr. Justice Abdul Raoof and not from the date on which the Letters Patent Appeal was dismissed. This view appears to be correct. As pointed out in *Martand Mahadev* v. *Dhondo Moreshwar* (1), under Indian Law an original decree is not suspended by presentation of an appeal nor is its operation interrupted, where the decree on appeal is one of dismissal. A similar question arose before their Lordships of the Judicial Committee in *Hukam Chand Boid* v. *Pirthichand Lal* (2) and the following may be cited from page 678* of the judgment of their Lordships "The only question is whether time began to run.....from the 3rd August, 1906, the date of the appellate decree, or.....from the 24th August, 1905, the date of the original decree..... Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian Law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 61 Ind. Cas. 34; 45 B. 582; 23 Bom. L. R. 69.

(2) 50 Ind. Cas. 444; 46 C. 670; 17 A. L. J. 514; 36 M. L. J. 557; 23 C. W. N. 721; 21; Bom. L. R. 632; (1919) M. W. N. 258; 30 C. L. J. 71; 26 M. L. T. 131; 10 L. W. 416; 46 I. A. 52 (P. C).

* Page of 46 C.—(*Ed*).

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 45 OF 1924.

September 21, 1926.

Present :—Mr. Justice Jackson.

ALAPATI SYAMALADOSS AND OTHERS—APPELLANTS

versus

DORADLA SUBBAYYA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, O. VI, r. 17—Execution application against certain properties—Subsequent application for execution against other properties after period of limitation, whether maintainable—Amendment of petition—Limitation Act (IX of 1908), s. 15—Agreement not to execute decree, whether saves limitation.

A decree-holder cannot file a complete application for execution against certain property before the expiry of the term of twelve years prescribed by s. 48, Civil Procedure Code, and then after the expiry of the period, apply for execution against other items of property treating that application as one for amendment of the previous application. [p. 20, col. 2.]

Varadiah v. *Rajakumara Venkata Perumal* (1), distinguished.

Where execution of a decree is not stayed by any order of Court, a mere agreement by the decree-holder to desist from executing the decree would not attract the provisions of s. 15, Limitation Act. [p. 21, col. 1.]

It is a mistake to hold that a peculiar equity lies in overriding limitation. [p. 20, col. 2.]

Appeal against the order of the Court of the Subordinate Judge, Bapatla, dated the 24th October, 1923, in A. S No. 62 of 1923, preferred against that of the Court of the District Munsif, Ongole, dated the 1st May, 1923, in C. M. P. No. 197 of 1923 in O. S. No. 922 of 1907.

Mr. *Ch. Raghava Rao*, for the Appellants.

Mr. *N. Visvanatha Iyer*, for the Respondents.

JUDGMENT.—Appeal against the order of the Subordinate Judge of Bapatla in A. S. No. 62 of 1923 The appellants are defendants and judgment-debtors in O. S. No. 922 of 1907, District Munsif's Court, Ongole.

The respondents filed E. P. No. 789 of 1920 on 4th October, 1920, praying that certain property attached before judgment might be sold. Some doubt was expressed whether there had been an attachment before judgment, and it seems that the District Munsif, suggested that other property of the defendants should be attached and sold. Accordingly, respondents filed E. A. No. 163 of 1923 on 20th March, 1923, praying that the property said to be under attachment might be attached, and also other property already scheduled in a compromise between the parties.

The District Munsif held E. A. No. 163 of 1923 to be a petition to amend E. P. No. 189 of 1920 ; otherwise, it would be time-barred under s. 48, Civil Procedure Code. The judgment-debtors appealed, and the learned Subordinate Judge has held that the application may be amended, following *Varadiah* v. *Raja Kumara Venkata Perumal* (1). This amounts to holding that if a decree-holder files an execution application against certain property before the expiry of the term of limitation, after the expiry he can proceed against other property by treating each subsequent application as an amendment of the application already filed.

It is not as though there were technical defects in the original application, which are allowed to be cured after time has run. A decree-holder cannot file a complete execution application before the expiry of twelve years, and then after the expiry of the period, apply for execution against other items of property, treating that application as one for amendment of the previous application. The settled rule of practice is that laid down by Lord Esher, M. R., in *Weldon* v. *Neal* (2) as pointed out in *Kumara Venkata Perumal* v. *Velayuda Reddi* (3). *Varadiah* v. *Raja Kumara Venkata Perumal* (1) which contravenes that rule must be regarded as governed by the peculiar circumstances of that case.

Sadasiva Aiyar, J., was one of the Judges in *Kumara Venkata Perumal* v. *Velayuda Reddi* (3) and only supported *Varadiah* v. *Raja Kumara Venkata Perumal* (1) on the ground that he personally was not inclined to consider the defendants' right to raise technical pleas. *Vemuri Pichayya* v. *Ankineedu Bahadur Zemindar* (4) concerns the amendment of a defective application, and does not apply to the facts of this case even if it be taken as overruling the Calcutta Full Bench decision in *Asgar Ali* v. *Troilokya Nath Ghose* (5) which seems to be in close conformity with the settled rule.

It is a mistake to hold that a peculiar equity lies in overriding limitation. A decree-holder does not obtain a decree which but for the merely technical and

(1) 21 Ind. Cas. 782; 26 M. L. J. 83; 14 M. L. T. 530; (1914) M. W. N. 157.

(2) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

(3) 24 Ind. Cas. 195; 27 M. L. J. 25 at p. 28.

(4) 76 Ind. Cas. 750; 45 M. L. J. 651; 18 L. W. 739; 33 M. L. T. 125; A. I. R. 1924 Mad. 367.

(5) 17 C. 631; 8 Ind. Dec. (N. s 960 (F. B.).

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possibly unjust provision of limitation, he would be at liberty to execute at any time he pleased. He obtains a decree which he must execute before the expiration of twelve years, and the law which limits the period is neither more nor less just than the law which authorizes the decree. A Judge takes a peculiar view of his office who thinks it incumbent on him, when administering a Statute, to pick out certain clauses which it is his duty to enforce, and certain clauses which it is his duty to evade.

It was finally argued for respondents that in this case time had not actually run because the execution was stayed by injunction. But, apparently, there was no actual injunction and only an agreement to desist, which would not attract the provisions of s. 15, Limitation Act.

The petition is allowed with costs throughout; and the order of the lower Courts permitting amendment is cancelled.

V. N. V. *Petition allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 32 OF 1926.
December 3, 1926.
Present:—Mr. Findlay, J. C.
GANPAT AND OTHERS—PLAINTIFFS—APPELLANTS
versus
LAXMAN SAO—DEFENDANT—RESPONDENT.

Easement—Prescription—Second appeal—Plea of grant or custom, whether can be allowed.

It is impossible to admit in second appeal a plea raised for the first time which would involve a fresh enquiry into questions of fact. [p. 22, col. 2.]

Where a plaintiff who sets up an easement on the ground of prescription fails to establish his case, he cannot be allowed in second appeal to set up a grant or custom. [*ibid.*]

A person is entitled to enjoy his own land in the way he chooses to do, unless he interferes with his neighbours and causes them injury or inconvenience. [*ibid.*]

Appeal against the decree of the Additional District Judge, Nagpur, dated the 26th October, 1925, in Civil Appeal No. 54 of 1925.

Messrs. *M. R. Bobde* and *M. D. Khandekar*, for the Appellants.

Mr. *R. N. Padhey*, for the Respondent.

JUDGMENT.—The plaintiffs-appellants' suit has been dismissed in both the lower Courts for reasons which are clear from the two judgments in question. The plaintiffs claimed that they had a right to ingress of light and air and to emit smoke through the window E shown in the plan attached to the plaint; that they had also a right to pass on to the vacant land A B C D in order to effect repairs to their wall A D; and, finally, that they had a right to project the eaves two feet to the south of A D. Both the lower Courts have held that the window has not been in existence for more than 15 years and that no prescriptive right of easement had, therefore, been acquired.

It has been contended on behalf of the plaintiffs-appellants in this Court that the right in question might also have been acquired by grant or custom and that the lower Courts have failed to consider this aspect of the case. If there was to have been any question of the right of easement in question having been acquired by grant or custom, there should have been specific pleading on the point and it is fairly obvious that the contention is now raised for the first time merely because the findings of fact arrived at by the lower Courts have bolted and barred the door against the right of easement having been acquired by lapse of time. It is obviously impossible to admit now a plea which would involve a fresh enquiry into questions of fact as to whether the rights claimed by the plaintiffs were acquired by grant or custom. The obvious principle to be followed in a case like the present is that the defendant is entitled to enjoy his own land in the way he chooses to do unless he interferes with his neighbours or causes them injury or inconvenience. In the present instance the very minute room shown as H in the plan has already, besides the window in dispute, another window G opening on to the compound and the door H. The inspection-note recorded by the Subordinate Judge suggests that the closing of the window E will necessarily cause some curtailment of the light and air entering the room, but it is impossible, on the evidence on record, to hold that any nuisance will be caused sufficient to justify interference by this Court in the particular circumstances of the present case: *cf.*, *Paul* v. *William Robson* (1).

(1) 12 Ind. Cas. 60; 39 C. 59.

As regards the arrangement made for draining of the roof-water from the defendant's house, the findings of the Subordinate Judge show that suitable arrangements have been made.

As regards the alleged right to enter on the previously open space A B C D for repairs to the plaintiffs' wall A D, the appellants' case is even a weaker one. I fully concur in this connection with the decision of Beaman and Heaton, JJ., in *Himatlal Maganlal Shah* v. *Bhikabhai Amritlal Shah* (2). Most obviously, on the evidence in the present case, no right to enter on the defendant's land for purposes of repairs has been made out and this aspect of the case has been correctly dealt with by the lower Appellate Court. There has been no proof worthy of the name that any entry on the defendant's land was ever exercised by the plaintiffs as of right for purposes of repairs to their own property, and it would have required strong evidence, indeed, to make out a right of any such nature.

The case has, undoubtedly, been decided correctly by the Courts below and the appeal is accordingly dismissed with costs.

G. R. D. *Appeal dismissed.*

(2) 45 Ind. Cas 422; 42 B. 529; 20 Bom. L. R. 403.

PRIVY COUNCIL.

APPEALS FROM THE LAHORE HIGH COURT.

November 9, 1926.

Present:—Lord Phillimore, Lord Sinha, Lord Blanesburgh, Lord Salvesen.

FITZHOLMES—DEFENDANT—APPELLANT

versus

THE BANK OF UPPER INDIA, LIMITED IN LIQUIDATION—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage suit—Preliminary decree—Appeal—Final decree, application for—Limitation

Where there has been an appeal from a preliminary mortgage-decree under O. XXXIV, r. 4, sub-r. (1) of the Civil Procedure Code and the Appellate Court has not extended the time for payment, the period of three years within which under Art 181 of Sch. I to the Limitation Act, an application for a final decree under O. XXXIV, r. 5, sub-r. (2) must be made, runs from the date of the decree of the Appellate Court and not from the expiry of the time for payment fixed by the preliminary decree. [p. 22, col. 2; p. 23, col. 1.]

When an appellant appeals to the High Court, unless there is some rule dismissing the appeal for want of time or an order is procured dismissing it, his appeal stands till it is heard and the final decree passed in the appeal by the High Court must be carried out. [p. 23, col. 1.]

Consolidated appeals from the judgment of the Lahore High Court.

Messrs. *A. M. Dunne, K. C.*, and *B. Dube*, for the Appellant.

Sir *G. R. Lowndes, K. C.*, and Mr. *W. Wallach*, for the Respondents.

JUDGMENT.

Lord Phillimore.—Their Lordships need not trouble Counsel for the respondents.

The cases under appeal were two, one against husband and wife, and one against wife only, in respect of mortgages to the respondent Bank. Decrees fixing a figure to be paid and giving six months within which it should be paid were passed in both suits, on 21st August, 1919, in one, and on 17th December, 1919, in the other. The mortgagors appealed and somehow or other the proceedings got so delayed that the judgment of the High Court in both of the suits was not passed till the 7th March, 1923, when the High Court dismissed both appeals. On the 13th March, the Bank applied for a final decree. Objection was taken by the mortgagors that six months had not expired since the decree of the High Court, and that objection prevailed. Thereupon the Bank waited for six months and a little more and on the 10th October applied for a final decree for sale, and an order was made on 20th October. Thereupon the mortgagors appealed to the High Court, on the ground that, under Art 181 of the Limitation Act, the decrees of the Court of first instance were dead. They passed by the decrees of the High Court and contended that there could now be no sale. The District Judge dismissed this application and the High Court agreed with him; but the mortgagors, not being content, have appealed to this Board. It has now been definitely settled, in the case of *Jowad Hussain* v. *Gendan Singh* (1) that "Where there has been an appeal from a preliminary mortgage-decree under O. XXXIV, r. 4, sub-r. (1) and the Appellate Court has not extended the time for payment, the period of three years within which, under the Indian Limitation Act, 1908, Sch. I, Art. 181, an application for a final decree under O. XXXIV, r. 5, sub-r. (2) must be made runs from the date of the

(1) 98 Ind. Cas. 499; 53 I A. 197; 24 A. L. J. 765; A. I. R. 1926 P. C 93; (1926) M W. N. 591; 44 C. L. J. 63; 3 O. W. N. 690; 24 L. W. 394; 7 P. L. T. 575; 31 C. W. N. 58; 51 M. L. J. 781; 28 Bom. L. R. 1395 (P. C.).

decree of the Appellate Court, not from the expiry of the time for payment fixed by the preliminary decree."

Therefore, in the first instance, it would seem quite simple that the mortgagors' point was a bad one. But a very ingenious suggestion was made with regard to the earlier of the two decrees. It was said that before the date of the High Court decision the three years and six months had passed and, therefore, that decree was dead before the High Court gave its decision and could not be revived, so no order for sale could be made. The point does not seem to have been taken in the Courts below, but it is open to the appellants to raise it. The answer is first, that no attempt has been made to discharge the order of the High Court. It stands unappealed from. The answer is next, that the jurisdiction of the High Court is not touched by the Limitation Act, and when an appellant appeals to the High Court, unless there is some rule dismissing the appeal for want of time or an order is procured dismissing it, his appeal, stands till it is heard. Therefore the High Court had a right to determine the appeal, and when the judgment of the High Court is given, though in form it affirms the decree of the Judge of first instance, it works out at a different figure, because the amount of interest is not at the same figure that judgment was passed for in the first instance. Therefore the High Court having jurisdiction to pass its decrees, those decrees were sought to be enforced in plenty of time. The mortgagors were right in their objection that these decrees should not be enforced till six months had elapsed from the judgment of the High Court, and it is sufficiently cynical that they should now turn round and take a point which one is glad to think entirely fails.

These appeals will be dismissed with costs and their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Mr. *H. S. L. Polak.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1748 OF 1926.

December 14, 1926.

Present:—Mr. Justice Zafar Ali.

PARMA NAND—DECREE-HOLDER—APPELLANT

versus

Musammat RAJ DEVI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI r. 5—Stay of execution—Appeal, whether lies—Execution of decree—Order disposing of objection, finality of.

No appeal lies from an order staying execution of a decree.

Where an order passed in the course of execution proceedings has become final it is binding upon the parties in the subsequent stages of the execution.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Rawalpindi, dated the 21st May, 1926.

Dr. *Nand Lal*, for the Appellant.

Mr. *Shambhu Lal Puri*, for the Respondent.

JUDGMENT.—This is a miscellaneous appeal against an order in execution proceedings relating to a money-decree. In execution of that decree a house was attached, but sale thereof was stayed by the executing Court (Senior Subordinate Judge of Rawalpindi) by order, dated 20th March, 1922. In 1925 the decree holder applied for cancellation of that order, but the application was rejected on the 23rd April, 1925, and the decree-holder's appeal to the High Court against that order was dismissed on the 13th July, 1925. On the 18th July, 1925, the decree-holder made a fresh application for execution by attachment of certain moneys payable to the judgment-debtor by the Punjab National Bank, Limited, Rawalpindi, and certain persons named by him, and his money lying in the Bank was attached but on the 21st October, 1925, it was released from attachment on the objection of the judgment-debtor on the ground that the execution had already been stayed by the order of the 20th March, 1922.

No appeal was preferred against the order of the 21st October, 1925, releasing the money from attachment. On the 2nd January, 1926, the decree-holder again applied for attachment of that money but the application was rejected on the 21st May, 1926. It is against this last order that the decree-holder appeals. It is clear that the order of the 21st October, 1925,

which was not appealed against became final and no fresh application for attachment of the money was competent.

It may be observed that it has been held by the Bombay, Allahabad and Calcutta High Courts that no appeal lies from an order staying execution. See *Janardan Trimbak* v. *Martand Trimbak* (1), *Husain Bhai* v. *Beltie Shah Gilani* (2) and *Rajendra Kishore Choudhury* v. *Mothura Mohan Choudhury* (3).

I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 59 Ind. Cas. 523; 45 B. 241; 22 Bom. L. R. 1212.
(2) 83 Ind. Cas. 1035; 46 A. 733; 22 A. L. J. 706; A. I. R. 1924 All. 808; L. R. 5 A. 482 Civ.
(3) 55 Ind. Cas. 228; 25 C. W. N. 555.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 726 AND 727 OF 1925.

September 21, 1926.

Present:—Mr. Justice Jackson.

V. CHINNAMALU—PETITIONER IN BOTH

versus

IN C. R. P. 726 OF 1925.

C. KUNHIKANNA MENON AND OTHERS PLAINTIFFS—RESPONDENTS.

IN C. R. P. 727 of 1925.

KANDANKUMARATH RUGMONI AMMA—RESPONDENT.

Execution of decree—Payment by judgment-debtor of decree amount into Court—Effect upon other creditors—Amount, whether liable to be attached by another decree-holder—Fraud on creditors, what constitutes.

Every payment on account of a debt is perfectly lawful payment irrespective of its effect upon other creditors.

Veerasokkaraju v. *Papiah* (1), followed.

A payment by a judgment-debtor in satisfaction of the decree against him is a final discharge of his obligations thereunder and the Court is bound to enter satisfaction of the decree. Such money cannot be regarded as lying to the credit of the judgment-debtor so as to be liable to attachment by another decree-holder, nor does such payment constitute a fraud upon other decree-holders, even if there was nothing left for them to proceed against.

Kasthuri Aiyangar v. *Arunachelam Chettiar* (2), followed.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the Subordinate Judge of South Malabar at Palghat dated the 22nd August, 1925, in E. P. No. 637 of 1925 in S. C. S. No. 694 of 1924 in M. P. No. 1673 of 1925 in S. C. S. No. 132 of 1924 respectively.

Mr. *T. S. Anantaraman*, for the Petitioners.

Mr. *C. Unikanda Menon*, for the Respondents.

JUDGMENT.—Petitioner seeks to revise the order of the Subordinate Judge of Palghat in E. P. No. 637 of 1925.

Two decrees were outstanding against petitioner, one in S. C. S. No. 132 of 1924 against her personally and against the assets of her mother; and one in S. C. S. No. 694 of 1924 against the assets only. She sold a house which apparently was her mother's own asset, and discharged the decree in S. C. S. No. 132 of 1924. The Subordinate Judge finds that this was a fraud against the decree-holder in S. C. S. No. 694 of 1924 because there is nothing left for him to proceed against. Hence the petition to revise. The learned Subordinate Judge cites no authority for holding that such payment is a fraud. His attention was drawn to *Veerasokkaraju* v. *Papiah* (1) and he should have observed the general applicability of the *dictum*, every payment on account of a debt is perfectly lawful payment irrespective of its effect upon the other creditors. The contrary view would amount to ruling that every holder of a decree against assets has *ipso facto* a charge upon those assets; and the Vakil for the counter-petitioner has shown a correct appreciation of the implications of the case by arguing it on the footing of subrogation. But at the time of the payment the petitioner was unfettered mistress of her own property, and could deal with it as best advised.

Nor can counter-petitioners claim to attach the money paid in satisfaction of the decree as being assets held by a Court. It is not as though an attaching decree-holder had sold up the mother's house, and brought the proceeds into Court awaiting orders. The judgment debtor herself paid in the money in satisfaction of the decree, which was a final discharge of her obligation, and no money can be said to have been lying to her credit so as to be liable to the counter-petitioner's attachment: *cf.*, *Kasthuri Aiyangar* v. *Arunachelam Chettiar* (2).

The petition C. R. P. No. 726 of 1925 is

(1) 26 M. 792.
(2) 34 Ind. Cas. 350; (1916) 1 M. W. N. 195.

ollowed with costs throughout; and the rder of the lower Court is cancelled.

Satisfaction in the decree in S. C. S. No. 132 of 1924 should accordingly be entered.

C. R. P. No. 727 OF 1925 is allowed with costs.

V. N. V. *Petitions allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 586 OF 1924.

December 9, 1926.

Present:—Mr. Justice Kendall.

RAGHUNATH TEWARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SITA RAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Place of registration—Fictitious item of property included in deed in order to give jurisdiction to particular Sub-Registrar, effect of—Fraud.

The inclusion in a deed of conveyance of an item of property which does not exist purely for the purpose of making the deed available for registration in a particular place, amounts to a fraud upon the Registration Law and the registration of the deed at such place cannot be held to be valid. [p. 26, col. 2.]

Second appeal against the decree of the District Judge, Azamgarh, dated the 10th of January, 1924.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *N. Upadhya*, for the Respondents.

JUDGMENT.—This is a second appeal from the judgment of the learned District Judge of Azamgarh, upholding the decision of the first Court by which the plaintiffs-appellants' suit for possession of certain *zemindari* property in Azamgarh District and of two mango trees in Fyzabad District was dismissed. Some difficulty has arisen in this Court owing to the lower Appellate Court having imported into the proceedings certain findings which are not based on the pleadings of either party. The plaintiffs-appellants based their suit on a sale-deed by which Jaikaran Singh, one of the defendants, purported to transfer the property described above to Sarju Tewari, son of Baijnath Tewari. This sale-deed was executed in 1915. In January, 1917, the same defendant, Jaikaran Singh, gifted the same property to defendants Nos. 2 and 3, and gave them possession. Sarju, the nominal vendee under the sale-deed of 1915, sued the donor and the donee for possession in 1918. The suit, which ultimately went up in appeal to the High Court, was dismissed on the ground that the registration of the sale-deed was invalid. It may be explained here that the registration took place in Fyzabad District, and it was found in that litigation that there were no mango trees belonging to the vendor, as described in the sale-deed, and that no part of the property transferred was situated in the District of Fyzabad.

In the present suit the first Court considered that the question of the validity of the registration was *res judicata* on the ground that the present plaintiffs-appellants actually fought out the previous suit in the name of Sarju Tewari; but in this the lower Appellate Court has disagreed. The facts of the transaction are by no means free from doubt. The plaintiffs-appellants' case was that the whole joint family intended to purchase the property, and it was actually purchased with joint family funds, but that Baijnath Tewari, father of Sarju Tewari, who was entrusted with the execution of the deed, dishonestly had it executed in the name of Sarju alone; and that the plaintiffs-appellants were entirely ignorant of the litigation in which Sarju attempted to obtain possession in 1918. The learned Judge has found that the sale was in reality not in favour of Sarju at all, or in favour of the joint family, or paid for from the joint family funds; but that it was a collusive transaction in favour of one Sadanand Shukul, maternal uncle of Sarju. As I have said above, this is not the case of either party, nor is it supported by the evidence on the record. Before he wandered on to this side tract, the learned Judge was in a fair way to agree with the finding of the Court of first instance that the plaintiffs-appellants were cognizant of the proceedings in which Sarju sued to recover possession of the property. He remarks, "The learned Subordinate Judge has not believed plaintiffs' case that they had no knowledge of the former litigation, and I am also not inclined to believe them. If they are really members of a joint family, as they allege and as has been found by the lower Court, plaintiffs must have known of Sarju's case fought up to the High Court in respect of the joint family property." However, the Judge then proceeds to make out what appears to be a hypothetical case, namely, that the property was purchased not by the joint family but by Sadanand Shukul. This hypothetical case is fatal to

the plaintiffs appellants' appeal, because on the Judge's findings the plaintiffs-appellants have no share in the property purchased. If, however, the case set up by the District Judge be discarded, as the appellants argue that it should be discarded, we are left with the finding of the first Court that the property was purchased with the joint family funds and that the plaintiffs-appellants were fully aware of, and were, in fact conducting the proceedings in Sarju's name, by which Sarju's possession was sought to be established at the expense of the donee. In these circumstances, it is difficult to see how the Judge could have avoided following the first Court in finding that the question of the validity of the registration was *res judicata*. The Judge's finding to the contrary is coloured by the hypothetical case that he has himself set up. My own opinion is that the matter is *res judicata* for the reasons given by the trial Court. I am clear, however, that in any case the registration must be held on the merits to be invalid. The lower Appellate Court has found that a fraud was practised on the Registration Department; but, as in reaching this finding also that Court has been influenced by the hypothetical case of Sadanand, it is necessary to look into the matter in some detail. The sale deed purports to transfer landed property in Azamgarh District and two mango trees in Fyzabad District. Under s. 28 of the Indian Registration Act, the deed could be presented for registration in the Office of a Sub-Registrar "within whose sub-District the whole or some portion of the property to which such document relates is situate." The two mango trees which, according to the recital in the deed, were the property of Jaikaran Singh, did not exist in Fyzabad District. An attempt has been made to show on behalf of the appellants that the mere fact that the document contains a reference to such trees is sufficient to justify the registration in Fyzabad District. It is argued that whether the vendor actually owned the trees or not, the registration would be valid, provided that there was no fraud or collusion. Reference was made to the following decisions:—

Harendra Lal Roy Choudhury v. *Hari Dasi Debi* (1), *Pahladi Lal* v. *Laraiti* (2) and *Ram Dai* v. *Ram Chandrabali Debi* (3). In none of these cases, however, was there any real difficulty in identifying the property concerned, nor does there seem to have been any suspicion that a fictitious entry was made in order to enable the registration to be carried out in one District rather than in another. In the present case, there are many suspicious elements. In the first place, it is difficult to conceive why the vendor should wish to transfer these two solitary trees in Fyzabad District in conjunction with the body of property in Azamgarh. The fact that possession was not given to the vendee aggravates the suspicion. We next find that the two trees referred to in the sale-deed do not exist. The Courts below have certainly found that the plaintiffs appellants are entitled to a share in one tree in plot No. 995. This is not the plot given in the sale-deed, and it needs special pleading to show that the two trees referred to in the sale-deed may possibly be partially identified with the share of the vendee in the tree on plot No. 995. In *Narasimha Rao* v. *Papanna* (4) it has been held by a Bench that the inclusion of an item of property belonging to the vendor in a sale-deed without any intention of passing any title in it and purely for the purpose of making the deed available for registration in a particular place is a fraud upon the Registration Law, and as such the sale-deed must be deemed not to have been properly registered. Without, therefore, going as far as the lower Appellate Court in its findings of fact, I am prepared to agree with it that the recital in the deed of the two mango trees and the registration of it in Fyzabad District amounted to a fraud on the Registration Department, and that the deed is, therefore, invalid.

The result is that the appeal fails, and is dismissed with costs, including fees in this Court on the higher scale.

Z. K. *Appeal dismissed.*

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 434; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(2) 48 Ind. Cas. 200; 16 A. L. J. 871; 41 A. 22.

(3) 52 Ind. Cas. 446; 4 P. L. J. 433.

(4) 56 Ind. Cas. 519; 42 M. 436; 11 L. W. 394; 38 M. L. J. 327; 27 M. L. T. 239.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 469 OF 1925.
November 11, 1926.
Present:—Mr. Hallifax, A. J. C.
DEVAJI—DEFENDANT—APPELLANT
versus
GOVIND AND OTHERS—PLAINTIFFS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), ss. 13, 89—Occupancy holding—Transfer in favour of Lambardar *and a co-sharer—Surrender—Consent of other co-sharers—Acceptance of debit of amount on account of holding—Partition—Transfer, whether can be set aside and by whom—Suit for setting aside transfer, proper frame of—Transfer in favour of co-sharer—Ejectment—Remedy of proprietary body—Application under s. 13—Contribution—Transferee, whether entitled to share—Remedy, nature of—Discretion of Court.*

A transfer by sale of an occupancy holding under a registered document to the *Lambardar* is a surrender to him as the landlord even though another co-sharer has been included in the sale-deed as a co-vendee with the *Lambardar*. [p. 27, col. 2.]

If the holding transferred continues to be in the possession of the *Lambardar* and the co-sharer as their separate *khudkasht* land or their occupancy holding with the consent of the other co-sharers, it must be deemed that the whole proprietary body has agreed to the transfer through their agent the *Lambardar* and the agreement is not any-the-less binding by the mere fact of the *Lambardar* being one of the transferees. [p. 28, col. 1.]

The agreement must be deemed to have been ratified by the other co-sharers who are not the transferees by acceptance at the end of each of the years the latter continue in occupation of the land, of some debit against each of the transferees, in respect of the land, in the village accounts, as also by doing nothing in the matter of claiming possession against them for a length of time. [*ibid.*]

No member of the proprietary body can set aside this agreement except on the ground of fraud or under s. 215 or s. 216 of the Contract Act or s. 90 of the Trusts Act, on the ground that the land has been allotted by the *Lambardar* to himself. In either of the cases the whole proprietary body will have to sue except, of course, the transferee or transferees. [*ibid.*]

If the transfer is in favour of a co-sharer who is not a *Lambardar*, it is not in favour of the entire proprietary body. The transferee has purchased it for his own benefit and must be considered an outsider for the purposes of ejectment as well as the transfer; he is simply the transferee of an occupancy holding and can be ejected only on application to a Revenue Officer under s. 13 of the C. P. Tenancy Act by the whole proprietary body. [p. 28, cols. 1 & 2.]

The co-sharer-transferee though entitled to go into possession, as a co-sharer with others after his ejectment as a result of the application under s. 13 of the Act by the whole proprietary body is not entitled to a contribution from the body of a share in the cost of acquisition. [p. 28, col. 2.]

The relief as to contribution is at the best an equitable relief the grant of which is purely discretionary with the Court. The discretion cannot be exercised in favour of a co-sharer who was not a transferee, if the claim for contribution is made after a considerable delay of four years. [*ibid.*]

Appeal against the decree of the District Judge, Wardha, dated the 25th July, 1925, in Civil Appeal No. 31 of 1925.

Mr. *K. K. Gandhe*, for the Appellant.
Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—The land in dispute, which was an occupancy holding till the beginning of the year 1919, is situated in the village of Talni. The plaintiffs, Govinda Teli and his two brothers, own a four-anna share in the village, but live at Vichora eleven or twelve miles away. The 1st defendant is their uncle Devaji Teli, who owns a four-anna share in Talni and lives there and is the *Lambardar* of the village. The remaining eight-anna share belongs to Tatyaji Kunbi who also lives at Talni; he was the 2nd defendant in the suit and a respondent in the lower Appellate Court, but he remained absent throughout and has now dropped out of the case. His connection with the matters in dispute is not without importance but has been left out of sight.

On the 15th of April, 1919, Devaji and Tatyaji jointly bought up the occupancy holding for Rs. 1,100. The deed executed in their favour was registered, and it contains the untrue statement that the sum paid was Rs. 2,000. The land was divided between the two defendants and each cultivated a half of it during the next three agricultural years, in each of which it was recorded as their separately held *khudkasht*. The plaintiffs were aware of the transfer within two months after it took place, but did nothing for three years. On the 2nd of August, 1922, they filed the plaint in the present suit, claiming possession of a joint quarter share in the land. It was found that the Court in which they filed the plaint had no jurisdiction in the suit, and the plaint was returned to them on the 21st of April, 1923, for proper presentation. They then waited nearly another year and presented the same plaint on the 22nd of February, 1924, in the Court which eventually tried the suit.

Probably the correct view of the transfer is that registration of the document makes it a surrender to the *Lambardar*, that is, to the whole proprietary body, and not a sale to the two co-sharers Devaji and Tatyaji, in spite of the inclusion of the latter as a transferee. But, even if the transfer is really a sale to two co-sharers

out of more, the position arising out of subsequent events is the same. After the transfer the whole proprietary body, including the plaintiffs, agreed that Devaji and Tatyaji should each cultivate a half of the land, either as his separately held *khudkasht* or as his occupancy holding. This agreement was made through their agent the *Lambardar*, who happened to be a member of the other party to it also, but that fact alone does not make it anythe-less binding.

Under these circumstances it is impossible that any member of the proprietary body can set aside its own agreement, except on the ground of fraud. But the plaintiffs here have ratified the action of their agent, not only by doing nothing for three years, but also by accepting at the end of each of those years, as they presumably did, the debit of some payment against each of the defendants in respect of this land in the village accounts.

There is a further circumstance in this case that debars the plaintiffs from questioning the action of their agent. In the pleadings it was stated by Devaji that in a partition between him and them some years ago it was agreed that thereafter he was to take possession of all surrendered lands in Talni and they were to do the same at Vichora. This allegation was never denied or even mentioned by the plaintiffs, and was, therefore, admitted by them to be true.

With more than the respect merely due to the opinion of a Judge of this Court, I have always found difficulty in accepting the views expressed by Stanyon, A. J. C., in *Ramdayal* v. *Gulabia Bai* (1) as correct. If an occupancy holding transferred to one of several co sharers in the village is regarded as *khudkasht*, then it is admittedly transferred to the whole proprietary body. In that case if the separate holding of it as *khudkasht* has the consent of the *Lambardar*, that is of the whole body of co-sharers, no member of that body can set aside that agreement except on the ground of fraud, or under s. 215 or s. 216 of the Contract Act or s. 90 of the Trusts Act if the *Lambardar* has allotted the land to himself. In either case the whole proprietary body would have to sue, except, of course, the defendant.

But a co-sharer who buys an occupancy holding does it for his own benefit, and he must surely be considered an outsider for the purposes of ejectment as well as in the transfer; he is simply the transferee of an occupancy holding, and can be ejected only on application to a Revenue Officer under s. 13 of the Tenancy Act, 1920, by the whole proprietary body; after ejectment he would, of course, go into possession as a co sharer with the others, but he would be entitled to no contribution from them of a share in the cost of acquisition.

The question of the correctness of the views expressed in *Ramdayal* v. *Gulabia Bai* (1) is of very great importance. The statement of them is to great extent *obiter dicta* as the suit was found to be barred by time. They are also based almost entirely on principles of equity, to which we can have recourse only in the absence of statutory provision, of which there seems to be enough to govern both that case and this. I am, therefore, entitled to decline to accept them without referring the matter to a Bench. From that, however, I refrain out of my respect for the learned Judge who stated them, and because the decision in this case will be the same even if they are accepted, so that the opinion of the Bench would also be an *obiter dictum*.

Stanyon, A. J. C., laid it down that such a claim as this "is a claim in equity, within the discretion of the Court to grant or refuse, and must be advanced without unreasonable delay after acquisition of the holding." The acceptance of the situation for three years, and for another year later, by the plaintiffs would clearly be enough of itself to make it inequitable to give them the relief they seek. But further their agreement with Devaji that he should take possession of all surrendered land in Talni bars their claim in law as well.

The decree of the lower Appellate Court will accordingly be set aside and in its place a decree will issue dismissing the suit. The plaintiffs-respondents will pay the whole of the costs of both parties in all three Courts.

G. R. D. *Decree set aside.*

(1) 4 N. L. R. 120.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 47 OF 1926.

December 16, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Banerji.

B. BINDHACHAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAND PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3—Commission, issue of—Court, whether can proceed to determine suit before return of Commission.

Where a Commission is ordered to issue, the Court should wait for the return of the Commission before proceeding to hear and determine the case. [p. 30, col. 1.]

First appeal from an order of the Third Additional Judge, Gorakhpur, dated the 22nd January, 1926.

Dr. *M. Waliullah*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This order is clearly right. We really have nothing to add to the order of the Additional District Judge, were it not for the perfectly astounding proceedings of the Munsif—but for his benefit, we add a word or two. We give him credit for the best possible motives. He says that the case has become very old, and that there have been several adjournments, and that he cannot adjourn it again. No doubt, he was impressed with the general complaint, which is often made of cases which remain pending too long, and are too easily adjourned. But a Judge ought to hesitate a long time before he applies an admirable precept of prompt despatch of work so as to punish, without a scrap of justification, a man who bore not a shadow of responsibility for the accident which had occurred. If third parties carrying out formal and necessary proceedings, under the direction of the Court, happen to be guilty of such delay as to cause necessary adjournments, that cannot be the fault of the parties, and it might have occurred to the Munsif that it is never right to punish a man for circumstances over which he has no control. So far from being in default the plaintiff was doing his utmost to comply in every way with the orders of the Court and the necessities of the case. No body can put it better than the District Judge has done. It was not in the power of the plaintiff to procure the papers from Calcutta before the 15th of October, on which date the suit was dismissed. They were not, in fact, received until the 25th of October. That was simply the consequence of the proceedings in Calcutta. Whether it is any body's fault in Calcutta, does not matter, and we have no materials for judging it, but it certainly was not the fault of the plaintiff.

As often happens, when a Court is unconsciously doing an act of flagrant injustice, a difficulty arose in putting the decision into the necessary form, required by law, to draw up the order. The so-called decree or order, whatever it may be, when you come to analyse it, is really nonsense, and it was certainly the duty of the successful defendant to draw the Court's attention to the form of the decree. It is described as an order in a miscellaneous case. It is said in the recital that it is brought forward for disposal. The recital goes on to set out that it is being disposed of before no less than five Pleaders on behalf of the plaintiff, who is foolishly described as the petitioner, while the defendant is the opposite party for some unexplained reason, and finally after showing that there was no default in the ordinary sense of the words "by absence," because both parties were present, it dismissed the plaintiff's claim for default. In substance, in our view, this was the disposal of the suit on the merits, on the ground that the plaintiff, although present, was unable to prove his case at the trial. There was no personal default by him. There was no default by absence, and the duty of the Court was to proceed, to decide the suit forthwith, notwithstanding the default described in the rule. Probably the correct way of drawing up the decree would have been to say that notwithstanding the failure of the plaintiff to produce his evidence, the Court proceeds to decide the suit and dismiss it with costs. That would have been an unjust order, but it would have been an attempt to comply with the rule under which the Court was clearly acting. The High Court has recently amended these very rules in order to avoid the tangles into which the Courts below constantly get, in dealing with these questions of failure, and default of various kinds, and to assist them to clear their minds as to whether they are really dismissing the suit for default, or disposing of it on the merits. But in our view the old formal rule is adequate

to meet this case, and the case must be treated as having been dealt with under O. XVII, r. 3, and, therefore, subject to the appeal which was brought to the District Judge. We might add that if any decision were necessary, there is a binding decision by a Bench of this Court [*Madho Singh* v. *Kashi Singh* (1)] where it is held that when a Commission is ordered, the Court should wait for the return of the Commission before proceeding to hear and determine the case. We are obliged to the gentleman appearing for the respondent, for having drawn our attention to that authority, which, no doubt, would have assisted the Munsif, if he had been aware of its existence. But we think that it might have occurred to him, without any authority, that what he was doing was hardship upon a perfectly innocent party.

The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 16 A. 342; A. W. N. (1894) 112; 8 Ind. Dec. (N. S.) 223.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 33-B OF 1925.

November 20, 1926.

Present:—Mr. Findlay, J. C.

SADASHEO—DEFENDANT No. 1—APPLICANT

versus

VITHOBA AND OTHERS—DEFENDANTS Nos. 2 AND 5—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Erroneous view of law, whether good ground for review—"Any other sufficient reason", scope of.

An erroneous view on a point of law cannot be deemed to fall within the provisions of r. 1 (1) of O. XLVII of the Civil Procedure Code. [p. 30, col. 2.]

Chhajju Ram v. *Neki* (1), followed.

The words "any other sufficient reason" as used in O. XLVII, r. 1, Civil Procedure Code, mean a reason sufficient on grounds at least analogous to those specified immediately previously. [p. 31, col. 1.]

Application for review of judgment of the Judicial Commissioner's Court in Second Appeal No. 178-B of 1924, dated the 11th July, 1925.

Mr. *M. R. Bobde*, for the Applicant.

Dr. *H. S. Gour* and Mr. *N. G. Bose*, R. B., for the Non-Applicants.

ORDER.—On the present application for review of the judgment of this Court dated the 11th of July, 1925, coming on for hearing, Counsel for the non-applicants raised an objection that no review lay having regard to the provisions of s. 114 and O. XLVII, r. 1, Civil Procedure Code. It was urged that avowedly, there had been no discovery of any new and important matter or evidence, that there was no mistake or error apparent on the face of the record, and that there was no other sufficient reason for granting the review.

On behalf of the applicant a considerable argument was developed to the effect that this Court had omitted to appreciate the full force of the words "at the commencement of this law, has either by himself or by himself and through his predecessor in-title, sub-tenant or mortgagee in possession held land continuously from a date previous to the 1st day of June, 1895," in s. 47 of the Berar Alienated Villages Tenancy Law, 1921. It was urged that the tenant had been out of possession from March 1921 to 1st June, 1922, and that in those circumstances it was impossible to hold that he had been holding the land continuously. This point was fully considered by me in the judgment in question, and whether my decision thereon is correct or not, it is only too obvious that by no stretch of terms and by no process of forced interpretation could the erroneous view on this point, assuming it to be such on the legal question involved, be deemed to fall within the provisions of r. 1, sub-r. (1) of O. XLVII. The question of the interpretation of the said rule has been discussed at length by their Lordships of the Privy Council in *Chhajju Ram* v. *Neki* (1) and on the principles laid down therein the present application for review clearly, in my opinion, does not lie for the reasons stated therein.

It has again been urged that in ground No.4 of the appeal to this Court it was urged that findings should have been given by the trial Court on the questions of the alleged voluntary surrender of the field and of limitation. The question of limitation was duly considered by me, as was also the question of surrender, and not the slightest ground exists for the present

(1) 72 Ind. Cas. 566; 3 L. 127; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; A. I. R. 1922 P. C. 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 132; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459; 49 I. A. 144 (P. C.).

application succeeding in this connection. Very obviously no new and important matter or evidence has been discovered. The very fact that Counsel, who appeared in support of the application, had to enter into a detailed argument on the alleged mistake of law made by this Court, proves that the said mistake or error, if it exists, is not one apparent on the face of the record.

Finally, as regards the words "any other sufficient reason" in the rule referred to, it is impossible to bring any of the grounds under this category in view of the fact that their Lordships of the Privy Council have construed the said term as meaning "a reason sufficient on grounds at least analogous to those specified immediately previously."

In the connected application of Sheoram, which is also disposed of by this order, it has been suggested that the case should have been remanded for a decision on the question of ejectment which was said to have been in dispute. The two connected suits were tried and contested on a common basis and, as pointed out by me, the fact of the so-called ejectment was, to all intents and purposes, admitted. It is too late now to resuscitate a question which has lain at rest ever since the initial stage of the suit and there is, in my opinion, no room whatever for review in this connection.

Both applications for review are accordingly dismissed. I fix Rs. 30 as Pleader's fee.

G. R. D. *Applications dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1140 OF 1924.

December 10, 1926.

Present:—Mr. Justice Pullan.

Bohra UDAI RAM—PLAINTIFF—APPELLANT

versus

Bohra GOBARDHAN—DEFENDANT—RESPONDENT.

Defamation—Statement contained in complaint—Privilege.

Statements made in a complaint filed in a Court of Justice having reference to the subject-matter of the complaint are absolutely privileged and cannot be made the basis of a suit to recover damages for defamation.

Second appeal against the decree of the District Judge, Agra, dated the 15th of March, 1924.

Dr. *N. C. Vaish*, for the Appellant.

Mr. *S. K. Dar*, for the Respondent.

JUDGMENT.—The plaintiff, who is the appellant before me, sued for damages because of certain statements made about him in a complaint filed by the respondent in a Criminal Court. Damages were allowed by the Court of first instance but not in the lower Appellate Court. The Judge of the Court below has referred to the Full Bench ruling reported as *Chunni Lal* v. *Narsingh Das*(1), which is conclusive authority that in India as in England a complaint made in a Court of Justice has absolute privilege. It is argued here that this does not apply to a statement made about a third party in a complaint. Now, it may be that the plaintiff's name does not figure as one of the accused persons in the complaint, which was made by the respondent, but the complaint is very clearly made against him. It is alleged that it is he who has enmity against the complainant and who has conspired with the accused persons in order that they should commit the assault of which the complainant complains. Thus, virtually, it is a complaint against the plaintiff and I see no reason to differ from the view taken by the lower Appellate Court on this point.

A second plea is raised here to the effect that the appellant was entitled to a finding by the lower Appellate Court as to whether the respondent defamed him subsequently in the village in addition to the words in the complaint which formed the basis of the suit. It is quite clear from the judgment of the Court below that this point was never raised before him and it is equally clear why it was not raised. The Court of first instance which decided the case partly in the plaintiff's favour passed such scathing comments on the witnesses who were suborned by the plaintiff to make out his supplementary case of defamation, that in supporting the judgment of that Court the plaintiff naturally refrained from mentioning this part of his evidence in the Court below. As he intentionally refrained from obtaining a finding on this question in the lower Appellate Court, he cannot take this ground of appeal in this Court. In my opinion, the suit was rightly decided and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 45 Ind. Cas. 540; 40 A. 341; 16 A. L. J. 360 (F. B.).

PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

November 1, 1926.

Present:—Lord Atkinson, Lord Carson and Sir John Wallis.

MA MI AND ANOTHER—DEFENDANTS APPELLANTS

versus

KALLANDER AMMAL—PLAINTIFF—RESPONDENT.

Muhammadan Law—Gift—Delivery of possession, necessity of—Gift by husband to wife—Mutation, effect of—Presumption.

The rule of Muhammadan Law that a gift must be perfected by delivery of possession is applicable in Burma. [p. 32, col. 2.]

In the case of a gift of immoveable property by a Muhammadan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between the donor and the donee is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own. [p. 34, col. 1.]

Appeal from the decision of the High Court at Rangoon.

Sir *G. R. Lowndes, K. C.*, and Mr. *R. W. Leach*, for the Appellants.

Mr. *E. B. Raikes*, for the Respondent.

JUDGMENT.

Sir John Wallis.—The question whether Kallander Ammal, the plaintiff in this suit, was divorced in the year 1918 by her husband Shaik Moideen, now deceased, and so lost her rights of inheritance in his estate, is dealt with in the appeal which came before this Board in the principal suit brought by her against the present first and second defendants, who claim to have succeeded to the estate of the deceased as his widow and son. In the present suit the plaintiff seeks to recover from them certain lands in Burma of the estimated value of Rs. 6,000, conveyed to her by her late husband by a registered deed of gift, dated the 20th July, 1914, which provided that out of the income remaining after the payment of the Government revenue she was to expend Rs. 450 every year for the charitable purposes mentioned in the schedule and to enjoy the balance; and that after her death her heirs were to continue the annual payments of Rs. 450 and to divide the balance according to the Muhammadan Law. The defendants pleaded that the gift was invalid according to Muhammadan Law as the donor had never put the donee in possession, but had remained in possession until his death, and also that the gift had been revoked by the donor by a registered deed, dated the 20th August, 1919. The District Judge held that the gift was not complete without possession, even if it should be regarded as a *wakf*, and that on the evidence possession had not been proved and dismissed the suit. The plaintiff appealed to the High Court, and Young, J., who delivered the principal judgment, began by considering the question whether the deed was a *wakfnama*, constituting a *wakf* within the meaning of the Wakf Act of 1913, or a mere deed of gift coupled with a trust. In the view their Lordships take of this case this question is immaterial, and they will merely observe that that is a definition for the purposes of the Act and not necessarily exhaustive, and that the question, when it arises, cannot be considered exclusively with reference to it.

The learned Judge next dealt with the question of possession, and observed that all the older High Courts were agreed before the passing of the Transfer of Property Act, 1882, that the rule of Muhammedan Law requiring gifts to be perfected by possession was applicable in India, and that this rule was preserved by s. 129 of the Act, which provided that nothing in the Chapter relating to gifts should affect any rule of Muhammadan Law. Notwithstanding this, the learned Judge proceeded to hold that in 1914, at the date of the deed, in this part of Burma transfer of possession was not necessary, because the Local Government, in the exercise of the powers conferred upon them by s. 1 of the Transfer of Property Act as amended to extend "the whole or any part of the Act," had only extended s. 123 in this part of the Act and had not extended s. 129. In their Lordships' opinion this view is based on a serious misconception. The power to extend any part of the Act to Burma did not authorise the Local Government to extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself read as a whole, and to abrogate in the area to which the extension applied a rule of Muhammadan Law till then in force there as to which the Legislature had expressly provided that it was to remain unaffected by the Act. Nor is there any reason to suppose that the Local Government purported to do anything of the kind. The notification, which has been read to their Lordships, was intended to rende-

registration and attestation compulsory in the case of transfers of immoveable property by sale, mortgage, lease or gift as provided in the Act, and effected this by applying the different sections of the Act making registration and attestation compulsory in the case of these different kinds of transfers. The section relating to gifts was s. 123, which provides that: "For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses," and there is no reason to suppose that the Local Government intended to do more in the case of gifts by Muhammadans than to make such registration and attestation compulsory.

Having thus, erroneously, in their Lordships' opinion, held that transfer of possession was unnecessary, the learned Judge proceeded to consider a question which was not directly raised on the pleadings, whether the gift was bad for want of acceptance by the donee, and held that it was not, a finding which has not been questioned before their Lordships.

Arguments have been addressed to their Lordships on the questions dealt with in the judgment of the trial Judge, whether this deed created a *wakf*, and, if so, whether according to the Hanafi School, *wakfs* form an exception to the ordinary rule of Muhammadan Law, which requires gifts to be perfected by possession and undoubtedly applies to *wakfs* among Shiahs. Their Lordships do not consider it necessary to consider these questions, because they are of opinion, differing from the trial Judge, that possession is sufficiently proved to have been given, and that is sufficient to dispose of the case. If the *wakf* was perfected by transfer of possession, it has not been contended that the donor had any power to revoke it as he purported to do.

Their Lordships will now proceed to give their reasons for holding possession sufficiently proved. The plaintiff and her husband Shaik Moideen were Lubbais, that is to say, they belonged to a section of the Muhammadan community in the Madras Presidency who retain the vernacular and many of the customs of their Hindu ancestors, and are extensively engaged in trade, both in India and abroad. Shaik Moideen, after his marriage to the plaintiff forty or fifty years ago, lived with her for some time at Nagore in the Tanjore District, and then went across the sea to Burma and began to carry on business there as a money-lender, leaving his wife behind at the home in Nagore. He was very successful, and became possessed of considerable property, moveable and immoveable; and while his relations with the plaintiff remained friendly, his visits to her at Nagore took place at longer intervals, and of late years had almost entirely ceased. He married a second wife in Burma, who predeceased him, and for many years before his death he had living with him in his house at Tawa, Ma Mi and Muhammad Eusoof, the first and second defendants in this suit, who claim to be his wife and son, and as such, on his death, took possession of the property left by him in Burma.

In 1914, when he was getting on in years, he was minded to found certain charities in Nagore, and appears to have decided that the best way to do so was to convey some of the lands he had acquired in Burma to his wife in Nagore and her heirs on trust to expend Rs. 450 in each year out of the annual income in Nagore on the charities mentioned in the schedule.

There is no reason for supposing that he was not desirous of founding the charity there and then, and it was only natural that he should have been anxious to perfect the gift by delivering possession so as to put it out of the power of those who came after him to question it. Accordingly, we find that mutation of names was duly effected in the public records and the plaintiff entered as proprietress. The District Judge, however, has observed that the plaintiff has not proved that the mutation was effected at the instance of the donor, Shaik Moideen. It appears to their Lordships that it was not to be expected that the plaintiff, who was far away at the time in Madras, should have been able to obtain direct evidence of this so many years after, and that it was not necessary for her to do so. The reasonable presumption is that such a mutation of names would not have been made except on the application of one of the parties to the deed, in this case the donor, who was on the spot. As for the District Judge's alternative suggestion that the mutation may have been made by the Land Records Department from a copy sent to them of the registered deed of gift without notice to the deceased, no-

thing has been urged before their Lordships in its favour, and it appears to be negatived by the fact that the plaintiff's address is not taken from the deed of gift, which gives her Nagore address, but is entered as "Railway Station, Tawa," her husband's address; and also by the fact that in the case of one parcel of land there is an additional entry stating that Shaik Moideen himself was in possession as the plaintiff's agent. It must, therefore, be taken that mutation was effected by Moideen himself, and in the case of a gift of immoveable property by a Muhammadan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own, as held in *Amina Bibi* v. *Khatija Bibi* (1) and in *Emnabai* v. *Hajirabai* (2).

It follows, therefore, that the questions so much debated at the trial, whether Shaik Moideen retained the deed of gift in his own custody or gave it to the plaintiff, and what became of it after his death, throw little light upon the case, and may be disregarded. That Shaik Moideen, whilst retaining the management of the lands in his own hands, regarded the plaintiff as being in possession, is shown by the admitted fact that in 1917 he got her to execute and register a power-of-attorney in favour of Mahommed Kassim, authorising him to manage the lands, and had the power sent to himself in Burma. It is then said truly for the defendants that he did not give the power to Mahommed Kassim, who was then a boy of fifteen living in his house and treated as an adopted son —there is no legal adoption among Muhammadans—or ever hand over the management to him, but there is nothing surprising in this. The natural explanation is that the creation of the power was a precautionary measure, and that Shaik Moideen was anxious to have it ready to hand over to one in whom he had confidence in the event of his becoming unable to manage himself: and he would probably have done so if he had not subsequently changed his mind and purported to revoke the deed of gift. With reference to the argument that Moideen executed other deeds of gift in favour of Kassim and others, in which possession was never given, it may be observed in the case of Muhammadans who have very restricted powers of testamentary disposition, the execution of such deeds with postponement of possession may well take the place of revocable legacies, the transfer of possession being dependent on the future conduct of the donees, but that no such reasons for postponement existed as regards a charity of this kind.

Further, the plaintiff was clearly treated by Shaik Moideen himself as having been in possession and in receipt of the income of the lands when in 1919 he purported to revoke the deed of gift on the grounds that she had failed to utilise the properties handed over to her for charity, and stated that he himself would so utilise them in future. This is strong corroboration of the plaintiff's own evidence that her husband was in the habit of remitting monies to her for the performance of the charities, which must, in the circumstances, be presumed to have come from the income collected by him on her behalf from the lands which he continued to manage. The plaintiff says the money was sent to her by money orders and by other methods of remitting monies to India which are not unusual with persons in the position of the deceased. It is not surprising that the money orders are not now forthcoming, but there is one telegraphic order sent by Shaik Moideen for Rs. 75 for *subrat* one of the scheduled charities, which the District Judge has omitted to notice. No doubt, the accounts of receipt and expenditure put forward by those in charge of the plaintiff's case do not carry conviction and have been rightly rejected. Like the stories that Mahommed Kassim had been in management under the power and that the plaintiff had herself leased out the charity lands to tenants, they are only another instance of the ill-judged attempts which are so often made in cases of this kind to improve a litigant's case by manufacture of evidence, but they do not affect the inferences in the plaintiff's favour arising from the admitted and clearly established facts of the case.

Their Lordships are, therefore, of opinion, though for different reasons, that the High Court was right in giving the plaintiff a decree, and that the appeal

(1) 1 B. H. C. R. 157.
(2) 13 B. 352; 13 Ind. Jur. 423; 7 Ind. Dec. (N. S.) 234.

should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Waterhouse & Co.*

Solicitors for the Respondent:—Messrs. *T. L. Wilson & Co.*

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN FIRST CIVIL APPEAL No. 139 OF 1923.

December 17, 1926.

Present:—Mr. Justice Ashworth.

Mahant BHAGWAN PURI AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 cl. v—*Suit for possession of land—Court-fee paid on market value—Appeal by defendant—Defendant, whether entitled to contest valuation adopted by plaintiff—Estoppel.*

A plaintiff's estimate of the value of the property in dispute in the suit if arrived at in contravention of the provisions of the Court Fees Act, cannot be allowed to operate to the prejudice of the defendant at any stage of the suit and the defendant can object to the valuation when it is in his interest to do so. [p. 36, col. 2.]

Plaintiff instituted a suit for possession of certain land against the defendant and valued the land for purposes of Court-fee according to its estimated market value. The suit was decreed and the defendant appealed. In his appeal the defendant admitted that the value of the land stated in the plaint was correct but he paid a Court-fee at a valuation corresponding to fifteen times the net profits arising from the land during the year next before the date of presenting the plaint:

Held, that the defendant was not estopped from questioning the valuation arrived at by the plaintiff and could not be compelled to pay Court-fee at a higher valuation than that prescribed by s. 7 cl. v of the Court Fees Act. [p. 36, col. 2; p. 37, col. 1.]

Stamp Reference.

OFFICE REPORT.—This appeal arises out of a suit by the plaintiff for recovery of some plots of land valued at Rs. 3,00,000 and an *ad valorem* Court-fee of Rs. 2,425 was paid on the plaint. The suit having been decreed by the lower Court the defendants have preferred this first appeal valuing it at Rs. 3,00,000 and paying a Court-fee of Rs. 1,425 only. The proper Court fee payable on this appeal is the same, *viz.*, Rs. 2,425. Rs. 1,425 having already been paid there is a deficiency of Rs. 1,000 payable by the defendant-appellant for this Court.

Objections from Mr. Narmadeshwar Prasad Upadhiya.

1. That the land in dispute brings a net profit of Rs. 480 per year at the rate of Rs. 40 per month: *vide* para. 2 of the plaint.

2. That s. 7, cl. v (*c*) of the Court Fees Act, lays down that in suits for possession of property covered by the above section, the Court-fee shall be paid on 15 times such net profits and so the valuation for purposes would be Rs. 480 × 15 = Rs. 7,200 and the Court-fee on this amount will be Rs. 365 only.

3. That the Court fee paid by the Secretary of State for India in Council was paid by mistake and the appellant is not bound to pay the same amount.

OFFICE REPORT TO THE TAXING OFFICER.—The main question raised by the objection filed to the deficiency report is as to whether the question of payment of Court-fee is to be decided with reference to s. 7, cl. v, para. (*c*) as contended by the learned Counsel for the appellant or with reference to para. (*e*) of the same section.

Paragraph (*c*) of s. 7 lays down that where the land pays no such revenue...or is charged with any fixed payment in lieu of such revenue, Court-fee will be calculated on 15 times of the annual profit. The most important words are "is charged with any fixed payment in lieu of such revenue." In this case nothing is paid in lieu of revenue because the land in question is not agricultural land. On going through the plaint it is manifestly clear that the land in question was never assessed with revenue and nothing is charged as part of revenue, on the contrary a building or enclosure for the purpose of habitation called *Juna Akhara* stands thereon and Rs. 40 a month is charged as ground or house rent. Rent is quite different a thing from revenue and the land having been given for purposes of habitation cannot be said to be "agricultural land" assessable to revenue. The phrase "in lieu of revenue" in para. (*c*) of the section signifies very well that the land contemplated therein was meant to be an "agricultural land" and not the land which is used for building purposes or habitation. Here the land in question is of latter character. Consequently the suit is governed by para. (*c*) of the said section which enjoins that where the subject matter is a house or

garden the Court-fee payable is according to the market value of the house or garden. The Secretary of State for India who is plaintiff in the suit has rightly paid an *ad valorem* Court-fee on the market value of the property in dispute. The same Court-fee is demanded here.

TAXING OFFICER'S REPORT.—This appeal arises out of a suit by the plaintiff for recovery of some plots of land, which he has valued at Rs. 3,00,000. The suit was decreed by the lower Court and the defendants have preferred this appeal at the same valuation. The Court-fee paid by the plaintiff was *ad valorem* and amounted to Rs. 2,425. This, it is held by the Stamp Reporter, is the correct fee, while that paid by the appellants in this Court, Rs. 1,425 is deficient by Rs. 1,000.

Counsel for the appellants has objected to the Office Report and claims that the land in suit falls under the classification of s. 7, cl. v (*e*) of the Court Fees Act.

The land in suit consists of plots within the Municipal limits of the Hardwar Union. According to para. 2 of the plaint the said Board without the authority of Government had been accepting rent at Rs. 40 per mensem for about 12 years previous to the institution of the suit from the *Juna Akhara*, who had used the land for an enclosure for the *hats* of *Mahants* and pilgrims. The land pays no revenue and the plaintiff (the Secretary of State) disregarding the rent taken for its use, valued it for purpose of jurisdiction and Court-fee presumably at its market value, Rs. 3,00,000, as if it fell within the classification of s. 7 cl. v (*e*).

On behalf of the appellants it is contended that this valuation was wrong and should have been based on the "net profits" that had arisen from the land, *i. e.*, Rs. 40 per mensem, amounting to Rs. 7,200 (fifteen times those profits) and that the Court-fee should have been Rs. 365.

Of the right of the plaintiff to put his own valuation on the suit and to pay the necessary Court-fee to entitle him to bring that suit before the highest *forum* available, there can be little doubt. It is to be decided whether the defendants-appellants, who availed themselves of that *forum* without making any objection to the valuation, can in appeal object that the valuation was too high and demand to pay a lower fee. It is to be noted that, until objection was raised in this office, the original valuation of three lakhs was accepted, though a deficient Court-fee was paid.

I consider that the case should be laid before the Hon'ble Taxing Judge for decision of the issue raised above and also for decision whether, if the lower valuation is accepted for the appeal in this Court, the defendants-appellants may be permitted at this stage to correct their valuation in the memorandum of appeal.

Dr. *S. N. Sen* and Mr. *N. Upadhiya*, for the Appellants.

Mr. *G. W. Dillon*, for the Respondent.

JUDGMENT.—The question referred to me by the Taxing Officer under s. 5 of the Court Fees Act, 1870, is as follows: The Secretary of State brought a suit for possession of certain land against the defendants-appellants. The plaint was valued for Court-fee according to the estimated market value of land, *i. e.*, Rs. 3,00,000. The suit was decreed. The defendants in their appeal stated the value of the land to be Rs. 3,00,000 but paid a Court-fee of Rs. 1,425 instead of Rs. 2,425 which was the proper Court-fee on the said valuation. Before the Taxing Officer the appellants' contention was that the land not being subject to revenue should have been valued under s. 7, cl. v at 15 times the net profit arising from the land during the year next before the date of presenting the plaint and not according to the market value, and that the plaintiff had paid an excessive Court-fee. The Taxing Officer while apparently admitting that the appellant is correct as to the valuation required by law has stated that the plaintiff could put his own valuation on the suit and so pay the necessary Court-fee to entitle him to bring that suit before the highest *forum* available. It seems to me, however, that the plaintiff's estimate of the value of the land, if contrary to the market value according to rule, cannot be allowed to operate to the prejudice of the defendant at any stage of the suit. It appears plain, therefore, to me that the defendant can object to the valuation since it is now in his interest to do so.

It is, however, suggested by the Taxing Officer that the defendant-appellant is estopped from objecting to that valuation because he availed himself of the highest *forum* when the original suit was tried. I know of no rule of law that would create

such estoppel and it is difficult to hold that the decision of the suit *against* him by a higher *forum* was any advantage to him. I hold that the defendant-appellant was entitled to stamp his appeal with a stamp based on the valuation of the land arrived at by correct application of the rule.

Another question, however, arises. The defendant-appellant in his petition of appeal stated that the value of the appeal was Rs. 3,00,000. Can he now be permitted to say that the value is less. I consider that he can and for the following reasons. The stated value of the appeal would not prevent his being called upon to pay a Court-fee on a higher valuation if that valuation were wrong. In the same way I do not see why he should not be allowed to correct his valuation when he is asked to pay a higher Court-fee than is due on the value correctly assessed according to law.

Apparently the appellant need only have paid the Court-fee of Rs. 365 according to the proper valuation of the land. He has, in fact, paid Rs. 1,425. He has not asked for any refund and, in my opinion, the Court-fee should be accepted as sufficient.

Z. K. *Order accordingly.*

[*Note.*—Mr. N. Upadhiya for the appellants applied for refund of Court-fee paid in excess, but the Court (Ashworth, J.) rejected his application on 23rd December, 1926.—*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 519 OF 1925.
November 23, 1926.
Present:—Mr. Findlay, J. C.
RAJARAM—DEFENDANT—APPELLANT
versus
MUKUND RAO—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 100, 115—Provincial Small Cause Courts Act (IX of 1887), s. 16—Jurisdiction, objection to, raised for first time in second appeal—Interference, when justifiable—Test.

When an objection to the jurisdiction of the trial Court is raised for the first time in second appeal, parties must be deemed to have consented to the case being tried originally in the Court in which it was so tried and a discretion rests in the Second Appellate Court not to interfere with the decree of the Court below whether under s. 115 or s. 100 of the Civil Procedure Code solely on the question of jurisdiction if the equities of the case do not demand interference and the interests of justice do not justify such interference, especially when the interests of the parties have been more thoroughly safeguarded by the trial of the case in the ordinary Court rather than in a Small Cause Court. [p. 38, col. 1.]

Appeal against the decree of the District Judge, Nagpur, dated the 21st August, 1925, in Civil Appeal No. 77 of 1925.

Mr. *D. T. Mangalmoorti*, for the Appellant.

Mr. *W. R. Puranak*, for the Respondent.

JUDGMENT.—The facts of this case are sufficiently clear from the two judgments of the lower Courts. On the appeal coming on for hearing, the only ground, which was pressed, was the 10th and last one. It is perfectly obvious that the other grounds stood no chance of success, as the findings of fact of the learned District Judge were arrived at after a careful and thorough investigation of all the evidence. It is urged, however, that the Subordinate Judge of the Second Class had no jurisdiction to try the suit on the ordinary side in view of the provisions of s. 16 of the Provincial Small Cause Courts Act, and in this connection reliance has been placed on *Ramasamy Chettiar* v. *R. G. Orr* (1). White, C. J., in the said case held that, as the lower Court had exercised a jurisdiction not vested in it by law, he was bound to interfere and exercise his revisional jurisdiction. It is pertinent, however, to point out that a Bench of the same High Court in *Parameshwaran Nambudiri* v. *Vishnu Embrandri* (2) expressly dissented from the earlier decision. Subrahmania Ayyar, O. C. J., and Benson, J., therein pointed out that the provision of the Provincial Small Cause Courts Act referred to must be read along with the corresponding provision, for revision as the case may be, in Civil Procedure Code. This question was considered at length in an exactly analogous case by Baker, O. J. C., *cf.*, *Kamruddin* v. *Indrani* (3). It has, however, been suggested by Counsel on behalf of the appellant that that decision overlooked the peremptory nature of s. 16 of the Provincial Small Cause Courts Act. I cannot concur, however, in this contention of the appellant. The judgment in *Kamruddin* v. *Indrani* (3) contains an exhaustive examination of many other decisions bearing on the point, and in these cases there was clearly no

(1) 26 M. 176; 12 M. L. J. 264
(2) 27 M. 478.
(3) 75 Ind. Cas. 769;; 19 N. L. R. 179; A. I. R. 1924 Nag. 17.

misapprehension as to the meaning of s. 16, Provincial Small Cause Courts Act.

For my own part, the objection to jurisdiction having been raised for the first time in this Court, it seems to me that the parties must be held to have consented to the case being tried originally in the Court in which it was. The equities of the case clearly do not, in my opinion, demand interference by this Court solely on the question of jurisdiction, and whether under s. 115 or s. 100 of the Civil Procedure Code, it seems to me that a discretion rests with this Court whether it is in the interests of justice to interfere. In the present case it cannot be seriously contended that the interests of the parties have not been more thoroughly safeguarded by the trial of this case in the ordinary Court rather than in the Small Cause one, and I, therefore, decline to interfere.

The appeal is accordingly dismissed. The appellant must bear the respondent's costs. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 69 OF 1926.

December 23, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Banerji.

RAGHUBAR DAYAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MULWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit based on act which may or may not be criminal, whether cognizable by Small Cause Court.

Article 35 (*ii*) of Sch. II to the Provincial Small Cause Courts Act applies only to those acts which by the circumstances of the case are clearly alleged or are clearly shown to be punishable under Ch. XVII of the Penal Code.

Merely because the facts stated in a plaint are ambiguous and are, therefore, consistent with *bona fides* as well as *mala fides*, it does not follow that the suit falls within the purview of Art. 35 (*ii*) and is excluded from the cognizance of a Small Cause Court. Where the plaint discloses no allegation of a crime the Article does not apply.

Letters Patent Appeal against the judgment of Mr. Justice Daniels, dated the 29th of April, 1926.

Mr. *Akhtar Husain Khan*, for the Appellants.

JUDGMENT.—In our view, some of the cases have gone too far in holding that an act which may be *bona fide*, and which may be done under a mistaken claim of right or which may be due to a *bona fide* act of negligence, yet may also be shown to have been done with a criminal motive, or intention is, therefore, a criminal act, and as a consequence exempt under Art. 35 (*ii*) of the Schedule of the Small Cause Courts Act. We are not prepared to hold that merely because the facts stated are ambiguous and are, therefore, consistent with *bona fides* although they are also consistent with *mala fides* according to the correct inference to be drawn, the act is, therefore, one necessarily of the kind referred to in this clause of the Schedule. We think that something more ought to be shown, namely, that the plaintiff, either by his specific allegations in the plaint, or in some other form, in the course of hearing, or by the nature of the evidence which he tendered at the hearing, distinctly alleged that the offence complained of was punishable under Ch. XVII of the Code.

There seem to be two strong reasons why this view should be insisted upon, and why the Courts should not go out of their way to apply this clause of the Schedule and to treat an act as criminal which the person who complains about it, has not himself treated as criminal. The first reason is that the introduction of this clause into the Schedule was admittedly for the benefit of defendants who otherwise might be held guilty of criminal acts without the possibility of appealing and without a full record of the evidence. Secondly, we think that to do so does violence to the provisions of Ch. IV of the Penal Code. The clause distinctly says that the act must be one which would be an offence. In our opinion, this is a clear indication that the Legislature intended to exclude from the operation of this clause *bona fide* acts such as would be exempted from criminal responsibility under the Penal Code. As every body knows, there are acts which are ambiguous, and which depend for their actual criminal responsibility upon the proper inferences to be drawn as to the intention of the person. The clause in question recognizes that ambiguity, and to our mind applies only to those acts which by the circumstances of the case are clearly alleged or clearly shown to

be punishable by the Penal Code. We are not prepared to say that merely removing fruit, or cutting trees under a *bona fide* claim of right, or as the result of the dispute, is necessarily a criminal offence. The same reasoning would apply to the wilful, but not criminal refusal, to return a specific article lent, such as a book, or some other piece of moveable property belonging to the plaintiff. We have already decided to-day, agreeing with Mr. Justice Daniels and dismissing an appeal from him, that where the plaint discloses no allegation of a crime, this Article did not apply. We think this is the correct view. We propose to maintain it in this case, and as these cases appear to be of somewhat frequent occurrence, we have thought it necessary to give our reasons at some length.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL No. 1123 OF 1925.

December 2, 1926.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Munshi AHMAD HAKIMULLAH—PLAINTIFF—APPELLANT

versus

MOHAMMAD HIKMAT ULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Pre-emption—First and second demands—Witnesses, presence of—Procedure.

Where a pre-emptor under the Muhammadan Law makes the first demand in the presence of witnesses and asks the witnesses to accompany him to the vendee in order that a second demand might be made in their presence and the second demand is in fact made in the presence of the witnesses and their attention is attracted to it, the mere omission of the pre-emptor to ask the witnesses in express terms to bear testimony to the fact of the demand having been made would not be fatal to his right to enforce pre-emption. [p. 39, col. 2.]

Ganga Prasad v. *Ajudia Prasad* (1), distinguished.

Second appeal against the decree of the First Subordinate Judge, Moradabad, dated the 24th of February, 1925.

Mr. *S. B. Jauhari*, for the Appellant.

Mr. *S. Mohammad Husain*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption under the Muhammadan Law. There were two rival suits, one of which stands dismissed and has not come up before us. We are here concerned with the suit brought by the plaintiff Hakim-Ullah. The Court of first instance believed the plaintiff's evidence which was to the effect that as soon as he heard of the sale he shouted out "I am the pre-emptor and I demand pre-emption." After that he took two witnesses, Muhammad Ibrahim and Munshi Farhat-Ullah, who were present at the time when he made the first demand, to the *diwan-khana* of the vendees, and addressing all the vendees he made a second demand in the following words :—

"I am the pre-emptor, and I demand pre-emption from all of you. As soon as I heard of the sale there and then I fulfilled the condition of pre-emption. After deducting the price of the materials which you have realized I would pay the price in full. Please take it from me and execute a sale-deed."

The learned Munsif held that the plaintiff had, in making his second demand, referred to the first demand, and that inasmuch as he had taken the witnesses with him it was not necessary for him specifically to ask them to bear testimony.

The lower Appellate Court has come to a contrary conclusion. Relying on the case of *Ganga Prasad* v. *Ajudia Prasad* (1) it has been held that the omission of the plaintiff to invoke the witnesses is fatal. In our opinion this view was not correct. In the case relied upon by the lower Appellate Court the plaintiff had neither taken the witnesses with him to the spot nor had he asked them to be witnesses to the demand. These persons simply happened to be present at the time when he made the second demand. It was, therefore, held that the second demand was invalid. In the present case the plaintiff had actually made the first demand in the presence of the witnesses and had asked them to accompany him to the vendees in order that a second demand might be made in their presence. They both stated that they heard the second demand being made and their attention was attracted to it. The mere omission to ask them in express terms to bear testimony would, therefore, not be fatal.

The learned Counsel for the respondents relies on the case of *Sadiq Ali* v. *Abdul Baqi Khan* (2). That case,

(1) 2 A. L. J. 682; A. W. N. (1905) 167; 28 A. 24.

(2) 71 Ind. Cas. 460; 21 A. L. J. 109; A. I. R. 1923 All. 251; 45 A. 290.

however, is clearly distinguishable inasmuch as there the main point considered was that in making the second demand no reference whatsoever had been made to the first demand. All the authorities quoted in the judgment referred to cases where at the time the second demand was made no reference whatsoever was made to the first demand. A mention of the first demand is necessary in order to inform the vendee that it was promptly made as required by law. That is not so in the present case, for here a reference to the first demand was in fact made.

Only two points were raised before the lower Appellate Court ; one was the question of law which we have just disposed of, and the other was the question of the amount of the sale consideration which has not been decided by that Court. We accordingly allow this appeal and set aside the decree of the lower Appellate Court, but before passing a final decree we call for a finding on the question of the consideration under O. XLI, r. 25.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1692 OF 1923.

August 27, 1926.

Present:—Mr Justice Curgenven.

PATTARACHARIAR—PLAINTIFF—APPELLANT

versus

ALAMELUMANGAIAMMAL—DEFENDANT RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 100, O. II, r. 2—Res judicata—*Competency of Court to try suit—Value of all causes of action, whether to be considered—Bar of O. II, r. 2, applicability of, to distinct causes of action—Suit for possession by vendee—Subsequent suit for damages for breach of covenant for title, whether maintainable—Limitation Act (IX of 1908), Sch. I, Art. 116—Vendor and purchaser—Covenant for title—Vendor without title—Possession not delivered—Suit for breach of covenant—Starting point of limitation—Practice—Second appeal*—Res judicata, *question of, not pressed in Court below, whether can be raised.*

Although taking all the causes of action together, the second suit may be outside the jurisdiction of the Court which tried the first suit, still, if the specific question which forms the subject of *res judicata* be within the jurisdiction of the Court which tried the first suit and was determined by that Court, the rule of *res judicata* will apply even though the whole suit as subsequently brought be beyond the jurisdiction of the Court which tried the first suit. [p. 42, col. 2.]

Thekkemannengath Raman v. *Kakkesseri Pazhiyot Manakkal* (10) and *Ranganathan Chetty* v. *Lakshmi Ammal* (12), followed.

Section 11 of the Civil Procedure Code only requires that the issue and not that the subject-matter of the suit should be common. [p. 43, col. 1.]

Order II, r 2, Civil Procedure Code, only requires that every part of the claim which the plaintiff is entitled to make "in respect of the cause of action" should be made. Where the causes of action for the remedies are quite distinct, O. II, r. 2 is not a bar for a fresh suit on the later cause of action. [*ibid.*]

Rangayya Goundan v. *Nanjappa Rao* (13), *Saminathan Chetty* v. *Palaniappa Chetty* (14), followed.

Where, from the inception the vendor has no title to convey and the vendee is not put in possession of the property sold, the starting point of limitation for a suit for damages for breach of covenant for title, is the date of the sale and a suit brought more then six years thereafter is barred under Art. 116 of Sch. I to the Limitation Act. [p. 43, col. 2; p. 44, col 1.]

Subbaraya v. *Rajagopala* (15), followed.

A plaintiff, who upon failing to obtain one remedy sues for an alternative one, is not entitled to exclude the time taken up by the former proceedings. [p. 45, col. 1]

The question whether or not a plea not pressed in the first Appellate Court should be permitted in second appeal, is largely a question of the nature of the plea. Although the general rule may be that a plea once abandoned may not be revived in second appeal, such fundamental issues as limitation and *res judicata* which go to the root of the case, are exceptions to the rule and may be raised in second appeal even though not urged in the Courts below. [p. 41, col. 2.]

A joint Hindu father made a bequest of certain properties to his daughter. With a view to dispute the bequest, one of the sons sold the property to the plaintiff who sued for possession impleading the sons and daughter as parties. The sons, however, contended that the sale was nominal and unsupported by consideration and the daughter contended that the bequest was valid. The trial Court found against both the pleas and gave the plaintiff a decree. On appeal by the daughter, the gift was upheld and the suit was dismissed. In a suit instituted by the plaintiff more than six years from the date of denial of plaintiff's title by the defendant in his written statement, for damages for breach of warranty of title against the heirs of the vendor :

Held, (1) that the plaintiff's claim was not barred by O. II, r 2 Civil Procedure Code; [p. 43, col. 1.]

Rangayya Goundan v. *Nanjappa Rao* (13), *Saminathan Chetty* v. *Palaniappa Chetty* (14,) relied on.

(2) that the plaintiff's cause of action arose on the date of sale itself, or, at the latest, when the vendor filed a written statement repudiating the plaintiff's title, and that the suit was, therefore, barred under Art. 116 of Sch. I to the Limitation Act. [p. 45, col. 1.]

Appeal against the decree of the District Court, Trichinopoly, in A. S. Nos. 191 and 240 of 1921, preferred against that of the Court of the Subordinate Judge, Trichinopoly, in O. S. No. 116 of 1919.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *Watrap S. Subramania Iyer*, for the Respondent.

JUDGMENT.—The plaintiff, who now prefers this second appeal, sued to recover a sum of Rs. 3,032-13-3 from the assets of one Srinivasachari, making his widow the defendant, in the following circumstances. Srinivasachari's father, of the same name whom we may refer to as Srinivasachari senior, bequeathed the plaint property to his daughter Kuttiammal under a Will. With a view to dispute this bequest, Srinivasachari junior sold the property to the plaintiff for Rs. 1,000. In 1912, the plaintiff sued for possession, making Srinivasachari senior's children as well as certain lessees, parties. Srinivasachari junior raised the defence that the sale-deed was nominal and unsupported by consideration, while Kuttiammal, besides advancing this plea (which it was not open to her to do) pleaded the validity of the bequest. The District Munsif found against both these pleas and gave the plaintiff a decree for Srinivasachari junior's half share (there being another brother). Against this decision, Kuttiammal alone appealed and the Appellate Court held that the bequest was good and dismissed the plaintiff's suit. In second appeal this decision was confirmed. The plaintiff then filed the present suit against Srinivasachari junior's widow for damages for breach of warranty of title, including in his claim not only the sale price of Rs. 1,000 and interest, but the costs incurred by him in the previous litigation, the whole claim amounting to the figure given above. The learned Subordinate Judge who tried the suit disallowed the claim to costs and decreed the remainder, holding that the defendant had failed to prove want of consideration for the sale. On appeal, the District Judge disagreed with this finding and dismissed the claim. I can see no reason for interfering with his decision on the question of fact. Substantially, the only point pressed in appeal is that the question whether or not the sale was nominal is barred by *res judicata*; and a preliminary objection is raised that this point cannot be taken in second appeal, since it was given up in the lower Appellate Court. That this was so, is clear from the District Judge's judgment, and the matter is placed beyond doubt by an assurance given by the respondent's Vakil, who appeared in that Court. The point formed the subject-matter of the second issue, and the Subordinate Judge found in the negative upon it. In support of his contention that the matter cannot be re-agitated here, the respondent's Vakil refers in the first place to two cases decided respectively by the Oudh Judicial Commissioner's Court, *Sheo Mangal Singh* v. *Jagmohan Singh* (1) and the Nagpur Judicial Commissioner's Court *Narayan* v. *Beharilal* (2). In the former case, the party acquiesced in first appeal in a refusal by the trial Court to allow an alternative case to be set up. The latter related to some question of rent abandoned by the party in first appeal. In *Dhanraj Joharmal* v. *Sonibai* (3) their Lordships of the Privy Council refused to allow a party to bring forward before them objections to a decree, not urged before the lower Courts. It seems to me that whether or not a plea not pressed below should be permitted in second appeal, is largely a question of the nature of the plea. In *Muhammad Ismail* v. *Chattar Singh* (4) it was held by a Full Bench that the plea of *res judicata* not only may, but must be entertained in second appeal, even when it has not been urged in either of the lower Courts or in the memorandum of appeal; and the reason given is that the objection is one which goes to the very root of the case, and to the jurisdiction of the Court, and if established, is an absolute bar to the suit. It is true that that was not a case in which the plea had once been raised and later abandoned. But, there is authority in a later Allahabad case, *Balkaran Upadhya* v. *Gaya Din Kalwar* (5) for the position that even in such circumstances the plea of limitation to which that of *res judicata* is akin, as affecting the Court's jurisdiction, may be so raised. Although, therefore, the general rule may be that a plea once abandoned may not be revived, the right view seems to be that such fundamental issues as limitation and *res judicata* are exceptions to it. I overrule the objection.

The learned Subordinate Judge rejected the plea of *res judicata* on the ground that

(1) 86 Ind. Cas. 29; 12 O. L. J. 30; A. I. R. 1925 Oudh 329.

(2) 89 Ind. Cas. 18; A. I. R. 1926 Nag. 160.

(3) 87 Ind. Cas. 357; 52 C. 482; 23 A. L. J. 273; A. I. R. 1925 P. C. 118; 2 O. W. N. 335; L. R. 6 A. (P. C.) 97; 27 Bom. L. R. 837; 21 N. L. R. 50; 49 M. L. J. 173; (1925) M. W. N. 692; 52 I. A. 231; 30 C. W. N. 601 (P. C.).

(4) 4 A. 69; A. W. N. (1881) 116; 2 Ind. Dec. (N. S.) 634 (F. B.).

(5) 24 Ind. Cas. 255; 36 A. 370; 12 A. L. J. 635.

the question for consideration was not a material issue in the former suit, but only of incidental importance. That is, no doubt, true as regards one of the defendants, Kuttiammal, but I do not think that it applies to the defence of Srinivasachari junior, who executed the sale-deed. A reference to his written statement shows that his case was that there was an understanding between the plaintiff and himself that he should sue Kuttiammal for the property, and only upon succeeding in that suit and paying the purchase-money should he have anything to do with it; and that he had not satisfied either condition. Whatever the merits of this defence, the issue was framed and tried whether the sale-deed was not supported by consideration and was, I think, a material issue. A further point raised here is that the issue was not "finally decided", but again, as between the plaintiff and Srinivasachari junior, that is clearly not correct, as the District Munsif decreed the claim and the latter preferred no appeal. The circumstances find no parallel in *Abdullah Ashgar Ali Khan* v. *Ganesh Dass* (6) where the Court of second appeal had before it the issue of fraud, but found it unnecessary to decide it.

The main argument is based on the fact that the District Munsif who tried the first suit was not competent to decide the second, as its value was beyond his pecuniary jurisdiction. It seems inadvisable to go for decisions bearing upon this point further back than to the Privy Council case, *Gokul Mandar* v. *Pudmanund Singh* (7), in which their Lordships observed that under s. 13 (now s. 11) of the Civil Procedure Code, "a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised. In this respect, the enactment goes beyond s. 13 of the previous Act X of 1877, and also, as appears to their Lordships, beyond the law laid down by the Judges in the *Duchess of Kingston's case* (8). They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction". The scope of these observations has been differently interpreted in Calcutta and in Madras In a Calcutta case, *Shibo Raut* v. *Baban Raut* (9). the first suit had to do with only a part of the property which was the subject-matter of the second, so that the Court which tried the first was not competent to try the second. It was held that no part of the claim was barred, Mookerjee, J., observing: "If the principle thus interpreted by the Judicial Committee is applied to the case before us, there can be no possible controversy that the plea of *res judicata* cannot be sustained." This view was not adopted by Sadasiva Iyer, J., in *Thekkemannengath Raman* v. *Kakkesseri Pazhiyot Manakkal* (10) on the ground that their Lordships' observations were only in criticism of an objection that the finding of a Revenue Officer in a revenue suit was *res judicata* in the subsequent suit which was not within the Revenue Officer's jurisdiction. The learned Judge felt himself, therefore, at liberty to follow *Pathuma* v. *Salimamma* (11), in which it was held that the principle of *res judicata* did apply to that part of the claim, which was within the jurisdiction of the Court which tried the first suit. He goes on to quote Sir Arnold White, C. J., in *Ranganatham Chetty* v. *Lakshmi Ammal* (12) thus:—

"Although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still, if the specific question be within the jurisdiction of the original Court and was determined by the original Court, it is no answer to say that the whole suit is beyond the jurisdiction."

Applying this test here, it appears to me that it is no answer to say that by the addition of claim to costs, the second suit was removed beyond the

(6) 42 Ind. Cas. 959; 45 C. 442; 128 P. W. R. 1917; 22 M. L. T. 451; 22 C. W. N. 121; 3 P. L. W. 381; 26 C. L. J. 568; 15 A. L. J. 889; 19 Bom. L. R. 972; 34 M. L. J. 12; 7 L. W. 62; 132 P. L. R. 1917; (1918) M. W. N. 7; 44 I. A. 213 (P. C.).

(7) 29 C. 707; 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

(8) (1776) 2 Sm. L. C. (11th Ed.) 731.

(9) 35 C. 353; 12 C. W. N. 359; 7 C. L. J. 470.

(10) 27 Ind. Cas. 989; 28 M. L. J. 184; 2 L. W. 433

(11) 8 M. 83; 4 Ind. Dec. (N. S.) 58.

(12) 21 Ind. Cas. 15; 25 M. L. J. 379; 14 M. L. T. 189; (1913) M. W. N. 690.

original Court's jurisdiction, if by excluding that part from consideration, the rule of *res judicata* would apply. Two objections have been urged against this view. One is that the subject-matter of the two suits was different, in the one case a claim to the possession of land, and in the other, claim to damages. But s. 11 of the Code of Civil Procedure only requires that the issue, and not that the subject-matter of the suit should be common. The other is that the learned Chief Justice's remarks only apply where the causes of action in the second suit are distinct whereas a sole cause of action—the decision of this Court in second appeal in the earlier proceedings—is alleged for the whole claim made in the second suit. I do not think that this can be made a basis for distinction, as it appears in no way to affect the principle underlying the rule. The further suggestion, that here the plaintiff desires to take advantage of the former decision, whereas in the reported cases, it was raised as *res judicata* against him, appears to afford no better ground for discrimination. I hold that the defendant is barred by *res judicata* from pleading that the sale was nominal and unsupported by consideration.

Upon my intimating to the parties my conclusion on the question of *res judicata* the respondent's Vakil has argued two further points, that the plaintiff's claim was barred, (*a*), by O. II, r. 2 of the Civil Procedure Code, and (*b*), by limitation. I am clear that there is no substance in the former of these objections; that is to say, when the plaintiff brought his first suit for possession, he was not bound to ask in the alternative for damages or for the return of his purchase-money in case possession could not be given. The rule only requires that every part of the claim which the plaintiff is entitled to make "in respect of the cause of action" should be made. Here, the causes of action for the one remedy and for the other were quite distinct, the former being the execution of the sale-deed and the latter a breach of its terms. In this respect, the case is distinguishable from the Privy Council case, *Rangayya Goundan* v. *Nanjappa Rao* (13) and congruent with another Privy Council case, originating from Ceylon, *Saminathan Chetty* v. *Pulaniappa Chetty* (14).

There remains the question of limitation. The facts to be borne in mind are that the sale-deed was executed on 27th December, 1909, and that it is now to be taken that consideration passed, the last instalment being paid before the Sub-Registrar at the time of the registration of the sale-deed. On 3rd May, 1912, the plaintiff filed his suit for possession. The District Munsif gave him a decree for one-half of the property on 16th February 1914, on 11th March, 1915, the Subordinate Judge dismissed the whole claim and on 6th February, 1917, the High Court confirmed the appellate decree. The plaint in the present suit was presented on 17th November, 1919. There are findings of fact that the plaintiff never got possession of the suit property, and that at the time that Srinivasachari junior sold it to him, the title vested not in him but in his sister Kuttiammal. There is a great deal of case-law upon the question of the starting point for limitation in a suit by a vendee to recover damages from his vendor upon breach of covenant, but when once it is ascertained to what class of such cases, the case in point belongs, many of the decisions become clearly inapplicable. In *Subbaraya* v. *Rajagopala* (15), Seshagiri Iyer, J., classifies cases of this nature as follows: "(*a*) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property; (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale; and (*c*) where though the title is known to be imperfect, the contract is in part carried out by giving possession of the properties." Now the present instance clearly falls under class (*a*) because the vendor was really selling someone else's property, so that the sale was not merely voidable but void, and because he gave no possession. In both respects there was a breach of covenant at the date of sale, a breach of the covenant for title implied under s. 55 (2) of the Transfer of Property Act, and a breach of the covenant for quiet enjoyment in the failure to give possession. If in the latter respect, it is arguable that the vendor did

(13) 24 M. 491; 6 C. W. N. 17; 3 Bom. L. R. 799; 28 I. A. 221; 8 Sar. P. C. J. 117 (P. C.).

(14) 26 Ind. Cas. 223; 41 I. A. 142; 18 C. W. N. 617; 17 New Law Reports 56; (1914) A. C. 618; 83 L. J. P. C. 131; 110 L. T. 913 (P. C.).

(15) 23 Ind. Cas. 570; 38 M. 887; 15 M. L. T 240; (1914) M. W. N. 376.

not at first refuse to give possession, it is clear that as early as 8th August, 1912, when he filed his written statement in the suit for possession denying the plaintiff's right to present possession, he so refused and committed a breach of the covenant. In the same case, *Subbaraya* v. *Rajagopala* (15) it was held that in the first class of cases, where the sale is *ab initio* void, the starting point for limitation will be the date of the sale assuming, of course, that the purchase-money was paid not later than that date. The point, however, did not directly arise for decision since the sale in that case fell under class (*b*). Direct authority for the proposition is to be found in *Kowuuri Basivireddy* v. *Tallaparagada Nagamma* (16) which in this respect is, I think, still good law, although upon the question which Article of the Limitation Act applies, it has been dissented from in *Arunachala Aiyar* v. *Ramasami Aiyar* (17). Another case in which the vendor had no title to convey was *Gopalasamy Iyengar* v. *Nummachi Rediar* (18) and although in that case time was held to run from the date of dispossession, the view of Seshagiri Iyer, J., in *Subbaraya* v. *Rajagopala* (15) was concurred in that if there had been no possession, it would have run from the date of the sale.

The appellant's contention is that time must be deemed to run as regards half the property, from the date of the District Munsif's decree disallowing the claim to possession of that half, and as regards the other half, from the date of the Subordinate Judge's decree dismissing the whole claim. I do not think there is any authority for this view in the case of a contract *ab initio* void and under which no possession was given. Cases in which, a decree has been taken as the starting point, are, as regards title, cases of voidable contracts where the decree has had the effect of invalidating a title believed good and, as regards possession, cases in which possession has been previously enjoyed, and lost under the decree. As instances of the former class may be cited *Hanuman Kamat* v. *Hanuman Mandur* (19) where the sale was by one coparcener and objected to by the others; and *Multanmal Jayaram* v. *Budhumal Kevalchand* (20) where possession and an ostensibly good title was given. Macleod, C. J., finding that the case clearly fell under Seshagiri Iyer, J.'s class (*b*) and adding "it must be specially noted that it is not the case that the seller had no title at all so that it could be said that he was selling nothing; and that, therefore, the transaction was void *ab initio*, nor is it a case where the purchaser got no possession." Fawcett, J., who concurred puts the point clearly when he says: "I agree, however, that a distinction should be made between cases where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property, and other cases, such as the present one, where the sale is only voidable on the objection of third parties and possession is taken under the sale." The appellant seeks especially to rely upon the judgment of the Privy Council in *Bassu Kuar* v. *Dhum Singh* (21) the facts of which were in brief, that a creditor contracted with his debtor to buy certain villages and set off the debt against the purchase-money. A dispute arose and the debtor sued the creditor for specific performance of the contract. The claim was at first decreed but in appeal dismissed whereafter the creditor sued upon the debt. The High Court of Allahabad held that there was never any contract of which specific performance could be granted, so that the character of the debt was never altered and accordingly that it was barred. Their Lordships of the Privy Council, however, took the view that there had been such a contract although the parties were not entirely at one as to its terms, and that up to the date of the decree refusing specific performance, the debtor retained the amount of his debt as of right. He was in a position to allege that the debt had been wiped out by the contract. The facts are comparable, therefore, not to a contract of sale which was *ab initio* void and without consideration but to one that became unenforceable and of which the consideration failed at some subsequent date, in other words to Seshagiri Iyer, J.'s class (*b*) or class (*c*) and not to class (*a*).

Apart from authority, the position seems to me clear enough. There is no provision of law according to which, a plaintiff who,

(16) 8 Ind. Cas. 1087; 35 M. 39; (1910) M. W. N. 827; 9 M. L. T. 467.

(17) 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 819; 27 M. L. J. 517; 16 M. L. T. 397.

(18) 74 Ind. Cas. 416; 17 L. W. 254; A. I. R. 1923 Mad. 392.

(19) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

(20) 61 Ind. Cas. 70; 45 B. 955; 23 Bom. L. R. 325.

(21) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458 (P. C.).

upon failing to obtain one remedy sues for an alternative one, is entitled to exclude the time taken up by the former proceedings. It was open to the plaintiff here, if he had any doubt of his vendor's ability or willingness to give him a good title and possession to ask in the alternative either for possession or for the refund of his purchase-money. As I have said, at latest, as soon as his vendor filed his written statement, he was aware that he repudiated the contract and alleged that title, possession and enjoyment of the property vested in Kuttiammal. A cause of action for damages thus arose and it is difficult to see in what manner limitation for such a suit could be affected by the course of the subsequent litigation.

I conclude, therefore, that the starting point was either the date of the sale-deed (27th December, 1909) or, at latest the date of Srinivasachari's written statement (8th August, 1912). It is now, I think, settled that Art. 116 applies to the breach of a registered contract of sale. [See *Arunachala Aiyar* v. *Ramasami Aiyar* (17) and *Multanmal Jayaram* v. *Budhumal Kevalchand* (20)], but even applying that Article, the suit will be barred.

The result, accordingly, is that the appeal is dismissed with costs. The Vakil's fee will be Rs. 150.

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1143 OF 1924.
December 16, 1926.
Present:—Mr. Justice Boys and Mr. Justice Kendall.

BHIKHAM SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
B. BHARAT INDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaratory suit—Title denied in revenue proceedings—Cause of action.

Where the title of a person who is seeking to have certain revenue entries corrected is disputed in the revenue proceedings, this furnishes him with a new cause of action to maintain a suit for declaration of title.

Second appeal against the decree of the District Judge, Farrukhabad, dated the 16th of April, 1924.

FACTS appear from the following judgment of the District Judge:—

This is an appeal from a judgment of the Subordinate Judge of Farrukhabad, decreeing the suit of the plaintiffs-respondents for a declaration that they are the owners in possession of a certain share of *zemindari* and that the defendants-appellants who are recorded as mortgagees of the said share, have no mortgagee rights therein and are not in possession.

The first plea taken before this Court is that the suit is barred by limitation.

In the Settlement papers of 1308 *Fasli*, Durga Prasad, father of the defendants-appellants was recorded as mortgagee and Kirpal Singh, father of the plaintiffs-respondents was shown as mortgagor. That entry appears to have been attested by Kirpal Singh, but it is alleged in the present suit that the entry was incorrect. The recording of the name of Durga Prasad as mortgagee in 1308 *Fasli* was, therefore, an invasion of the rights of the plaintiffs-respondents and it gave the plaintiffs respondents a cause of action. It is not shown that there has been any subsequent invasion of their rights. I am, therefore, clearly of opinion that under Art. 120 of the Limitation Act the suit of the plaintiffs-respondents is time-barred. The mere fact that in the proceedings for correction papers the defendants appellants opposed the application of the plaintiffs-respondents would not give the latter a fresh cause of action. The case of *Akbar Khan* v. *Turaban* (1) is pertinent to the case before me. I, therefore, find that the suit is time-barred and allow this appeal and dismiss the suit of the plaintiffs respondents with costs in both Courts.

Mr *U. S. Bajpai*, for the Appellants.
Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—The lower Appellate Court relied on *Akbar Khan* v. *Turaban* (1). Its attention was not directed to *Sheopher Singh* v. *Deo Narain Singh* (2), *Kali Prasad Misir* v. *Harbans Misir* (3) and other cases in which it was held that the Revenue Court proceedings gave the plaintiffs a new cause of action. It is agreed by Counsel for the appellants and the respondents both that no question of limitation can, therefore, arise in this case and that the suit must be remanded for deci-

(1) 1 Ind. Cas. 557; 5 A. L. J. 637; 31 A. 9; A. W. N. (1908) 252; 4 M. L. T. 444.
(2) 17 Ind. Cas. 675; 10 A. L. J. 413.
(3) 50 Ind. Cas. 767; 17 A. L. J. 588.

sion by the lower Appellate Court on the merits. Ordered accordingly. Costs will abide the result.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 492 OF 1926.
December 22, 1926.

Present:—Mr. Justice Broadway.

THE FIRM AMIN CHAND-KANSHI RAM THROUGH KANSHI RAM-DHARM CHAND —DEFENDANTS—PETITIONERS

versus

THE FIRM KANSHI RAM-MITTAR SAIN THROUGH KANSHI RAM-MELA RAM—PLAINTIFFS—RESPONDENTS.

Arbitration—Court, inherent power of, to revoke arbitration.

A Court has inherent power to revoke the appointment of an arbitrator before the making of an award in a proper case. But this power should always be exercised with the greatest caution.

Petition for revision of the order of the Subordinate Judge, Third Class, Kasur, District Lahore, dated the 7th June, 1926.

Mr. *Jai Gopal Sethi*, for the Petitioners.

Mr. *Jagan Nath Aggarwal*, for the Respondents.

JUDGMENT.—On the 21st April, 1925, the Firm of Kanshi Ram-Mittar Sain of Kasur instituted a suit for the recovery of Rs. 2,000 on *hundis* against the Firm of Amin Chand-Kanshi Ram also of Kasur. This case remained pending till 23rd October, 1925, when the parties agreed to refer their disputes to arbitration and the parties each nominated their own arbitrator. The defendant firm nominated Lala Kishan Dial, Vakil. Soon after this nomination in November, 1925, the defendant firm asked the Court to allow him to cancel the appointment of Lala Kishan Dial as the said gentleman was related to the other arbitrator as well as to the plaintiff. Evidence was taken and Lala Kishan Dial was put in the witness-box and on the 7th June, 1926, the Court came to the conclusion that there was no proof whatever to show that the defendant was not aware of the alleged relationship between Lala Kishan Dial and the plaintiff as well as between the arbitrators and finally came to the conclusion that this particular application was premature. It accordingly refused to allow the defendant to revoke the appointment of Lala Kishan Dial. Against that order, which is clearly of an interlocutory nature, the defendant firm came up to this Court under s. 44 of the Punjab Courts Act and Mr. Jai Gopal Sethi has endeavoured to satisfy me that this is a case in which I should interfere and has cited two decisions of the Allahabad High Court in which it was pointed out that a Court has inherent power to revoke the appointment of an arbitrator before the making of an award in a proper case but that this power should always be exercised with the greatest caution. I have no doubt that this Court has the inherent power claimed for it by Mr. Jai Gopal Sethi. In the present instance the Court below has exercised that inherent power and has come to the conclusion that no case has been made out for interference on its part. In revision I am unable to say that the view taken by the Court below is against law. It has not declined jurisdiction by merely saying that the application is premature for it is perfectly clear from the order itself that it has weighed the evidence led by the objector and has come to the conclusion that the objector has failed to prove that he had no knowledge of the alleged relationship prior to the selection of Lala Kishan Dial as his representative on the Arbitration Board. In these circumstances I am unable to interfere in revision and I, therefore, dismiss this petition with costs.

R. L. *Petition dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 395-B OF 1924.
November 19, 1926.

Present:—Mr. Kinkhede, A. J. C.

BALAYYA—PLAINTIFF—APPELLANT

versus

NANDLAL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Preference of some creditors, effect of—Price, inadequacy of.

The mere circumstance that a debtor selects some of his creditors and makes payments of their debts out of the sale-proceeds of his property is no ground for imputing a fraudulent intention to the vendor and vendee, so as to bring the transaction within the scope of s. 53 of the Transfer of Property Act, especially where the price fetched is not alleged or proved to be grossly inadequate. [p. 48, col. 2.]

Bhagwant v. *Kedari* (1) and *Musahar Sahu* v. *Hakim Lal* (2), followed.

Appeal against the decree of the Second Additional District Judge, Akola, dated the 30th August, 1926, in Civil Appeal No. 36 of 1924.

Mr. *D. T. Mangalmurti*, for the Appellant.

Mr. *W. B. Pendharkar*, for the Respondent.

JUDGMENT.—This appeal is by the plaintiff who lost his suit in the Courts below. He sued on foot of a registered sale-deed, dated 30th March, 1922, executed in his favour by three brothers Rajlingu, Piraji and Balu in respect of the fields in suit for a consideration of Rs. 3,000. The possession of the fields was actually transferred to the purchaser who then sublet them to the vendor Rajlingu for the year 1922-23 under a *bataipatra* dated 17th April, 1922. It appears he was allowed to hold over on the same terms after the expiry of the terms of the *batai* contract. While the plaintiff was in possession defendant Nandlal sued Piraji and obtained a decree on 31st March, 1922, and in due course attached the fields in suit. Plaintiff preferred an objection but the same was disallowed by holding the sale to be fraudulent; and the attachment was maintained as regards Piraji's 1/3rd share and withdrawn as regards the remaining 2/3rds shares of Rajlingu and Balu. The plaintiff, therefore, sued to set aside the summary decision passed in Civil Suit No. 194 of 1921 on the file of the Munsif, Basim. The defendant alleged that the sale was fraudulent and the lease was bogus and intended to give colour to the transaction of sale. The first Court found the sale proved and held that it was for valuable consideration and not fraudulent. It accordingly decreed the claim. The decree-holder-defendant, therefore, appealed to the Additional District Judge's Court.

The learned Additional District Judge notes that the execution of the sale was not disputed before him. So the only ground of attack was the so-called fraudulent nature of the transaction. Of course, the plaintiff being unsuccessful in the claim proceedings had the burden of proving the reality and good faith of the transaction. The vendee, and one of the vendors Rajlingu and one of the creditors *Musammat* Munna have been put in the witness-box. One more witness Rajanna has been examined to prove that Rajlingu was separate from his other brother Piraji. The plaintiff's relationship has been relied on as one of the circumstances tending to prove the fraudulent nature of the transaction of sale.

As regards consideration the lower Appellate Court has found that out of the five items forming the consideration, *viz.*:

(1)	Rs. 50	already received;
(2)	„ 275	due to plaintiff by all the three brothers on account of old debts;
(3)	„ 424	due to one Rodba by all three brothers undertaken to be paid by plaintiff;
(4)	„ 725	due to one Munna on a pro-note executed by Rajlingu and Piraji undertaken to be paid by plaintiff and
(5)	„ 1,526	due on a mortgage executed by all three brothers in favour of one Raghunath Marwadi undertaken to be paid by plaintiff.
	Rs. 3,000.	

There is no independent evidence to prove the payment of Rs. 50 and the existence of the prior debt of Rs. 275 and the payment of Rs. 424 to Rodba as per Ex. P-4. Thus, Rs. 749 disappeared as unproved. As regards the 4th item of Rs. 725 the lower Appellate Court held that though the creditor Munna was examined to prove the genuineness of his receipt Ex. P-5 there was no satisfactory and convincing evidence to prove the existence of the debt. The lower Appellate Court thus held the consideration of the sale to the extent of Rs. 1,474 unproved. This left a balance of Rs. 1,526. With regard to this item the Court of Appeal entertained suspicion in view of the re-payment of Rs. 531 said to have been made towards the debt by Rajlingu. According to plaintiff the money was supplied by him but the payment was made by Rajlingu's hand. But in this he was contradicted by the mortgagee who denied all knowledge of the plaintiff's sale. In short, the story of the *havala* was held to be sham. He thus concluded that excepting the mortgage there was no proof of other debts and even as to the mortgage there was no proof of *havala*. As regards

the possession of the property he found that there was no satisfactory evidence to prove that possession was, in fact, transferred to plaintiff.

Taking the relationship of the parties to the sale to the vendee, the proximity of the sale to the date of the decree and the absence of all attempts at taking possession in consideration the lower Appellate Court concluded that the sale was fraudulent and intended to defeat the defendant creditor. The first Court's decree was upset and the plaintiff's claim dismissed.

The plaintiff, therefore, comes up in second appeal and contends that the lower Appellate Court has misapprehended the real question at issue; that the sale-deed itself was the best evidence of the *harala*; and that the sale by three persons could not have been intended to defeat the creditor of one brother and that s. 53 of the Transfer of Property Act does not prohibit undue preference to one of several creditors.

I think on each of these points the plaintiff is entitled to succeed. The sale having been held proved the direction to pay the debts to the several creditors implied an admission of the existence of the several debts and of the liability thereof being subsisting and outstanding not against one or the other of the executants but as against all of them jointly. What may have originally been the debt due by one was treated as a debt payable by all three and liable to be satisfied out of the interest of all three brothers without distinction. Then again the balance of the consideration of the sale apart from the mortgage encumbrance which was then ascertained to be of Rs. 1,526 was Rs. 1,474. This represented the price of redemption of all the three brothers. The proportionate value of Rajlingu's equity of redemption would at the most be Rs. 491. No attempt has been made to prove that Piraji's equity of redemption has been sold for less than its proper value.

There is, therefore, no ground for suspecting the *bona fide* of the transaction merely because the sale was effected just a day before the decree was passed or because it was in favour of a relation or because one of the vendors was chosen as the *bataidar* by the vendee. It is said that there is no convincing proof of the evidence of the other debts. Exhibit P-4 evidences a payment of Rs. 424 to Rodba on 4th April, 1922, and Ex. P-5 of Rs. 725 to Munna under the same date. Munna has pledged her oath to the truth of the admission made by her in the receipt (Ex. P-5) that she received the payment towards a debt due to her. These two documents have been held proved by the Court of first appeal but have been suspected not to represent a real state of facts. I see no reasonable grounds for the lower Appellate Court's suspicions which on the face of them seem to be wholly unwarranted.

The mere circumstance that the respondent's debtor Piraji preferred the two creditors Rodba and Munna and the plaintiff to whom also Rs. 275 were due as admitted in the sale deed is no ground for imputing a fraudulent intention to the vendors and the vendee, so as to bring the transaction within the scope of s. 53 of the Transfer of Property Act, especially as the price fetched is not alleged or proved to be grossly inadequate. The cases in *Bhagwant* v. *Kedari* (1) and *Musahar Sahu* v. *Hakim Lal* (2) fully support this proposition of law.

I am not prepared to go to the length of imputing an intention to Piraji's other brothers to defeat creditors or to become parties to a plot of Piraji to defeat the present respondent Nandlal and to go to the length of inventing some debts and to admit that they were due to them. On the contrary the sale appears to be genuine and for consideration and intended to take effect.

For all these reasons I differ from the lower Appellate Court and hold that the sale has been improperly regarded as fraudulent by that Court. The result is that the decree of the Appellate Court is set aside and that of the first Court restored with costs in all Courts to be paid by the defendant-respondent.

Z. K. *Decree set aside.*

(1) 25 B. 202; 2 Bom. L. R. 986.

(2) 32 Ind. Cas. 343; 43 C. 521; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C.).

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2649 OF 1925.

November 25, 1926.

Present :—Mr. Justice Coldstream.

MOHAMMAD SHAFI—DEFENDANT—APPELLANT

versus

Panchayat, FATEHGAR THROUGH *Sardar Sahib Sardar* NARAIN SINGH PRESIDENT OF THE SAID *Panchayat*—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Court Fees Act (VII of 1870), s. 13—Remand for amendment of plaint and re-trial—Court-fee, refund of—Appeal, whether lies.

An order of remand directing the amendment of the plaint and a trial of the suit falls within the purview of r. 23 of O. XLI of the Civil Procedure Code.

Jadab Gobinda Singh v. *Anath Bandhu Sahu* (3), relied on.

An order refunding Court-fee when remand is made can only be passed under s. 13 of the Court Fees Act, in a case where the remand is made under O. XLI, r. 23 of the Civil Procedure Code.

Miscellaneous second appeal from the order of the District Judge, Gurdaspur at Dalhousie, dated the 18th June, 1925, reversing that of the Subordinate Judge, Fourth Class, Pathankote, District Gurdaspur, dated the 21st June, 1924.

Mr. *Shambhu Nath Puri*, for Dr. *Mohammad Alam*, for the Appellant.

Messrs. *Hargopal* and *Nanwan Mal*, for the Respondents.

JUDGMENT.—The village of Fatehgarh in Batala Tahsil of Gurdaspur District was at one time a Municipality. In 1896 it became a Notified Area under the provisions of the Punjab Municipal Act, and in 1912 the Notified Area Committee being abolished the affairs of the town were by an executive order of the Deputy Commissioner made over for Government to a *Panchayat*. A dispute arose between the *Panchayat* on one side and the proprietors of one of the *pattis* (sub-divisions) of the town and Muhammad Shafi, to whom the *pattidars* had sold a site, on the other, and in June 1922 a suit was instituted by the *Panchayat* through its President for possession of the site in dispute.

The Subordinate Judge, Fourth Class, held that the *Panchayat* had failed to prove its ownership and dismissed the suit. The *Panchayat* appealed to the District Judge of Gurdaspur urging that the first Court had not understood the nature of the suit which had been brought by the *Panchayat* Committee on behalf of all the inhabitants.

On the date of hearing a preliminary objection was taken before the District Judge by the respondents to the effect that the *Panchayat* had no *locus standi*. The District Judge held that so far as could be discovered the *Panchayat* had no basis in Statute Law and he recorded the following order :—

"Under the circumstances I think the best course is to accept the appeal, set aside the decree of the lower Court and order a retrial on an amended plaint in which the members of the *Panchayat* shall sue under O. I, r. 8 of the Code of Civil Procedure, on behalf of the *bashindgan deh*. Lala Iqbal Rai, Subordinate Judge, Batala, should thereupon proceed according to law. Stamp on appeal to be refunded and other costs to be costs in the case. All the vendors were not served for this Court but they are not necessary parties to the appeal, the only point involved being that of ownership of the site in dispute. It is, however, desirable that the Subordinate Judge should give them the opportunity of appearing at the retrial."

Against this order Mohammad Shafi the vendee of the disputed site has filed the present appeal.

On behalf of the *Panchayat* Mr. Nanwan Mal raises the preliminary objection that no appeal lies against the order of the learned District Judge. He points out that in this case the suit had not been disposed of on a preliminary point and that the District Judge's order of remand must, therefore, be held to have been passed in exercise of the inherent powers conferred by s. 151 of the Code of Civil Procedure. He cites the Lahore ruling *Wisahiv Ram* v. *Alwal* (1) which states expressly that there is no appeal provided in the Civil Procedure Code, against an order of remand made in exercise of such power, and not made under the provisions of r. 23 of O. XLI of the Code. In reply to this objection Mr. Shambhu Nath urges that it is clear from the fact that the stamp on the appeal was refunded that the District Judge intended his order to be one under O. XLI, r. 23 and appeal against which is provided for by O. XLIII, r. 1 (*u*).

An order refunding Court-fee when remand is made can only be passed under

(1) 78 Ind. Cas. 408; 6 L. L. J. 153; A. I. R. 1924 Lah. 487.

s. 13 of the Court Fees Act in a case where the remand is made under O. XLI, r. 23 [*Agent, Bengal Nagpur Ry.* v. *Behari Lal Dutt* (2)]. The judgment in *Jadab Gobinda Singh* v. *Anath Bandhu Sahu* (3) is authority for holding that an order on appeal directing the addition of parties to a suit and remanding the suit for re-trial is an order upon a point which is necessarily preliminary to the proper decision and the trial of the suit. The circumstances of the present case appear to me to be analogous to those dealt with by that judgment and assuming the order appealed against to be one passed under the provisions of O. XLI, r. 23, I proceed to dispose of the appeal on its merits.

The objection that the *Panchayat* had no *locus standi* was pleaded by the defendants in their written statements but was apparently not pressed, for no issue on the point was raised. It ought to have been obvious from the beginning that the plaintiffs who sued through the President of the *Panchayat* were not suing in their personal capacity as "*panches*" but as representatives of the people of Fatehgarh town. How the first Court failed to grasp (as apparently it did) the real nature of the suit when it came to write its judgment is difficult to understand. The facts, stated in the learned District Judge's order, that the *Panchayat* was constituted by the Deputy Commissioner in 1912 and has since then governed the town, are not disputed. The circumstances are very similar to those of the case reported as *Krishna Boi* v. *Collector and Government Agent, Tanjore* (4) and I think, that the learned District Judge's order fell within the express provisions of O. I, r. 10 of the Civil Procedure Code, although that rule is not mentioned in his order.

Finding the order neither illegal nor improper but permitted by law and justified by the circumstances, I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

A. N. A.

(2) 90 Ind. Cas. 426; 52 C. 783 at p. 787; 29 C. W. N. 614; A. I. R. 1925 Cal. 716.

(3) 5 Ind. Cas. 998; 37 C. 171.

(4) 30 M. 419; 2 M. L. T. 447.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 412 OF 1923.

November 30, 1926.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Lala MADAN LAL AND ANOTHER—APPELLANTS

versus

Rai Bahadur Lala JANKI PRASAD AND OTHERS—RESPONDENTS.

Public policy—Partnership, illegal—Suit for partition of partnership property, whether maintainable.

A suit for the partition of the property of a partnership, which consists of more than twenty persons and is consequently illegal, cannot be maintained. [p. 50, col. 2.]

Mewa Ram v. *Ram Gopal* (1), followed.

First appeal against the decree of the Subordinate Judge, Bulandshahr, dated the 16th July, 1923.

Dr. *S. N. Sen*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal arising out of a suit for partition of a ginning factory and press. The plaintiffs alleged that they were share-holders in this ginning factory and press to the extent of 5/72. They admitted that this partnership had been declared to be invalid inasmuch as it consisted of more than 20 members. Nevertheless they asked for the relief mentioned above.

The defendants, who were other members of this illegal association, pleaded *inter alia* that the suit was not maintainable because the partnership was illegal. The learned Subordinate Judge has dismissed the suit holding that this was a suit by one partner against the remaining partners in respect of illegal partnership transactions, and the plaintiffs could not seek any redress from a Court of Justice.

The plaintiffs have come up in appeal, and on their behalf it is contended that there is no bar to the Court granting them a relief for the actual partition of the property, treating it as belonging to a number of co-owners (though more than 20 in number) and entirely ignoring the existence of any alleged partnership. The argument is that the Court should not recognize the existence of any such partnership, but it cannot at the same time ignore that the property which exists belongs to a number of co-owners including the plaintiffs. This question of law has been the subject of decision in a recent case, *Mewa Ram* v. *Ram Gopal* (1). Two learned Judges out

(1) 97 Ind. Cas. 90; 24 A. L. J. 777; A. I. R. 1926 All. 591; 41 A. 735.

of three held that a suit brought by some members of an illegal association for any relief was not maintainable and that the well-known rule that where all the parties were equally in fault the law favoured him who was actually in possession was applicable even to a claim for partition where the plaintiff claimed to be in joint possession with the defendants. This being the view of the majority in the case so recently decided, we cannot go behind that expression of opinion.

The learned Counsel for the appellants has brought to our notice the case of *Greenberg* v. *Cooperstein* (2) in which Tomlin, J., remarked that "he does not himself believe that the law is so powerless that when money is in the hands of persons who have received it for application for an illegal purpose, it cannot protect the contributors or enable them to recover it before it has been applied for this illegal purpose;" and further that the case of persons who have subscribed money for an illegal purpose, who come requiring the agents in whose hands it is and who were to apply it for that purpose and have not done so, to return it to them, was different from cases where an illegal association was seeking to recover money lent by it. The case may perhaps be distinguished on the assumption that there the money had not been applied for the illegal purpose and was in the hands of agents who had received it from the plaintiffs. However that may be, we are bound by the ruling of our own High Court mentioned above.

The result, therefore, is that this appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) (1926) Ch. 657; 95 L. J. Ch. 466.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1268 OF 1926.
December 13, 1926.
Present:—Mr. Justice Zafar Ali.

GANGA RAM—DEFENDANT—APPELLANT
versus
HASSAN SHAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Waste land—Possession follows title—Adverse possession—Onus of proof.

Where land is lying waste possession follows title. In a suit for possession of waste land it is for the defendant to prove adverse possession for more than 12 years under Art. 144 and not for the plaintiff to prove his possession within 12 years.

Second appeal from the decree of the District Judge, Shahpur at Sargodha, dated the 4th January, 1926, varying that of the Sub-Judge, Fourth Class, Shahpur, dated the 16th May, 1925.

Mr. *Amar Nath Monga*, for the Appellant.

Mr. *Ghulam Mohi-ud-Din*, for the Respondents.

JUDGMENT.—This was a *banna shikni* or boundary encroachment case. Between the plaintiffs' fields on the east and the defendant's garden on the west there is a foot-path 4 *karams* wide and 2 *kanals* in area which belongs to the plaintiffs. In the *Jamabandi* 1912-13 it was shown that the defendant had encroached upon the foot-path to the extent of half a *kanal* and had annexed it to his garden. The plaintiffs instituted the present suit on the 7th June, 1924, for possession of this half *kanal*. The defendant pleaded adverse possession but the trial Court overruled that plea and decreed the plaintiffs' suit. On appeal the learned District Judge proceeded on the erroneous assumption that the entry in the *Jamabandi* 1912-13 related only to one-fourth of a *kanal* and holding that the defendant's possession with regard to that quarter had been adverse for over 12 years dismissed the plaintiffs' suit with regard to that quarter. The defendant appears in this Court in second appeal and his learned Counsel pointing out the error into which the learned District Judge had fallen argues that the plaintiffs' claim for the reasons assigned by the District Judge should have been dismissed with regard to the entire half *kanal*.

Now, it is quite clear that where land is lying waste possession follows title, and that as the entire strip of land two *kanals* in area was lying waste, it must be presumed to have been in the possession of the plaintiffs its owners till it was encroached upon. It was, therefore, on the defendant who was the trespasser to prove when that encroachment was made, and the Article applicable was Art. 144 and not Art. 142 of the Indian Limitation Act. The only reliable evidence on this point was furnished by the entry in the *Jamabandi* 1912-13 which related to the period from *Kharif* 1912 to 1913 and must have been verified in 1913 and not before,

The defendant's possession could not have been presumed to have commenced from before July 1912 and as the suit was instituted in June 1924 it was within time.

Counsel for the plaintiffs-respondents urges that though they did not prefer an appeal against the order of the District Judge, this Court should, by virtue of O. XLI, r. 33, restore the decree of the trial Court. I am of opinion that this is a fit case for interference under the said rule and I, therefore, dismiss the appeal with costs and restore the decree of the trial Court.

R L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1439 OF 1924.
November 18, 1926.
Present:—Mr. Justice Iqbal Ahmad.
MOHENDRA DUBE AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM BHAJAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Partition, suit for—Plaintiffs claiming share for themselves and some defendants—Procedure.

Where in a suit for partition the plaintiffs claim along with some of the defendants a certain definite share in the property in dispute and those defendants do not object to that share being assigned to the plaintiffs, the share may be assigned to the plaintiffs jointly along with the defendants who are entitled to such share.

Second appeal against the decree of the District Judge, Ghazipur, dated the 13th September, 1924.

Mr. *Baleshwari Prasad* for Mr. *S. K. Das*, for the Appellants.

Mr. *A. P. Pande*, for the Respondents.

JUDGMENT.—This is a defendants' appeal and arises out of a suit for possession of a one-third share in certain occupancy holding and for damages.

The plaintiffs' case was that they were entitled to a one-third share in the holding and that the remaining two-thirds share belonged to defendants Nos. 1 to 7. One of the defendants to the suit was Ram Das Dube and he alleged in his written statement that he along with the plaintiffs was entitled to a one-third share claimed by the plaintiffs; in other words he maintained that he had a one-ninth share in the holding in dispute and that the decree in the plaintiffs' favour should be passed "subject to the reservation of his right and share."

The contesting defendants, who are the appellants before me, resisted the suit on the ground, that the plaintiffs had no share in the holding in dispute and, further the plaintiffs not having been in possession within 12 years prior to the institution of the suit, the suit was time-barred.

The trial Court dismissed the plaintiffs' suit. On appeal by the plaintiffs, the learned District Judge remitted certain issues to the trial Court for findings thereon. On return of those findings the lower Appellate Court has held that the plaintiffs' allegation that they were the owners of a one-third share in holding, and had a subsisting right to the same, has been proved and on that finding it has passed a decree in the plaintiffs' favour for a one-third share of the holding in dispute.

The only point that has been argued before me on behalf of the defendants-appellants in this appeal is that the plaintiffs' share was only to the extent of two-ninth in the holding and the remaining one ninth share with respect to which a decree has been passed in the plaintiffs' favour belongs to Ram Das Dube, and as such the decree in the plaintiffs' favour should have been only with respect to the two-ninth share in the holding. In support of this contention reliance has been placed on the case reported as *Rohan Singh* v. *Ahsani Begam* (1). It was held in that case that when the plaintiffs have a definite share in the property in dispute, the decree in their favour should be limited to the specific share to which they are entitled. In my opinion, that case is distinguishable from the present case. In the case of *Rohan Singh* v. *Ahsani Bagam* (1) only one of several heirs of a deceased Muhammadan was the plaintiff, and her remaining co-heirs were no parties to the suit, and, as a matter of fact, their whereabouts were not known. In the present case Ram Das Dube who was entitled to a one-ninth share was a party to the suit, and he himself prayed that the decree in the plaintiffs' favour as prayed for by the plaintiffs should be passed "subject to the reservation of his right and share."

Moreover, the point now raised in appeal before me was nowhere taken in the written statement and this by itself was a justifica-

(1) 17 Ind. Cas. 469; 10 A. L. J. 518.

tion for the lower Appellate Court to overrule the point now urged before me.

The learned Counsel for the respondent has no objection to a modification of the decree of the lower Appellate Court to this extent that instead of decreeing the plaintiffs' claim as decreed by that Court, I should pass a decree for one-third share jointly in the plaintiffs' favour and Ram Das Dube. All the parties are before me and I think that I must pass a decree that will protect the rights of all the persons having an interest in the holding in suit.

The result is that I modify the decree of the lower Appellate Court by passing a decree for possession of a one-third share in the holding in dispute jointly in favour of the plaintiffs and Ram Das Dube, defendant No. 8. As the appeal substantially fails, the appellants must pay the costs of the plaintiffs-respondents in all Courts, including in this Court fees on the higher scale.

Z. K. *Decree modified.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 71 OF 1925.
January 14, 1927.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Broadway.

CHANDU LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUKANDI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Guardianship—Step-mother, whether de jure *guardian—Mortgage by step-mother—Antecedent debt.*

A step-mother is not a *de jure* guardian of her step-son under Hindu Law.

Where it is not proved that the step-mother was *in fact* the manager of her step-son's property or the guardian of his person, a mortgage of his property effected by her is not a mortgage by a *de facto* guardian and the debt secured by the mortgage cannot be regarded an antecedent debt.

Letters Patent Appeal against the judgment of Mr. Justice Campbell, dated the 2nd of February, 1925.

Mr. *Sheo Narain*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.

Shadi Lal, C. J.—This is an appeal under s. 10 of the Letters Patent against the decision of Mr. Justice Campbell dated the 2nd February, 1925. The facts briefly are as follows:—

In 1906 one *Musammat* Dashodan, widow of Telu Mal, mortgaged certain shops to Chandu Lal, etc., for a sum of Rs. 590 with interest. She professed to have acted on her own behalf and on behalf of her step-son Mata Ram as his guardian. On the 20th of August, 1918, Mata Ram executed a mortgage of the said property in favour of the same mortgagees. The consideration for this mortgage is entered as the sum of Rs. 800 due under the mortgage of 1906 and a further loan of Rs. 100.

At or about the same time Mata Ram executed a document taking the shops on lease from the mortgagees. As the rent reserved under the lease was not paid, the mortgagees sued and obtained a decree for possession of the mortgaged property.

The three minor sons of Mata Ram then instituted the suit out of which this appeal has arisen asking for a declaration that Chandu Lal and others were not entitled to take possession of the mortgaged property under the decree referred to above, inasmuch as the said property was joint and ancestral.

It was found that the sum of Rs. 100 said to have been paid before the Sub-Registrar had not been proved to be for necessity and the only question before the learned Judge in Chambers was whether the sum of Rs. 800 could be regarded as an antecedent debt. After a careful examination of the situation Mr. Justice Campbell came to the conclusion that it had not been proved that *Musammat* Dashodan had been *in fact* the manager of her step-son's estate or the guardian of his person. *Musammat* Dashodan was clearly not Mata Ram's guardian *de jure* and after giving due weight to the arguments addressed to us by Mr. Sheo Narain I am of opinion that the view taken by the learned Judge in Chambers is correct, that the mortgage of 1906 was not effected by a *de facto* guardian of the minor Mata Ram. I also agree with the learned Judge in Chambers in holding that the debt incurred by *Musammat* Dashodan in 1906 cannot be regarded as an antecedent debt.

I, therefore, dismiss this appeal with costs.

Broadway, J.—I concur.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 605 OF 1924.
November 17, 1926.
Present:—Mr. Justice Waller.
YEGNANARAYANA AYYAR, MINOR AND OTHERS—DEFENDANTS—APPELLANTS
versus
SUPPAN CHETTY—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso (4)—Oral agreement to accept less than mortgage amount in full discharge of mortgage-debt, whether can be proved.

An oral agreement by a mortgagee to accept a lesser amount than is due on a registered mortgage-deed in full discharge of the mortgage cannot be proved under s. 92 (4) of the Evidence Act.

Mallappa v. *Matam Naga Chetty* (1), *Jagannath Kashiram* v. *Shankar Ganpat* (4), followed.

Second appeal against the decree of the Court of the Subordinate Judge, Dindigul, in A. S. No. 93 of 1922, preferred against that of the Court of the District Munsif of Periyakulam, in O. S. No. 1191 of 1919.

JUDGMENT.—The appeal raises a somewhat difficult question of law. The plaintiff owed money to defendant No. 1 who was conducting a chit-fund, on a deed of mortgage. It is common ground that he paid to defendant No. 1 on 5th July 1919, a sum of Rs. 3,500. His case, shortly, is this:—that defendant No. 1 who had a decree against his father-in-law asked him to discharge it and that they eventually agreed that the contract rate of interest on the mortgage should be reduced and that the balance of the above sum of Rs. 3,500 should be directed to discharging the decree, which was to be assigned to the plaintiff. An endorsement was made on the deed of mortgage to the effect that it had been fully discharged by a final payment of Rs. 1,500 although much more was due. Defendant No. 1, however, failed to assign the decree and the plaintiff accordingly brought a suit to recover Rs. 1,500 odd, which was the amount due on the decree. Defendant No. 1 denied the alleged agreement. The trial Court found against the agreement and dismissed the suit. The lower Appellate Court came to a different conclusion on the facts and gave the plaintiff a decree for the amount claimed by him.

It is now argued that the agreement set up by the plaintiff to receive a lesser amount than was due on the mortgage in full discharge of it cannot be proved under s. 92 (4) of the Evidence Act and s. 17 (*b*) of the Registration Act. The argument is supported by the decision of a Full Bench of this Court in *Mullappa* v. *Matam Naga Chetty* (1). The same view was taken in two other cases from this Court, *Namagiri Lakshmi Ammal* v. *Srinivasa Aiyangar* (2) and *Chundooru Lakshmana Setty* v. *Duggisetty Chenchuramayya* (3) and also in a Bombay case, *Jagannath Kashiram* v. *Shankar Ganpat*, (4).

Two other decisions have been cited in *Karampalli Unni Kurup* v. *Thekku Vittil Muthorakutti* (5) and *Kattika Bapanamma* v. *Kattika Kristnamma* (6) which seem to lay down that, though the oral agreement cannot be proved, the actual discharge can. They were referred to and relied on in the argument before the learned Judge who decided the case of *Jagannath Kashiram* v. *Shankar Ganpat* (4) but they preferred to follow *Mallappa* v. *Matam Naga Chetty* (1). I think that that decision is conclusive and allow the appeal, dismissing the plaintiff's suit with costs throughout.

V. N. V. *Appeal allowed.*

(1) 48 Ind. Cas 158; 42 M. 41; 8 L. W. 522; (1918) M. W. N. 719; 35 M. L. J. 555; 24 M. L. T. 400.
(2) 27 Ind. Cas. 269.
(3) 44 Ind. Cas. 132; 34 M. L. J. 79; 7 L. W. 229; (1918) M. W. N. 262.
(4) 51 Ind. Cas. 689; 44 B. 55; 22 Bom. L. R. 39.
(5) 26 M. 195.
(6) 30 M. 231; 17 M. L. J. 30.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1553 OF 1922.
November 23, 1926.
Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Agha Haidar.
Musammat JIO—DEFENDANT—APPELLANT
versus
Musammat RUKMAN, WIDOW AND LEGAL REPRESENTATIVE OF RAMI MAL DECEASED AND OTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Intention of testator—Bequest in favour of two persons—Joint tenancy or tenancy-in-common.

The intention of the testator is a very important element in the construction of a Will, but where the language of the Will is clear and unambiguous, the question of finding out the intention of the testator does not arise and the Will has to be construed according to its plain language. [p. 55, col. 2.]

When a gift or a Will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint tenants. [p. 56, col. 1.]

The principle of joint tenancy is unknown to the Hindu Law except in connection with the joint family. [*ibid.*]

First appeal from the decree of the Senior Sub-Judge, Delhi, dated the 27th April, 1922.

Lala *Sarda Ram*, R. S., and Mr. *Bishan Narain*, for the Appellant.

Messrs. *Jagan Nath Agarwal* and *Lal Chand Malhotra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs for a declaration that the sale made by *Musammat* Jio, defendant No. 1 in favour of Mohammad Umar, defendant No. 2 with respect to one-half share of certain property was without necessity and ineffectual against their rights as reversioners. They admitted that *Musammat* Jio had rights of ownership in the other half of the property. *Musammat* Jio and Muhammad Umar, her transferee, pleaded that the sale was for necessity and, therefore, the plaintiffs had no right to challenge the alienation.

In order to understand the case properly we must go back to the year 1891 when a widow *Musammat* Sundar made a Will in respect of five shops and one house in favour of *Musummat* Jio her daughter and her son-in-law Ram Saran. Under that Will she provided that after her death her daughter (*Musammat* Jio) and her son-in-law (Ram Saran) should succeed to the entire property detailed in the Will and that they were to be the owners of, and heirs to the property in every way. *Musammat* Jio executed two mortgage-deeds dated respectively the 11th of May, 1909, and the 18th of June, 1909.

They are in respect of two shops and the mortgagee under both these mortgage-bonds is one Jainti Parshad. The first mortgage was for Rs. 300 and the second for Rs. 99. Both these documents contained recitals to the effect that money was required for the repairs of the shops included in the mortgages. In 1913 we come to a third mortgage in respect of those very two shops for a sum of Rs. 900 in favour of the mortgagee, Jainti Parshad. This sum of Rs. 900 was partly in satisfaction of the two prior mortgage-deeds of the year 1909 and also "for the purpose of defraying food expenses and effecting repairs, etc., to the mortgaged property." "This last mortgage was for possession like two previous ones. It must be noted that at the time of these three mortgages the husband of *Musammat* Jio, Ram Saran, was alive. He died about 15 months before the filing of the present suit, that is to say, some time early in 1920. After his death on the 18th of August, 1920, *Musammat* Jio executed these two sale-deeds in favour of defendant No. 2, Mohammad Umar, under which she transferred three shops and a half share in the house.

The total consideration for these two sale-deeds is Rs. 8,000. In the sale-deed relating to the three shops there is a recital of the mortgage-bond of 1913 in favour of Jainti Parshad and it is further mentioned that after satisfying the mortgage of Jainti Parshad, the purchaser, Mohammad Umar, has been put in possession of the property as an absolute owner.

A plaint was filed on behalf of the plaintiffs which curiously enough, does not bear any date. We find a document purporting to be an amended plaint printed at page 24 of the paper-book, also without a date. In this plaint the plaintiffs claimed as reversioners of Ram Saran, the late husband of *Musammat* Jio, and, as stated above, they said that sale of the property in favour of Mohammad Umar was without any necessity and was, therefore, not binding upon them. The Court below has decreed the suit of the plaintiffs to the extent of only half of the shop, holding that under the terms of the Will of the year 1891 *Musammat* Jio was the full proprietor of half the property, *i. e.*, half of the house and $2\frac{1}{2}$ shops. The sale-deed in favour of Mohammad Umar in respect of the three shops has been held to be invalid only to the extent of half the shop.

Musammat Jio has come up in appeal to this Court and her contention is that under the terms of her mother's Will and, according to the intention of the testatrix she was entitled to the whole of the property left by her mother *Musammat* Sundar, and that the name of her husband was more or less a surplusage. This contention is directly against the clear language of the Will of 1891 and cannot be entertained for a moment. It is true that the intention of the testator is a very important element in the construction of a Will but at the same time when the language is clear and unambiguous, the question of finding out the intention of the testator does not arise and the Will has to be construed according to its plain language.

It was further argued that there was a joint tenancy created under the terms of the Will of 1891 and that as a consequ-

ence on the death of Ram Saran, *Musammat* Jio became the full owner of the whole property by right of survivorship. This contention of the appellant is contrary to a large volume of case-law on the subject: *vide*, *Kishori Dubain* v. *Mundra Dubain* (1), *Gopi* v. *Jaldhara* (2), *Rampiari* v. *Krishna Piari* (3), *Bai Diwali* v. *Patel Bechardas* (4) and *Munni* v. *Umrao Singh* (5). These cases in substance lay down that when a deed of gift or a Will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint tenants. In fact the case of *Kishori Dubain* v. *Mundra Dubain* (1) clearly lays down that the principle of joint tenancy is unknown to the Hindu Law except in connection with the joint Hindu family. This being so, there is no force in the contention of the appellant that *Musammat* Jio on the death of her husband took the whole property by survivorship.

Note.—The rest of the judgment is not necessary for purposes of this report.—[*Ed.*]

Z. K. *Appeal dismissed.*

(1) 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757.
(2) 7 Ind. Cas. 697; 33 A. 41; 7 A. L. J. 941.
(3) 63 Ind. Cas. 301; 43 A. 600; 19 A. L. J. 608.
(4) 26 B. 445; 4 Bom. L. R. 102.
(5) 1 Ind. Cas. 720; 39 P. R. 1909; 55 P. W. R. 1909; 59 P. L. R. 1909.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

November 29, 1926.

Present:—Lord Sinha, Lord Blanesburgh, Mr. Ameer Ali and Lord Salvesen.

RAMSARAN MANDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHABIR SAHU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Agreement by Hindu father—Specific performance, suit for—Appeal—Claim to recover earnest money, whether can be enforced against sons.

Plaintiff instituted a suit for specific performance of an agreement to sell immoveable property against a Hindu father and his sons on the allegation that the father had entered into the agreement as the head of the joint family. In the alternative, the plaintiff asked for damages for breach of contract. The suit was dismissed by the trial Court and during the pendency of an appeal by the plaintiff to the High Court, the first defendant died and his sons and grandsons were substituted in his place as his legal representatives. At the hearing of the appeal the claim for specific performance was abandoned and it was contended on behalf of the plaintiff that he was entitled to recover the earnest money paid by him with reasonable interest:

***Held*, that the abandonment of the claim for specific performance did not alter the suit as framed into an action for money had and received, or for the recovery of a debt and that the relief claimed could not be granted in the suit against the respondents who were the sons and grandsons of the original defendant No. 1. [p. 58, col. 1.]**

It is not permissible by amendment to change the nature of the suit as framed. [*ibid.*]

Appeal from the judgment and decree of the Patna High Court, dated the 2nd February, 1924, reversing those of the District Judge, Durbhanga, dated the 9th March, 1921, in Suit No. 835 of 1919.

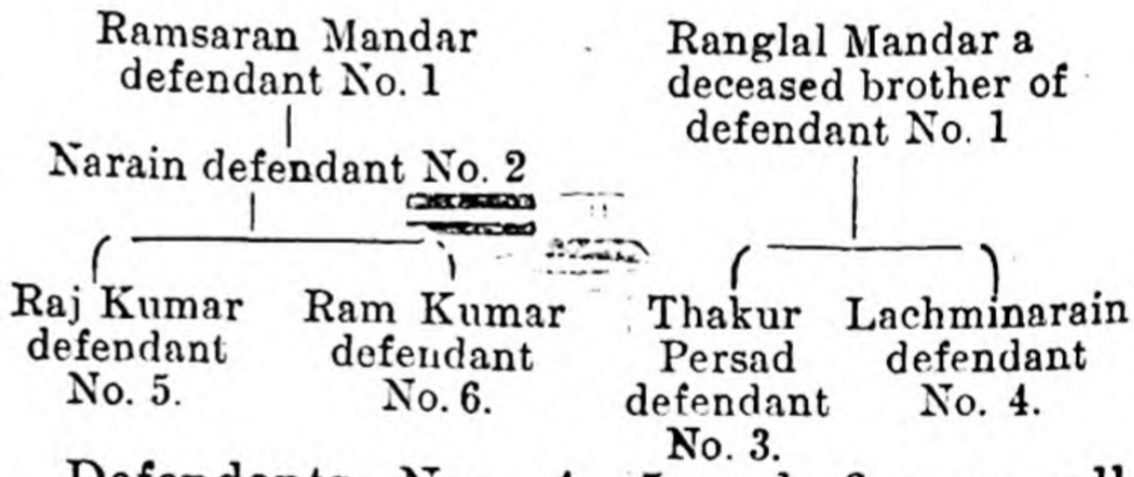
Sir *G. R. Lowndes, K. C.*, and Mr. *A. Majid*, for the Appellants.

Messrs. *L. De Gruyther, K. C.*, and *B. Dube*, for the Respondent.

JUDGMENT.

Lord Sinha.—This is an appeal from a judgment and decree, dated the 22nd February, 1924, of the High Court of Judicature at Patna, which reversed a judgment and decree, dated 9th March, 1921, of the District Judge of Durbhanga and made in Suit No. 835 of 1919.

That suit was instituted by the plaintiff, Mahabir Sahu, against six defendants, all members of a joint Hindu family, constituted as shown in the pedigree below:—



Defendants Nos. 4, 5 and 6 were all minors at the time the suit was filed, but defendant No. 4 attained majority before judgment. Defendant No. 3 died before filing any written statement.

The plaint alleged that Ramsaran (defendant No. 1), as head and *karta* of the above joint family, entered into an agreement with the plaintiff to sell certain houses and lands belonging to the said family for Rs. 11,000, and on the 20th August, 1919, executed an agreement for such sale (Ex. 5 in the case) on receipt of Rs. 9,000 as earnest money, "affixing a stamp with his signature and thumb impression thereon," and stipulating to execute and register a regular conveyance within three weeks on receipt of the balance of the consideration. Ramsaran failed to execute the conveyance though called upon to do so, and the plaintiff prayed for specific performance of that agreement on

payment of Rs. 2,000, or "if for any reason a decree for specific performance be not possible in the opinion of the Court, Rs. 9,000, the principal amount of the earnest money, with interest thereon, at Rs. 2 per month by way of damages may be awarded to the plaintiff against the defendants."

By his written statement Ramsaran denied that he entered into any such agreement, or that he executed the document (Ex. 5) as alleged or "received a single farthing as earnest money." He asserted that it was a false case altogether, put forward by one Kisorilal, in the name of his father-in-law, the nominal plaintiff, with a view wrongfully to obtain the properties in suit which he had unsuccessfully claimed in previous litigation; that the value of the properties was at least Rs. 21,000, and the story of an agreement to sell them for Rs. 11,000 was false and fraudulent.

Written statements were put in, on behalf of the defendants Nos. 2 and 4, and of the minor defendants Nos. 5 and 6, by which they also denied the truth of the plaintiff's story and further pleaded that even if defendant No. 1 entered into any such transaction, "he had no right to make any contract to execute a sale-deed in respect of the said properties, nor were these defendants at all benefited by the said act."

The two chief issues raised on these pleadings were numbered 4 and 6 respectively in the trial Court, and were as follows:—

Issue No. 4.—Is the letter of agreement, dated 20th August, 1919, genuine and for consideration? Did the defendant No. (1) enter into any agreement for the sale of the properties in suit and receive Rs. 9,000 as earnest money as alleged in the plaint?

Issue No. 6.—Are the other defendants bound by the agreement entered into by defendant No. 1?

On the fourth issue the District Judge held that the agreement (Ex. 5) was not proved to be genuine, and that even if genuine there was no consideration for the same.

On the sixth issue he held that the contract was not binding on the other defendants, as the plaint did not allege, nor was any evidence adduced by the plaintiff, to show that the contract was entered into for the benefit of the defendants' family, or that it was necessary as an act of prudent management.

The District Judge accordingly dismissed the suit with costs.

The plaintiff appealed to the High Court of Patna. Pending appeal Ramsaran (defendant No. 1) died, and by an order, dated 19th December, 1922, the cause title was amended as follows:—

Mahabir Sahu—Plaintiff—Appellant

versus

Ramsaran Mandar and, after his death, respondents Nos. 2, 4 and 5 are his heirs (*vide* order, dated 19th December, 1922)—2, Narayan Mandar; 3, Lachminarain Mandar; 4, Raj Kumar Mandar; 5, Ram Kumar Mandar (Nos. 4 and 5 minors), through Babu Soney Lal Choudhury, defendants-respondents.

At the hearing of the appeal in the High Court, Counsel on behalf of the plaintiff (appellant) gave up his claim for specific performance, but contended that plaintiff was entitled to recover the earnest money paid (Rs. 9,000), with reasonable interest.

The learned Judges of the High Court proceeded upon the view that the only issue which the Court below had to try was forgery or no forgery. They were of opinion that the expert evidence to the effect that the thumb-mark on Ex. 5 was identical with the thumb-mark of defendant No. 1 taken in Court was conclusive as to the genuineness of the mark, and so strongly supported the plaintiff's case that the improbabilities, contradictions and suspicious circumstances relied upon by the District Judge were not sufficient to displace the evidence on the plaintiff's side with regard to the execution of the agreement and the receipt of Rs. 9,000 by the defendant Ramsaran. On this basis the High Court set aside the decree of the lower Court and decreed that the plaintiff was entitled to Rs. 9,000 with interest at 1 per cent. per year from 20th August, 1919, to date of decree, and at 6 per cent. on decree, as against all the defendants.

The learned Judges do not appear to have considered either issue No. 6 or the District Judge's finding thereupon.

At the hearing of the appeal before this Board there was considerable argument at the Bar on the question of the genuineness of the agreement Ex. 5 and the receipt of the Rs. 9,000, as to which the two Courts in India have differed. Their Lordships are, however, relieved from the necessity of pronouncing any opinion on these

questions of fact, inasmuch as the decree of the High Court cannot be sustained *in law*, even if their conclusions of fact were well founded.

The suit was framed as an ordinary suit for specific performance of an agreement, with an alternative claim for damages for breach thereof, such damages being assessed at Rs. 9,000 (the earnest money paid), with interest at 2 per cent. from date of agreement to date of realisation. The amendment of the cause title in the appeal before the High Court on the death of defendant No. 1, above referred to, did not alter the nature of the suit. Nor did the abandonment of the claim for specific performance at the hearing of that appeal alter the suit as framed into an action for money had and received, or for the recovery of a debt. Even so, the suit was bound to be dismissed as against Lachminarain, defendant No. 3, who was not an heir of Ramsaran, defendant No. 1, and against whom the liability of sons and grandsons to pay their ancestor's debts under the doctrines of Hindu Law could not be invoked. Mr. De Gruyther, on behalf of the plaintiff-respondent, conceded that point, but relied on that very doctrine in order to support the decree as against defendants Nos. 2, 5 and 6, the son and grandsons of defendant No. 1, who are now on the record in a dual capacity. It was urged by Mr. De Gruyther that the decree of the High Court should stand, as against defendants Nos. 2, 5 and 6, and the question whether they had in their hands any assets of Ramsaran against which such decree could be enforced might be left to be determined in proceedings for execution of that decree; and that, if necessary, the plaint might be amended even at this stage, under the wide discretionary powers of this Board and the somewhat elastic provisions of the Code of Civil Procedure in that behalf.

Their Lordships cannot accede to these arguments. It is not permissible by amendment to change the nature of the suit as framed; and even if it were, the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would involve fresh written statements and a fresh trial. Their Lordships are unable to permit such a course at this stage.

The result is that no decree can be made against the surviving defendants in this suit. The decree of the High Court must be set aside and the suit dismissed, with costs in all Courts, including the costs of this appeal, and their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Chapman-Walker* and *Shepherd.*

Solicitors for the Respondent:—Messrs. *Pugh & Co.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 952 OF 1926.

October 21, 1926.

Present:—Mr. Justice Jai Lal.

JAGAT MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHAZAN CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption suit—Particulars of mortgage given in plaint, inaccuracy of, effect of—Dismissal of suit.

Where in a suit for redemption of a mortgage it is found that the description of the mortgage, given in the plaint, the date of the mortgage, the consideration for the mortgage and the area of the mortgaged property are all incorrect, the suit is liable to be dismissed on the ground that the mortgage set up has not been established. [p. 59, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 1st February, 1926.

Dr. *Gokal Chand Narang*, for the Appellants

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for redemption filed by the appellants against the respondents. It has been dismissed by the learned District Judge on the ground that the description of the mortgage given in the plaint was wrong. The date of the mortgage, the consideration and the area were all wrong. It was alleged in the plaint that 15 years before the date of the institution of the suit one Jiwan whose successors-in-interest the plaintiffs are alleged to be mortgaged 139 *kanals* and 10 *marlas* of land for Rs. 300 to Mul Raj, that Mul Raj sold his mortgagee rights to Sain Ditta five years later, and that Sain Ditta having died, the defendants succeeded to his estate. The plea of the defendants, on the other

hand, was that there was no such mortgage as alleged by the plaintiffs and that they were in possession of the land in suit as heirs of Jiwan.

On these pleas an issue was framed, whether Jiwan mortgaged for Rs. 300 and whether Mula sold the mortgagee rights to Sain Ditta. At the trial Nihal Chand son of Mul Raj was called as a witness by the plaintiffs and he produced a mortgage-deed according to which Jiwan mortgaged 55 *kanals* and 15 *marlas* of land on the 23rd of August 1889 for Rs. 450 to Mul Raj. The District Judge has held that there was no reliable evidence to show that the mortgagee rights were transferred by Mul Raj to Sain Ditta. He has also held that the existence of the mortgage set out in the plaint had not been proved and has, therefore, dismissed the suit.

In my opinion the view of the learned Judge is correct specially having regard to the fact that in the proceedings taken before the Revenue Court for redemption under Redemption of Mortgages (Punjab) Act, 1913 the existence of the registered mortgage-deed for Rs. 459 was brought to the notice of the plaintiffs in spite of which they gave absolutely wrong details of the mortgage. The issue as framed has not been established by the plaintiffs and, therefore, the District Judge was fully justified in dismissing the suit.

I dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL No. 316 OF 1923.

November 10, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, Mr. Justice Lindsay, Mr. Justice Sulaiman, Mr. Justice Dalal, and Mr. Justice Pullan.

November 15, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

ASKARI HASAN—JUDGMENT-DEBTOR—APPELLANT

versus

JAHANGIRI MAL AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Mortgage-suit—Compromise decree directing payment by instalments—Final decree, whether necessary.

Where a compromise decree based on a mortgage provides for the payment of the mortgage-money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due, O. XXXIV, r. 4 of the Civil Procedure Code has no application to the case and consequently it is unnecessary to apply for a final decree in the terms of r. 5 of the Order. [p. 60, col. 1.]

First appeal from a decree of the Subordinate Judge, Bulandshahr, dated the 5th of May, 1923.

REFERRING ORDER.

Pullan and Dalal, JJ.—In this appeal a question arises as to whether the respondents' right has abated owing to the death of Bilas Rai, who was the original decree-holder in a mortgage-suit. The decree which was passed was a compromise decree and allowed for payment of the mortgage-money in instalments. According to the view taken by the Allahabad High Court in *Jagan Nath Umar* v. *Ram Karan Singh* (1) the proceedings were not concluded by that decree but it was necessary to go on and obtain a final decree under O. XXXIV, r. 5 of the Code of Civil Procedure. If this view is followed the present suit must be held to have abated as the applicants did not have their names put on record within three months of the death of Bilas Rai. The lower Court has followed a ruling of the Calcutta High Court reported as *Bechu Singh* v. *Bicharam Sahu* (2) and certain other rulings, both of the Calcutta and the Patna High Courts, which appear to be in direct conflict with the ruling of the Allahabad High Court to which we have referred. The Patna High Court ruling is reported as *Ishan Chandra Kundu* v. *Nilratan Adhikari* (3). In view of this conflict of authority we are of opinion that the matter should be referred to a larger Bench. We, therefore, submit the case to the Hon'ble Acting Chief Justice with a request that he will constitute a Bench for the determination of the following question:

Whether in a compromise decree passed for payment of mortgage-money in instalments, and not on a fixed date within six months from the date of declaring the amount due, O. XXXIV, r. 4 applies, and it is necessary to apply for final decree under r. 5.

(1) 68 Ind. Cas. 251; 20 A. L. J. 575; 4 U. P. L. R. (A.) 182; A. I. R. 1922 All. 396.

(2) 1 Ind. Cas. 677; 10 C. L. J. 91.

(3) 72 Ind. Cas. 1049; A. I. R. 1923 Pat. 375; 4 P. L. T. 311; 1 Pat. L. R. 217; (1923) Pat. 184; 2 Pat. 538.

Mr. *U. S. Bajpai*, for the Appellant.

Messrs. *P. L. Banerji* and *K. C. Mital* for the Respondents.

JUDGMENT OF THE FULL BENCH.

The question referred for the opinion of the Full Bench of this Court is as follows: "Whether in a compromise decree passed for payment of mortgage-money in instalments, and not on a fixed date within six months from the date of declaring the amount due, O. XXXIV, r. 4 applies and it is necessary to apply for final decree under r. 5?" We have heard the arguments of Counsel in this case and our answer to the reference is as follows: Where the compromise decree provides for the payment of mortgage-money in instalments, and does not provide for payment on a fixed date within six months from the date of declaring the amount due, O. XXXIV, r. 4 has no application to the case; and consequently it is unnecessary to apply for a final decree in the terms of O. XXXIV, r. 5.

JUDGMENT OF THE DIVISION BENCH.

Dalal and Pullan, JJ.—The main question for decision in this appeal has now been decided by the ruling of a Full Bench on the 10th of November, 1926, which held that where a compromise decree provides for the payment of mortgage-money in instalments, and does not provide for payment on a fixed date within six months from the date of declaring the amount due, O. XXXIV, r. 4 of the Civil Procedure Code has no application to the case, and consequently it is unnecessary to apply for a final decree in the terms of O. XXXIV, r. 5.

Thus, the suit before us was not really an application for preparation of a final decree but an execution application. Consequently, there was no question of abatement, and the only point to decide is whether regarded as an execution application this was within time. It has been argued before us that the terms of the compromise decree were not observed by the judgment-debtor and that there was actually a non-payment of two instalments on the 15th of November, 1918, and that, therefore, the present application which was made on the 14th of November, 1922, was beyond time. But we do not find that there has ever been a failure on the part of the judgment-debtor to pay two instalments. No doubt the instalment due on the 15th of May, 1918, was paid late, that is, on the 19th of May, and the succeeding instalment due on the 15th of November, 1918, was also paid late, namely, on the 23rd of December. But at that time only one instalment was due because the instalment of the 15th of May had been paid and was no longer in default. We find, therefore, that regarded as an application for execution the present application was within time, and we see no reason to amend the decree of the lower Court on a purely technical point.

We, therefore, dismiss the appeal with costs, but as this has been regarded now as an appeal in execution costs will be calculated accordingly.

Z K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1397 OF 1923.

November 3, 1926.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

MUHAMMAD BAKHSH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHADI MUHAMMAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Accounts, suit to recover balance of—Balance struck—Admission—Burden of proof.

Where a party to a suit admits that a balance which contains an acknowledgment that a certain sum of money as due from him was struck by him the burden is shifted on him to prove the circumstances in which he came to execute the balance and to establish the fact that it had been induced by fraud or without a comprehension of accounts or is the result of transactions which cannot be enforced in a Court of law. It is not necessary in such a case for the opposite party to prove each and every item of the account before the striking of the balance. [p. 61, cols. 1 & 2.]

Second appeal from the decree of the Additional Judge, Lahore, dated the 5th March, 1923.

Messrs. *Tirath Ram* and *Muhammad Amin*, for Sheikh *Abdul Qadir*, K. B., for the Appellants.

Dr. *Shuja-ud-din*, for the Respondents.

JUDGMENT.

Broadway, J.—The Firm Muhammad Bakhsh-Karm Ilahi sued the Firm of Shadi Muhammad-Muhammad Bakhsh for a sum of Rs. 3,259 claiming that that amount was due as a result of certain transactions between the two firms as evidenced by the account-books. Subsequent to the filing of the suit a sum of Rs. 314 was said to have been paid by the defendant firm to the plaintiff firm and consequently the actual

amount claimed was Rs. 2,945-3-0. The parties are *Khojas* of Kasur in the District of Lahore and are related to each other. One of the defendants is an uncle of one of the plaintiffs. The entries in the account-books of the plaintiffs are mainly in the handwriting of the defendant Muhammad Bakhsh who is the uncle. There are two or three balances struck, some signed by both the defendants, the last one being written by Muhammad Bakhsh and signed by Shadi Muhammad. The Courts below dismissed the plaintiffs' suit on the ground that the onus of proving the correctness of the accounts had not been discharged by the plaintiffs.

With regard to the first balance of Rs. 1,841-6-0, while it was admitted that the defendants had struck this balance, the Courts below held that it was necessary for the plaintiff firm to prove each and every item of that account before the striking of the balance. In doing so the learned Courts have lost sight of the principle laid down by a Full Bench of this Court in *Ram Chand* v. *Chhunun Mal* (1), where it was held that "where an unregistered document, the execution of which is admitted or proved, contains an admission of the payment of the consideration, the onus lies on the person executing the document to prove that what he himself admitted to be true was, as a matter of fact, false and that he did not receive the consideration." In this case all the former decisions of this Court as well as authorities from other High Courts were considered and carefully weighed. Admittedly this balance of Rs. 1,841-6-0 was struck by the defendants and signed by both of them. In it that amount is acknowleged as due to the plaintiff firm. All that the plaintiff firm was called upon to do was to prove that this balance had, as a matter of fact, been struck by the defendants. This they have admittedly done. It was then for the defendants to prove the circumstances in which they came to execute that balance and to establish the fact that it had been induced by fraud or without a proper comprehension of the accounts, etc.

The next item for consideration is one of Rs. 1,857-1-9. This is signed by both the defendants and they acknowledged the fact that this amount is due on account of losses in connection with certain cotton transactions. This item has been disallowed by the Courts below on the ground that there was no proof of the actual delivery of the cotton. Here again the principle referred to above has been entirely lost sight of. Both the defendants having admitted in writing that this amount was due on account of losses incurred in connection with dealing in cotton it was for them to establish that the transaction was a *badni* one or one which could not be enforced in a Court of law and that, therefore, they were not liable to pay that amount, their admission notwithstanding. It has been urged by Dr. Shuja-ud-din for the respondent firm that the suit was one on a balance and that it was not maintainable. An examination of the plaint shows beyond question that the suit is not one on a balance. It is clearly a suit for the payment of money due as a balance resulting out of certain dealings which had extended over a definite and stated period. The balances struck have been referred to merely as pieces of evidence in the case. This view is supported by the authorities cited by Dr. Shuja-ud-din which need no discussion. He then asked that the case should be remanded in order that the defendants-respondents should be given an opportunity to produce evidence rebutting the presumptions arising out of their admissions. It appears that issues have been correctly settled, parties have throughout been fully aware of what they had to prove and if the defendant firm lost sight of the fact that the onus of rebutting the plaintiffs' evidence was on them that is not, in my opinion, a sufficient ground to remand the case in order that they might have a second opportunity of rebutting the plaintiffs' evidence. In my judgment, the decision of the Courts below is erroneous owing to the fact that they have taken a wrong view on the question of the onus in this case.

I would, therefore, accept the appeal and grant the plaintiffs a decree for the amount claimed with costs throughout.

Zafar Ali, J.—I concur.

Z. K. *Appeal accepted.*

(1) 88 Ind. Cas. 301; 6 L. 470; 26 P. L. R. 369; 2 L. C. 85; A. I. R. 1925 Lah. 471; 7 L. L. J. 306.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE NO. 340 OF 1924.
November 18, 1926.
Present:—Mr. Justice Mukerji.
In the matter of ALLAHABAD UNION BANK, LTD. (IN LIQUIDATION)
versus
JAGESHAR PRASAD SHUKUL.

Banker and customer—Money deposited with Bank to be lent out on security—Depositor, whether secured creditor.

J. having some money to spare for investing in loans handed over the money to a Bank and received a note-book in which it was stated that the money was for safe custody. As a matter of agreement and practice, however, *J.* used to secure borrowers who would agree to pledge ornaments by way of security. The borrower was taken by *J.* to the manager of the Bank, the ornaments were kept by way of security, and money was advanced on interest out of which a certain share was paid to *J.* No money of *J.* used to be lent out by the Bank without the security of ornaments. When a man came to redeem his ornaments *J.* used to go to the Bank with him and the ornaments were released on payment:

Held, that *J.* occupied the position of a secured creditor of the Bank.

Mr. *H. K. Mukerji*, (Liquidator), appeared in person, for the Bank.

JUDGMENT.—Mr. Jageshar Prasad Shukul states that the nature of the transaction between him and the Bank was like this. Jageshar Prasad having some money to spare for investing in loans he handed over the money to the Union Bank and received a note-book in which it was stated that the money was for safe custody. As a matter of agreement and practice, however, Mr. Jageshar Prasad used to secure borrowers who would agree to pledge ornaments by way of security. The borrower was taken by Jageshar Prasad to the Manager of the Bank or he would go to the Manager of the Bank with a note from Mr. Jageshar Prasad. The ornament was kept by the Bank by way of security and money was advanced on an interest of 12 per cent. per annum. Out of this interest Jageshar Prasad used to get 9 per cent. and the Bank 3 per cent. No money of Jageshar Prasad used to be lent out by the Bank without any security of ornaments. Similarly when a man came to redeem his ornaments he would either take Jageshar Prasad to the Bank or take a note of his to the Manager of the Bank and on payment the ornament would be released.

Mr. Harendra Krishna Mukerji, Official Liquidator, states that this is a correct representation of the transaction. Mr. Jageshar Prasad and Mr. Mukerji are also agreed that in the pass-book given to Mr. Shukul the book numbers of transactions by which money was lent on security of ornaments used to be noted and afterwards a slip of paper used to be given to Mr. Jageshar Prasad on which were entered the particulars of the transactions of the loans entered into on his behalf by the Bank.

The question under the circumstances is whether Mr. Shukul is to be treated as a secured creditor or whether he should rank as an ordinary creditor of the Bank.

No Counsel appears for Jageshar Prasad and I have heard Mr. Harendra Krishna Mukerji on behalf of the Bank.

In my opinion Mr. Shukul is in the position of a secured creditor. The reasons are these. His money was not at the disposal of the Bank like that of any other customer. Jageshar Prasad's money was always secured on a pledge of ornaments and the transactions were all entered into with the consent and approval of Mr. Shukul. It is true that the ornaments over which the money of Mr. Shukul was secured did not belong to the Bank. But if we look into the spirit of the transaction we see that Jageshar Prasad had the security of ornaments and he could never lose his money so long as the ornaments were available. It is common ground that Kedar Nath eventually disposed of the ornaments in a way detrimental to the interest of Mr. Shukul but that does not make any difference in principle. Kedar's act was in breach of confidence.

Holding as I do that Mr. Jageshar Prasad is a secured creditor I direct that he shall rank as such. No Counsel is appearing and, therefore, there is no order as to costs.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1629 OF 1923.
May 4, 1926.
Present:—Mr. Justice Devadoss.
AJAGAR HAZAR SAHEB AND OTHERS—DEFENDANTS—APPELLANTS
versus
CHEDALAVADA ANNAMMAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Gift—Onerous gift—Discharge of debts and maintenance of donor by donee—Gift, whether revocable—Gift to non-Muhammadan—Muham-

madan Law, whether applicable—Delivery of possession, necessity of—Gift of equity of redemption, validity of.

A gift by a Muhammadan on account of natural love and affection is revocable. But, where the gift is burdened with something to be done by the donee, and if the donee does that which is required by the donor to be done, the gift becomes irrevocable. [p. 64, col. 1.]

Casamally Jairajbhoy v. *Currimbhoy Ebrahim* (1), followed.

Where a donee was directed under a deed of gift to pay off the debts of the donor and look after and maintain the donor and at least for 10 or 12 years the donee so looked after him attending to his creature comforts and maintaining him, and also paid off the debts as required, the gift cannot be revoked by the donor. It is immaterial that the debts were paid out of the property gifted by the donor himself. [p. 64, cols. 1 & 2.]

Where a gift is made by a Muhammadan, the mere fact that the donee is a person belonging to a different persuasion, by itself, is not sufficient, to take the gift out of the ordinary incidents of the Muhammadan Law relating to gifts. [p. 65, col. 1.]

Under the Muhammadan Law delivery of possession is necessary in order to make a gift valid. By possession in this connection is meant such possession as the nature of the subject of the gift is capable of and the question, whether there has been a complete delivery or not in a particular case is a question of fact to be determined with regard to the intention and the contract of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises forming the subject of the gift and that there should be a formal entry on the part of the donee. [p. 65, cols. 1 & 2; p. 66, col. 2.]

If the intention of the donor is clear that the donee should have possession of the property, the mere fact that the donor happened to live in the house which was the subject of the gift is not sufficient to make the possession of the house that of the donor. [p. 65, col. 2.]

Mandy Abdul Rahim Saheb v. *Hussain Saheb* (6), *Alla Pichai Tharaganar* v. *Mahomad Mohideen Tharaganar* (7), relied on.

A gift of the equity of redemption by a Muhammadan is valid in Muhammadan Law, where the donee himself redeems the property. [*ibid.*]

A deed of gift must be looked at as a whole. The fact that some of the items of gift constitute the equity of redemption in certain properties does not affect the validity of the gift, where delivery of possession is made to the donee in respect of the other items and redemption is effected in respect of the equity of redemption by the donee himself. [p.66, col. 2.]

Chandsaheb Kashim Saheb v. *Gangabai Vishnu* (11), *Hashimbi Yakubsaheb Beg* v. *Ajamatbi Maktumsaheb* (13), relied on.

Second appeal against the decree of the District Court, Nellore, in A. S. No. 78 of 1922, preferred against that of the Court of the Additional District Munsif, Nellore, in O.S. No. 311 of 1919 (O. S. No. 631 of 1918, Principal District Munsif's Court, Nellore).

Mr. *P. Chenchiah*, for the Appellants.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT—The first point raised by Mr. Chenchiah for the appellants is that the plaintiff had parted with her right to the property under Ex. II and, therefore, she had no right to bring the suit. This point was not specifically raised in the first Court but was raised in a way in the grounds of appeal to the lower Appellate Court. The learned District Judge held that the appellants were not entitled to raise this point in appeal as they did not put forward this case in the lower Court. The defendants did not rely upon want of title in the plaintiff in their defence to the suit. During the examination of the witnesses this point was brought out and the plaintiff was asked whether she had executed Ex. II to which she replied she did and that it did not take effect. It is not proper for the appellants now to raise this contention at this stage, for that would depend upon facts which should have been proved in the Court of first instance. Granting that Ex. II was executed by the plaintiff with the intention to convey title, yet, inasmuch as she continued to be in possession of the property till 1914, when she complained of trespass by the defendants Nos. 1 to 3 in this suit, it cannot be said that the suit is unsustainable, for she is entitled to bring the suit merely on a possessory title and the defendants Nos. 1 to 3 who were only trespassers could not plead the title of the true owner and the other defendants are persons who obstructed the delivery of possession and, therefore, I hold that the suit is not incompetent by virtue of the execution of Ex. II. The plaintiff's contention, no doubt, was that it was a nominal transaction and was never given effect to. Defendant's own witness D. W. No. 2 says that the document was not acted upon. I, therefore, disallow this contention.

The next point urged is that Ex. B, the deed under which the plaintiff got a gift of the property from a Muhammadan, was only a deed of management and, therefore, the plaintiff is not entitled to the property. From the recitals in Ex. B it is quite clear that the donor did intend that the donee should have full title to the property and that the property should be hers and not the donor's. Under Ex. B the donor stipulated that the donee should protect him during his lifetime and maintain him and the recital in the document is that she is to have absolute right over the property subject to her maintaining him. This contention is

not seriously pressed and it is not sustainable.

The most important contention in the case is that a gift under the Muhammadan Law is always revocable and that the donor in this case revoked the gift by a document Ex. IV nearly 8 years after the date of Ex. B. A very elaborate and learned argument was addressed to me on this point by Mr. Chenchiah. The principle deducible from the authorities is that if the gift is one made by a Muhammadan on account of natural love and affection he may revoke it. But, where the gift is burdened with something to be done by the donee, and if the donee does that which is required by the donor to be done, the gift becomes irrevocable. In this case the donee was asked to pay off the debts and look after the donor and maintain him and the evidence is that at least for 10 or 12 years the plaintiffs looked after him attending to his creature comforts and maintaining him. It is also in evidence that she was able to pay off his debts. In these circumstances, the question is whether the gift is revocable or irrevocable. Mr. Ameer Ali in his book on Muhammadan Law, Vol. I, page 165, discusses the question and observes: "Where the condition has not that effect, where it forms in fact, the consideration for the grant, and the gift is made on the express stipulation that the donee should do something or abstain from doing something or should give something in return for the gift, the contract is valid in its entirety. For example, if *A* were to convey *B* a property in consideration of *B* maintaining him during his lifetime or paying him, and after his death to his heirs, a fixed allowance, there is absolutely nothing illegal in the contract as the condition does not make the contract nugatory; and if the grantee obtains possession of the property upon that contract, the grantor or his heirs would have the right to enforce the performance of the covenant relating to the consideration against the grantee and all persons deriving title under him." In this case the grantor purported to cancel the gift by a document Ex. III, dated 21st April, 1908. In that, he did not specifically complain that he was not maintained, and by another document, dated 30th September, 1908, he cancelled the so-called cancellation deed, and by Ex. IV, dated 3rd August, 1912, he purported finally to cancel the gift deed. The question is, did the plaintiff act up to the terms of the gift deed Ex. B? If so the gift became irrevocable and the donor was not justified after the donee had fulfilled her part of the contract in revoking the gift made by him in consideration of the donee looking after him and attending to his creature comforts and maintaining him. In this view, I do not think it necessary to consider in detail the various cases quoted by Mr. Chenchiah as well as by Mr. Somayya.

With regard to payment of debts the contention of Mr. Chenchiah is that they were paid out of the property gifted to the plaintiff. Whether that was so or not and whether as contended by Mr. Somayya the plaintiff put in her own funds for the purpose of discharging the debts is immaterial, she was asked to discharge the debts and she did what she was required to do. It is immaterial wherefrom the fund came, for it was not stipulated that she should pay the debts out of her separate property.

With regard to the general power of a Muhammadan to revoke a gift, Beaman, J., in *Casamally Jairajbhoy* v. *Currimbhoy Ebrahim* (1) observes: "It is true that this general rule like everything else in the Muhammadan Law which has yet come under my analysis, is open to innumerable exceptions many of which appear to conflict in principle with the main rule." And fulfilment of one of the terms of the gift deed by the donee brings the case within one of the exceptions to the general rule: see *Abirjan Bewa* v. *Sheikh Kabil* (2).

It is urged by Mr. Somayya that when the gift is made by a Muhammadan to a follower of another persuasion, the Muhammadan Law relating to gifts is not applicable to such a case, and he relies upon a passage in Mr. Tyabji's book on Principles of Muhammadan Law, s. 354 at page 388. There the learned writer lays down:—

"Where a Mussalman makes a gift to a donee who is governed by a law of property other than Muhammadan Law the subject of gift...may not continue to be subject to the incidents of Muhammadan Law after the completion of the gift." He relies upon three cases in support of this position; if the learned author meant to say that the moment a Muhammadan makes a gift to a non-Muhammadan the ordinary principles governing gifts by Muhammadans do not apply to such a gift, I am not prepared to

(1) 12 Ind. Cas. 225; 36 B. 214 at p. 248; 13 Bom. L. R. 717.

(2) 54 Ind. Cas. 542.

hold that the authorities relied upon by him do support him. After the gift takes effect and the donee gets possession of the property given, the law that governs the devolution of the property would be the personal law of the donee, but I am not prepared to hold at this stage that the mere fact that the donee is a person belonging to a different persuasion, by itself, is sufficient to take the gift out of the ordinary incidents of the Muhammadan Law relating to gifts.

The next contention urged by Mr. Chenchiah is that no possession was given in this case and, therefore, the gift did not become a valid gift. No doubt, under the Muhammadan Law delivery of possession is necessary in order to make a gift valid. In this case the evidence is that the plaintiff was living with the donor for a number of years and she was, no doubt, his mistress. She was a married woman with children and she evidently forsook her husband and children and lived with a Muhammadan who was an old man in consideration of his giving something to her and after she lived with him for a number of years he made a gift of his property to her. After making the gift he, no doubt, lived with her in the house. Mr. Chenchiah's argument is that inasmuch as he lived with her, it must be held that he did not deliver possession to her. We have to see what the intention of the donor is. From Ex. B it is quite clear that he divested himself of all his property and that he wanted to be maintained by the plaintiff. That being so, can it be reasonably contended that his mere living in the house meant that she had no possession of the house? When a man makes a gift of property to a near relation who is living with him the mere fact that he happens to live with him after the gift is made is not a sufficient circumstance to hold that possession did not pass. Each case would depend upon its circumstances. If the intention of the donor is clear that the donee should have possession of the property, the mere fact that the donor happens to live after the date of the gift with the donee in the house which is the subject of the gift would not by itself entitle the Court to hold that possession had not passed and that possession remained with the donor. As I have said, from the facts of this case and from the nature of Ex. B, and from the subsequent documents to which the donor was a party such as Exs. III and F, possession of the house as well as other properties was given to the plaintiff and she continued to be in possession and *pattah* for the lands was transferred in her name. From the evidence it is clear that she collected and took the produce to the house. In this view of the facts it is not necessary to consider in detail the cases quoted on both sides. Mr. Chenchiah relies upon *Bava Saib* v. *Mahomed* (3) and *Vahazullah Sahib* v. *Boyapati Nagayya* (4), as supporting his contention. In *Bava Saib* v. *Mahomed* (3) the gift was by a woman to her nephew and it was held that the mere fact that a gift was made by a registered instrument would not make it valid. In *Kandath Veettil Bava* v. *Musaliam Veettil Pakrukutti* (5) a Muhammadan mother gave to her daughter house and lands and put her in possession of the lands and got the name changed in the register. It was held that the mere fact that the mother continued to reside with her daughter was not sufficient to constitute a non-delivery of possession so as to invalidate the gift. In *Mandy Abdul Rahiman Saheb* v. *Hussain Saheb* (6) it was held that the question whether there has been a complete delivery or not in a particular case is a question of fact to be determined with regard to the intention and contract of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises which is the subject of the gift and that there should be a formal entry on the part of the donee. In *Alla Pichai Tharaganar* v. *Mahomed Moideen Tharaganar* (7) it was held the mere fact that the donor happened to live in the house which was the subject of the gift would not be sufficient to make the possession of the house that of the donor.

The next contention is that there cannot be a gift of the equity of redemption, as for a valid gift by a Muhammadan there must be actual and physical delivery of possession of the property which is the subject of the gift. A mortgagor out of possession cannot deliver possession to the donee. In this case only two items (1 and 2) were in the possession of the donor. With regard to possession of these two

(3) 19 M. 343; 6 Ind. Dec. (N. S.) 944.
(4) 30 M. 519; 17 M. L. J. 562.
(5) 30 M. 305; 2 M. L. T. 180.
(6) 16 Ind. Cas. 616; 23 M. L. J. 734; 12 M. L. T. 305.
(7) 23 Ind. Cas. 520; 15 M. L. T. 216.

items, it is urged that it was not possible for the donor to give possession because the mortgagee was in possession and, therefore, the gift did not take effect with regard to them. In *Fakir Nynar Muhamed Rowther* v. *Kandasawmy Kulathu Vandan* (8), Abdur Rahim, J., observes at page 130*: "It is, however, to be observed that so far as the text already referred to is concerned, its requirement would be satisfied if such possession is given to the donee as the nature of the subject of the gift admits of" Where the estate is gifted by a Muhammadan and it is not possible to give physical possession, if the donee is allowed to collect the rents and profits, that would be sufficient delivery of possession under the Muhammadan Law. It was held by the Privy Council in *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (9) that the land in the possession of the tenants could be the subject of a valid gift and all that is required by the donor in order to perfect the gift is to give such possession as the property is capable of. If the property is in the possession of tenants and if the donee is unable to receive the rents and profits of the property even then the gift would be good; and in the case of a mortgage when the term expires or when the time for redemption accrues, if the property is redeemed by the donee I think that would be sufficient in order to validate the gift under the Muhammadan Law. In this case there is evidence that the plaintiff redeemed the property before 1908. In *Tara Prasanna Sen* v. *Shaudi Bibi* (10) a Muhammadan mortgaged some of the lands to a third person putting the mortgagee in possession and while the mortgagee was in possession he made an oral gift to a person and got that person's name recorded in the Settlement Record, and also put him in physical possession of one of the properties, namely, the homestead. A Bench of the Calcutta High Court held that the gift was valid in law and that in order to properly appreciate the judicial idea of gift as conceived by Muhammadan Jurists, it is to be borne in mind that the gift is considered a class of contract but as it is a voluntary contract without consideration, it is not enforceable unless accompanied by possession in which case the devolution or transfer of right to the property becomes complete. By possession in connection with the law of gift is meant such possession as the nature of the subject of the gift is capable of.

A further argument is put forward by Mr. Somayya to meet this contention, namely, that when one of several items are delivered the whole gift becomes valid. The answer to that by Mr. Chenchiah is that the Court must distinguish between that portion of the gift which is valid and the portion of the gift which cannot be valid under Muhammadan Law. But in all these cases the Court should take such a view as would be consonant with the condition and state of society existing. Where a person makes gift of certain items some of which he cannot at once deliver into the hands of the donee, it would not be right to hold that the whole gift is invalid or that portion of gift relating to the property which could not be delivered into the hands of the donee is invalid. It would be against the clear intention of the donor to declare that a portion of the gift is invalid when he intended that the whole of it should be valid. I think this is the principle of the recent decisions of the Bombay High Court in *Chandsaheb Kashimsaheb* v. *Gangabai Vishnu* (11), where it was held that the deed of gift must be looked at as a whole, and that so viewed the gift of the equity of redemption coupled with the completed gift of the remaining lands was a valid gift in law. In that case a Muhammadan female who owned five lands made a gift of them to the plaintiff's father. At the date of the gift she had possession of only two lands and a moiety of the third land. These were immediately put in possession of the donee. The remaining lands had been mortgaged by her to the defendants who retained their possession under the mortgage. The same view was held in *Mohammad Abdul Ghani Khan* v. *Fakir Jahan Begam* (12). In *Hashimbi Yakubsahib Beg* v. *Ajmatbi Maktumsaheb* (13) the donee got possession of one item through the mortgagee after the donor's death. But he was given possession of the other items of

(8) 14 Ind. Cas. 993; 35 M. 120.

(9) 11 A. 460; 16 I. A. 205; 5 Sar. P. C. J. 433; 6 Ind. Dec. (N. S.) 721.

(10) 62 Ind. Cas. 481; 25 C. W. N. 761; 49 C. 68; A. I. R. 1922 Cal. 422.

*Page of 35 M.—[Ed.]

(11) 64 Ind. Cas. 21; 45 B. 1926; 23 Bom. L. R. 563.

(12) 68 Ind. Cas. 254; 44 A. 301; 25 O. C. 95; 31 M. L. T. 21; 9 O. L. J. 369; 43 M. L. J. 453; 24 Bom. L. R. 1268; 27 C. W. N. 53; A. I. R. 1922 P. C. 281; 20 A. L. J. 994; 37 C. L. J. 1; 49 I. A. 195 (P. C.).

(13) 80 Ind. Cas. 208; 48 B. 396; 26 Bom. L. R. 337; A. I. R. 1926 Bom. 410.

property on the date or soon after the date of the gift. It was held that the gift of all the items is valid including that over which there was a mortgage at the time of the gift and which was redeemed after the donor's death. In this case the redemption was in the lifetime of the donor and I think the principle of these decisions is applicable to the present case and, therefore, this contention on behalf of the appellants must fail.

In the result the appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL CASE No. 485 OF 1926.
December 14, 1926.
Present:—Mr. Justice Jai Lal.
PAHLAD RAI—DEFENDANT—PETITIONER
versus
SHIV RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 22—Jurisdiction, question of, decided against defendant—Transfer application by defendant, whether barred—Plaintiff's right to choose forum—*Balance of convenience, meaning of.*

Section 22, Civil Procedure Code, does not absolutely bar an application for transfer by the defendant where he has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed. But, where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the transfer of the case will not be allowed. [p. 69, col. 2.]

National Engineering Co., Karachi v. *Rattan Engineering Co., Lahore* (1), distinguished.

Firm BehariLal-Kanhaya Lal v. *Official Receiver, Insolvents' Estates, Lahore* (2), explained and followed.

It is the right of the plaintiff to choose the Court in which to institute the suit and the Court should not interfere with this right except on very strong grounds. In considering the question of balance of convenience for purposes of transfer, it is not the convenience of the defendant only that has to be considered; but the convenience of the plaintiff deserves primary consideration. [*ibid.*]

Petition, under s. 22, Civil Procedure Code, for transfer of the Suit No. 24 of 1921 pending in the Court of the Senior Subordinate Judge, Ludhiana, to the Court competent to try the same in Burma.

ORDER.

Jai Lal, J.—(*November 30, 1926*).—This is an application under s. 22 of the Civil Procedure Code for transfer of two Suits Nos. 24 of 1921 and 64 of 1922 pending in the Court of Senior Subordinate Judge, Ludhiana, to the Courts competent to try the same in Burma.

A preliminary objection is taken on behalf of the plaintiffs-respondents that the application does not lie as it has not been made at the earliest opportunity. It is alleged that issues have already been settled in the case. It appears that after the institution of the suits the petitioner did not put in an appearance in the trial Court but preliminary pleas including an objection to the jurisdiction of the Court, were filed by other defendants in one suit and written statements including preliminary objections and defence on the merits were filed in the other suit. The Court framed issues in both the cases which arose out of such objections and pleadings but proceeded to try the issue relating to jurisdiction first and held that it had no jurisdiction to try the suits and returned the plaints for presentation to the proper Court.

Appeals filed by the plaintiffs in this Court were accepted, the present petitioner having appeared to oppose them. Then Letters Patent Appeals were filed by him which were dismissed at the end of April, 1926. It is consequently contended by the petitioner that it was only at the end of April last that it was finally decided that the suits were cognizable by the Civil Courts both in Ludhiana and in Burma. It also appears that formerly the petitioner was impleaded in the two suits as a defendant in his capacity as an executor of the Will of Indar Singh to whose estate in this Province the present suits relate, and it was after the decision of the Letters Patent Appeals in this Court that he was impleaded in his personal capacity. It is, therefore, contended by his learned Counsel in reply to the preliminary objection that the petition has been presented (*a*) immediately after the decision of the Letters Patent Appeals and (*b*) soon after the petitioner was impleaded as a defendant in his personal capacity. It is explained that according to the Will whereby he was appointed an executor and which has duly been proved in Burma the petitioner is concerned only with the property of the deceased situated in that Province, and that he, as an executor, has nothing to do with the property in the Punjab and was, therefore, not directly interested in the suits as formerly framed but that he is very much interested now that he has been impleaded

in his personal capacity. Counsel for the respondents relied upon *National Engineering Co., Karachi* v. *Rattan Engineering Co, Lahore* (1) in which it was held that it is only when a suit may be brought in the one or other of the two Courts, both of which have jurisdiction, that an application may be made under s. 22 of the Civil Procedure Code and that where the jurisdiction of one of the Courts is denied an application for transfer under these sections cannot lie. It appears that in that case the defendant had alleged in his petition for transfer that the Court in which the suit had been instituted had no jurisdiction to entertain it, and that in any case owing to the peculiar facts of the case, it could more conveniently be tried in another Court. It was held that on the allegations made by the petitioner his application did not lie. In the case before me though an objection was raised to the jurisdiction of the Ludhiana Court to entertain the suits the matter has now been finally decided by this Court and the present petition is made on a clear assumption that they are cognizable by the Senior Subordinate Judge of Ludhiana. The case relied upon by the Counsel for the respondent is, therefore, distinguishable from the present case. He also cited *Firm Behari Lal-Kanhaya Lal* v. *Official Receiver, Insolvents' Estates, Lahore* (2), where it was held that the provisions of s. 22, Civil Procedure Code, are mandatory and an application under the section must be made, in a case where issues are settled, at or before such settlement is made. The facts of that case are somewhat similar to the present one and it was held that after an objection to the jurisdiction of the Court to entertain the suit has been decided against the defendant, his application to transfer the case should not be entertained, as such an application almost amounts to an attempt to get this Court to exercise its revisional powers and thus evade the decision of the question of jurisdiction that the Court has arrived at against the petitioner.

There is this distinguishing feature in the present case that the defendant has not yet pleaded to the plaint and no issues have yet been framed between him and the plaintiff and I do not understand the learned Judge to hold that under no circumstances an application under s. 22 would lie if the defendant had raised an objection as to the jurisdiction of the Court and failed thereon. In my opinion, all that the learned Judge held was that under such circumstances, this Court should be very reluctant to grant such an application. Section 22 does not absolutely bar an application for transfer where the defendant has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed. The matter has, however, an important bearing on the merits of the application though it does not present an absolute bar to the petition for transfer. I, therefore, disallow the preliminary objection and order that a very early date be fixed for the hearing of the application on the merits.

Mr. *C. Bevan Petman* and Lala *Badri Das*, R. B., for the Petitioner.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—This order will be read in continuation of my order of the 30th November, 1926. I have now heard Counsel on the merits of the applications under s. 22 of the Civil Procedure Code, for the transfer of the two Suits Nos 24 of 1921 and 64 of 1922 from the Court of the Senior Subordinate Judge, Ludhiana, to Burma. The dispute relates to the estate of one Indar Singh who died in February, 1920, leaving property both moveable and immoveable in Ludhiana and also in Burma. It appears that proceedings for grant of a Succession Certificate were instituted in Burma and on the 2nd March, 1921, Shib Ram, a brother of the deceased instituted a suit in the Court of the Senior Subordinate Judge, Ludhiana, praying for a declaration that he was a member of a joint Hindu family with the deceased at the time of his death and was, therefore, entitled to all the property in Ludhiana and in Burma by right of survivorship. This is Suit No. 24 of 1921. In the meanwhile during the pendency of the proceedings for grant of a Succession Certificate a Will of the deceased was produced in Court on the 16th April, 1921, and Probate was granted in respect thereof some time in 1923 to Pahlad Rai, the petitioner before me. On the 11th March, 1922, Shib Ram instituted Suit No. 64 of 1922 praying for the administration of the estate of the deceased Indar Singh claiming, *inter alia*, that he was entitled to the estate by right of survivorship as a member of a joint Hindu family and

(1) 71 Ind. Cas. 268; A. I. R. 1923 Lah. 288;
(2) 78 Ind. Cas. 608; A. I. R. 1925 Lah. 175; 1 L. C. 319.

that the Will propounded by Pahlad Rai was a forgery and was invalid. Pahlad Rai and *Musammat* Ishari the widow of Indar Singh were impleaded as defendants in the suit.

It appears that Pahlad Rai did not appear in pursuance of summons served upon him and proceedings were *ex parte* against him. *Musammat* Ishari raised objections to the jurisdiction of the Senior Subordinate Judge at Ludhiana which were allowed. The plaintiff thereupon filed an appeal in this Court. The matter was finally settled by a Division Bench of this Court on a Letters Patent Appeal [*Shiv Ram* v. *Prahlad Rai* (3)] when it was held that the Senior Subordinate Judge, Ludhiana, had jurisdiction to entertain the suit. Pahlad Rai appeared for the first time in this Court to support the contention of *Musammat* Ishari as to the want of jurisdiction of the Ludhiana Court to try the suit. After the Letters Patent Appeal had been decided against the defendants Pahlad Rai filed his pleadings on the 16th August, 1926, and on the same day asked the Court to stay proceedings as he intended to move this Court for the transfer of the suits and then presented the present petitions.

In my previous order I mentioned that the Counsel for the petitioner stated that his client was originally impleaded as an executor and that he was impleaded in his personal capacity only after the decision of the Letters Patent Appeal, and further that as an executor he had no direct interest in the suit but in his personal capacity he was very much affected by the same. This statement of the learned Counsel was not challenged at the hearing by Mr. Fakir Chand who appeared for the respondent, but, after I had announced my order of the 30th November disallowing the preliminary objection by Mr. Fakir Chand he presented an application for review stating that the above allegations by the Counsel for the petitioner were wrong. Mr. Bevan Petman frankly admitted before me that the statements made by him on the previous occasion were wrong and were not supported by the record and were made by him under instructions from his client. That, however, does not absolve Mr. Fakir Chand from his duty to challenge them at the hearing. It is, therefore, very doubtful whether, under the circumstances, there is any sufficient ground for review of my previous order. Be that as it may, I expressly reserved the question of the effect of the delay in making the present application and of the objection to jurisdiction for consideration when deciding it on the merits. I merely held before that the fact that the petitioner had objected to the jurisdiction of the Senior Subordinate Judge at Ludhiana did not in law disentitle him to present an application for transfer of the suits. The facts now brought to my notice, however, materially affect the question whether an order transferring the suits should or should not be made. Moreover, *Firm Behari Lal-Kanhaya Lal* v. *Official Receiver, Insolvents' Estates, Lahore* (2) fully covers this case because in the absence of any new circumstances which entitle the petitioner to present this application, this is merely an attempt to get an order from this Court which would enable the petitioner to evade the question of jurisdiction which a Division Bench of this Court has decided against him. The petitioner had ample opportunity during the four and a half years that have elapsed between the institution of the suit and the present petition to get the relief that he is now applying for. His conduct in this case is such that the Court ought to hesitate in granting him the relief prayed for even if there be ground for such relief. But I am not satisfied that on the merits there is any good ground for transferring the suits from the Court of the Senior Subordinate Judge, Ludhiana. The property of the deceased is situated both in Ludhiana and in Burma, it may be that there is more property in Burma than in Ludhiana, still, it is the right of the plaintiff to choose the Court in which to institute the suit and this Court ought not to interfere with this right except on very strong grounds. I am unable to hold that the balance of convenience is in the transfer of the suits to Burma. The principal question involved being whether the deceased and the plaintiff were members of a joint Hindu family, the witnesses are more likely to be in Ludhiana where the original home of the parties is. Moreover, in considering the question of balance of convenience it is not the convenience of the defendant alone that has to be considered. The plaintiff has, in my opinion, to be primarily considered as initially it is his right to

(3) 96 Ind. Cas. 691; 2 L. C. 237; A. I. R. 1926 Lah. 503; 27 P. L. R. 398.

choose the Court in which to institute the suit. I am, therefore, of opinion that the application for transfer has been unduly delayed, that an order of transfer at this stage will mean evasion of the decision by a Division Bench of this Court, and on the merits there are no good grounds for transferring the suits.

I dismiss this application with costs.

R. L. *Application dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION No. 520 OF 1926.
(CIVIL APPEAL No. 945 OF 1926).
December 21, 1926.
Present:—Mr. Justice Jai Lal.

KHAZAN SINGH AND ANOTHER—DEFENDANTS—PETITIONERS
versus
THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—RESPONDENT.

Sikh Gurdwaras Act (VIII of 1925), ss. 7 (3), 8, 9, 10, 16, 31 (2)—Notification under s. 7 (3), effect of, when no petition is filed under s. 8 or s. 10—Government's power to declare Gurdwara not a Sikh Gurdwara—Notification under s. 10—Stay of proceedings in relation to Gurdwara in Civil Courts after notification under s. 7 (3).

Where a notification has been issued by the Local Government under s. 7 (3) of the Sikh Gurdwaras Act and no petition has been presented under s. 8 of the Act by the Secretary of State or by any private individual alleging that the Gurdwara is not a Sikh Gurdwara, the Government have no option but to issue a notification under s. 9 declaring the Gurdwara to be a Sikh Gurdwara. [p. 71, col. 1.]

Similarly, where there is no petition under s. 10 of the Gurdwaras Act by any person claiming a right, title or interest in any property in the list published under s. 7 (3) of the Act, the Government are bound to publish a notification under the same section specifying the rights, title or interest in the property in respect of which no claim has been made and such a notification is conclusive proof of the fact that no claim has been made. [p. 71, col. 2.]

After the issue of a notification under s. 7 (3) of the Gurdwaras Act all proceedings in the Civil Courts of the nature mentioned in s. 31 (2) of the Act must be stayed unless the Tribunal appointed under the Act decides under s. 16 that the alleged Gurdwara is not a Sikh Gurdwara. [*ibid.*]

Petition, under O. XLI, r. 5, Civil Procedure Code, for stay of execution proceedings pending the decision of the appeal case noted above by the High Court.

[Appeal against the decision of the Senior Subordinate Judge, Ambala, dated the 22nd January, 1926, in Original Suit No. 77 of 1923.]

Dr. *Gokal Chand Narang*, for the Petitioners.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

JUDGMENT.—A decree for possession of the land in dispute was granted by the Senior Subordinate Judge of Ambala in favour of the Secretary of State for India in Council against the defendants. The latter have lodged an appeal in this Court which has been admitted for hearing by a Division Bench. It appears that the decree-holder has applied for the execution of the decree. Two applications have been presented on behalf of the judgment-debtors; one is for the stay of execution under O. XLI, r. 5, and the other is under the provisions of s. 31 (2) of the Sikh Gurdwaras Act, 1925, for the stay of the execution proceedings.

A previous application under O. XLI, r. 5, was dismissed by this Court on the 23rd of April, 1926, on the ground that no action had then been taken in execution and that no sort of grievance had been disclosed. In the present application under that rule it is alleged that the decree-holder has applied for execution of the decree and that the property in suit is the property of a Sikh Gurdwara and that, therefore, unless the execution is stayed the appellant will suffer substantial loss as it would become impossible to maintain the Gurdwara concerned which will pass into the hands of the decree-holder. This, it is alleged, would be nothing short of sacrilege.

The learned Counsel for the petitioners did not address any arguments to me in support of this application. He, however, strenuously urged that the proceedings should be stayed under the Sikh Gurdwaras Act. The learned Government Advocate opposes this application and contends that before the provisions of the Sikh Gurdwaras Act could be applied it must be shown that there was a Gurdwara in existence. It is alleged that initially there was no Gurdwara and that the building which was claimed to be a Gurdwara was demolished in 1925.

It is common ground that an application under s. 7 of the Sikh Gurdwaras Act was made by 50 or more Sikh worshippers of the alleged Gurdwara which was accompanied by a list of property claimed for the Gurdwara and the other details required by the law and also that the Local Govern-

ment published the application along with the accompanying list by a notification on the 5th of July, 1926. It is, however, alleged by the learned Government Advocate that the Local Government has actually declined to issue a notification under s. 9 of the Act declaring the Gurdwara to be a Sikh Gurdwara on the ground that the Government is not satisfied as to the existence of the Gurdwara. An affidavit in support of the allegations made on behalf of the Secretary of State should have been filed before the hearing but I have permitted the Government Advocate to file one now.

Contention of the Counsel for the Secretary of State is and indeed it is conceded by the Counsel for the petitioners, that an application and a notification under s. 7 of the Sikh Gurdwaras Act presuppose the existence of a Gurdwara. The learned Counsel also are agreed that it is open to the Local Government to refuse to publish a notification under s. 7, sub-s. (3) if it is not satisfied as to the existence of the alleged Gurdwara. In the case before me, however, the Local Government did publish a notification under s. 7 and, therefore, the question arises what is the legal effect of the publication of such a notification.

Now s. 8 of the Sikh Gurdwaras Act provided that a counter-application may be made to the Local Government within the time prescribed therein to have it declared that the place asserted to be a Sikh Gurdwara is not such a Gurdwara. Then s. 9 provides that if no petition has been presented in accordance with the provisions of s 8 the Local Government shall publish a notification declaring the Gurdwara to be a Sikh Gurdwara. It is consented by the learned Government Advocate that even if no petition had been presented under s. 8 it was open to the Local Government *suo motu* to decline to publish a notification under s. 9. The Counsel for the petitioners, on the other hand, contends that if no petition is made under s. 8 the Government has no option but to publish the notification under s. 9. In my opinion, it was open to the Secretary of State to present an application under s. 8 and admittedly this has not been done, and, therefore, it is quite clear that whatever powers the Government had to refuse to publish a notification under s. 7, having once done so they were bound to publish a notification under s. 9 if no petition under s 8 had been presented or to take action under the provisions of Part III of the Act if such a petition had been presented.

Section 10 of the Act further provides that any person claiming a right, title or interest in any property in the list published under s. 7 (3) of the Act may forward a petition to the Local Government specifying the nature of the right, title or interest claimed by him and the ground of the claim and that in the absence of such a claim the Local Government shall publish a notification specifying the rights, title or interests in the properties in respect of which no claim had been made and further that such a notification shall be conclusive proof of the fact that no such claim was made. Section 14 of the Act provides that the Local Government shall forward to the tribunal appointed under the Act all petitions received by it under the provisions, *inter alia*, of ss. 8 and 10 and that the tribunal shall dispose of such petitions by order in accordance with the provisions of the Act. My remarks relating to the powers of the Local Government to issue or to refuse to issue a notification under s. 9 apply *mutatis mutandis* to its power to issue or not to issue a notification under s. 10.

Now, s. 31 (2) of the same Act provides that no Court shall continue any proceedings in so far as such proceedings involve any claim relating to a Gurdwara in regard to which a notification has been published under the provisions of sub-s. (3) of s. 7 which could have been made in a petition forwarded to the Local Government under the provisions of s. 10 or s. 11 and was not so made unless and until it has been decided under the provisions of s. 16 that such Gurdwara should not be declared to be a Sikh Gurdwara. This means that after the issue of a notification under s. 7 (3) all proceedings in the Civil Courts of the nature mentioned in s. 31 (2) must be stayed unless the Tribunal appointed under the Act decides under s. 16 that the alleged Gurdwara is not a Sikh Gurdwara. I am bound by these mandatory provisions of the law which fully apply to the present case. The learned Government Advocate then asked me to hold an enquiry as to the existence of the alleged Gurdwara with a view to decide whether the notification of the 5th July was invalid and *ultra vires*. Whatever other remedy the decree-holder may have to have the notification declared invalid or *ultra vires*, I am unable to see

that I can give such a finding in these proceedings. It may be mentioned that in the trial Court the existence of a Gurdwara does not appear to have been denied. I must, therefore, order that the execution proceedings relating to the decree in question be stayed under the provisions of s. 31 (2) of the Sikh Gurdwaras Act. No order as to costs.

R. L. *Execution stayed.*

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 140 OF 1925.

March 9, 1926.

Present :—Mr. Justice Odgers and Mr. Justice Wallace.

In re PUNYA NAHAKO AND OTHERS—PETITIONERS.

Court Fees Act (VII of 1870)—Madras Court Fees (Amendment) Act (V of 1922)—Judgment before amended Act—Review application after amendment—Court-fee leviable—Scale, whether under new Act—Mesne profits, Court-fees on, till date of application, whether payable.

Where a judgment in appeal was passed before the increase in the Court-fees under the Madras Court Fees (Amendment) Act of 1922 came into force, and a review application was put in after the amended Act was passed:

Held, that the Court-fee leviable on such application must be calculated as if the application for review were a Memorandum of Appeal for the relief sought for and that the fee was leviable according to the new scale. [p. 73, col. 1.]

Proceedings, 16th January, 1872 (1), *In re Manohar G. Tambekar* (3), followed.

An application for review praying that the applicant may be relieved from the liability to pay mesne profits under the decree sought to be reviewed, must bear Court-fee on the amount of such mesne profits up to the date of the application. [p. 73, col. 2.]

Brahmayya v. *Lakshminarasimham* (4), *Balaramunaidu* v. *Sangannaidu* (5), relied on.

Petition, under O. XLVII, r. 1, Civil Procedure Code, praying that the High Court will be pleased to review the decree and judgment, dated the 29th February, 1924, passed in S. A. No. 641 of 1921, preferred against that of the District, Court, Ganjam, in A. S. No. 282 of 1919, (O. S. No. 598 of 1917, Principal District Munsif's Court, Berhampore).

Mr. *C. Sambasiva Rao*, for the Petitioners.

The Government Pleader, for the Crown.

ORDER.

Odgers, J.—I agree with the opinion of my learned brother. I see no valid reason why the decision of this Court in 1872 to be found in *Proceedings, 16th January, 1872* (1) which has stood since 1872 should be dissented from. The interpretation put upon the articles in question in *Nanda Lal Agrani* v. *Jogendra Chandra Datta* (2) seems to me to work an obvious injustice. This Court's interpretation of the rule seems also to have found acceptance in Bombay [*In re Manohar G. Tambekar* (3)]. I also agree with my learned brother's remarks on the question of mesne profits.

The fee levied by the office is right.

Wallace, J.—The point for decision in this reference is what is the proper stamp-fee to be levied on the review application in C. M. P. No. 140 of 1925? This was an application for review of a judgment in second appeal. The judgment in that appeal was passed before the increase in the Court-fees under the amended Court Fees Act of 1922 came into force. The review application was put in after that amended Act had been passed. The first question is whether the rate of fee to be levied is under the old Act or under the amended Act. Under Sch. I, Arts. 4 and 5, the Court-fee for application for review of judgment is either the whole or half of "the fee leviable on the plaint or Memorandum of Appeal" and the decision turns on the interpretation of that phrase.

It may be construed in at least four different ways:—

(1) As the fee actually levied on the plaint or Memorandum of Appeal when admitted;

(2) as the proper fee to be levied on the plaint or Memorandum of Appeal at the time of presentation thereof;

(3) as the fee which would have been properly levied on the plaint or Memorandum of Appeal if that had been put in at the time of the presentation of the application for review and

(4) as the proper fee to be levied if the applicant for review were then putting in a plaint or Memorandum of Appeal for the same relief.

As to 1, it seems clear that it is not a proper construction of the phrase. In the case of a suit or appeal in *forma pauperis* no fee is actually levied on admission. Again the Court of Appeal may in certain circumstances increase or decrease the fee

(1) 7 M. H. C. R. App. 1.

(2) 82 Ind. Cas. 297; 28 C. W. N. 403; 29 C. L. J. 222; A. I. R. 1924 Cal. 881.

(3) 4 B. 26; 2 Ind. Dec. (N. S.) 528.

actually paid, and it is clearly more reasonable to suppose that the Legislature meant the fee which was the proper fee to be levied and not the fee actually levied.

As to 2, an adherence to this construction would mean that, even though the review application only related to a small portion of the relief asked for in the plaint or Memorandum of Appeal, the applicant for review would have to pay the full stamp paid on the plaint or Memorandum of Appeal. This again seems to me hardly acceptable. This view, however, has found favour in the Calcutta High Court [see *Nanda Lal Agrani* v. *Jogendra Chandra Datta* (2)] which refused to follow an earlier decision of this Court, *Proceedings, 16th January, 1872* (1), to which I shall allude later on. Such a construction would in this Court at least make an application for review much more expensive than an appeal.

As to 3, it would imply that where an applicant for review is the defendant and the appeals have been by the plaintiff all through, and the review application is thus the first motion of his own for any relief, his application would have to be valued not on any sums paid by himself for the relief sought for by him but on the stamp paid by the opposite party for the relief sought for by it, which may obviously have no sort of relation to the relief which the review applicant wants. This again seems hardly a reasonable construction of the phrase.

Construction No. 4 implies that the applicant pays not for the relief sought for by any one else over which he has no control but on the relief sought by himself, and he thus pays naturally and equitably on that relief as if it were a plaint or Memorandum of Appeal by himself, for that relief. This appears to be the most reasonable interpretation of the phrase and it is the interpretation put upon the phrase by this Court so long ago as 1872 [see *Proceedings, 16th January, 1872* (1)] and this interpretation has been practically followed ever since by this Court. The Bombay High Court has taken a similar view in *In re Manohar G. Tambekar* (3). It follows, therefore, that the Court-fee will be the Court-fee payable as if, on the date when the review application was put in, the applicant was filing a plaint of Memorandum of Appeal for the same relief, *i.e.*, in the present case the Court-fee leviable will be the Court-fee which falls to be levied under the Amended Court Fees Act calculated as if the application for review were a plaint or Memorandum of Appeal for the relief sought for.

The next point is whether Court-fee must be paid on the mesne profits up to the date of the review application. Now, it is plain that in this matter the review application has to be considered as if it were a Memorandum of Appeal, and on such a Memorandum of Appeal there is no doubt that the applicant who seeks to be relieved from the payment of such mesne profits must pay Court-fee on such mesne profits up to the date of his appeal memorandum [see *Brahmayya* v. *Lakshminarasimham* (4) and *Balaramunaidu* v. *Sanganaidu* (5)]. When the mesne profits have been ascertained, the Court-fee is payable on the ascertained rate. Where the mesne profits have not been ascertained the fee is chargeable on the valuation of mesne profits in the plaint. The petitioner, therefore, must pay on the mesne profits which in this case are payable on the ascertained rate calculated upto the date of the application.

The last point is at what rate, the old rate or the new rate, must the fee on these mesne profits be levied. The answer to point (1) answers this point also. It must be paid as if the applicant was now putting in a Memorandum of Appeal and he must, therefore, pay according to the new scale.

The Court-fee levied by the office is quite correct.

V. N. V. *Order accordingly.*

(4) 16 M. 310; 5 Ind. Dec. (N. S.) 923.

(5) 69 Ind. Cas. 722; 45 M. 280; 14 L. W. 730; 30 M. L. T. 83; 42 M. L. J. 184; A. I. R. 1923 Mad. 19.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 792 OF 1926.

December 22, 1926.

Present:—Mr. Justice Zafar Ali.

LAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

WADHAWA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Non-payment of rent—Adverse possession.

A tenant cannot be said to be in adverse possession simply because he pays no rent. [p. 74, col. 1.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 15th

December, 1925, reversing that of the Subordinate Judge, Second Class, Gurdaspur, dated the 19th August, 1924.

Mr. *Fakir Chand*, for the Appellants

Mr. *Muhammad Azim Khan*, for the Respondents.

JUDGMENT.—The land in dispute only 11 *marlas* in area is a portion of the *shamilat* of the village and bears 13 mango trees. The Revenue Record of 1910-11 shows that it was in the occupation of Kahna sweeper as a tenant but he paid no rent. The defendants are sons of Kahna and they like their late father paid no rent. In answer to the suit brought by the proprietors of the village for possession of the plot these sons of Kahna pleaded that they had been in possession for 60 years as owners and not as tenants. The trial Court decreed the plaintiffs' suit, but on appeal the learned District Judge dismissed it holding that defendants' possession had been adverse for upwards of the statutory period *as they had paid no rent during the past 35 years.*

Now it is clear that if a tenant pays no rent it does not follow therefrom that he is in adverse possession. Presumably, the proprietors in the present case allowed Kahna to enjoy possession of this small plot of land without paying any rent because he was a village menial and served them as such. There was nothing to indicate that Kahna's possession was adverse to the proprietors.

I, therefore, accept the appeal, set aside the order of the lower Appellate Court and restore that of the trial Court. The defendants will pay plaintiffs' costs throughout.

R. L. *Appeal accepted.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 218 OF 1925.

August 11, 1926.

Present :—Mr. Justice Carr and Mr. Justice Mya Bu.

MAUNG PO THA AND ANOTHER—APPELLANTS

versus

S. R. M. M. A. NAGAPPA CHETTYAR AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 66, 90—Sale proclamation—Omission to state place of sale—Delay in starting sale—Material irregularity.

Omission to mention the place of sale in a sale proclamation is a serious flaw in publishing the sale and constitutes a material irregularity. [p. 75, col. 1]

There is no hard and fast rule that an execution sale must start punctually at the appointed time. [*ibid.*]

Miscellaneous appeal from the order of the District Court of Magwe, in Civil Miscellaneous No. 38 of 1925.

Mr. *Kyaw Din*, for the Appellants

Messrs. *Banerjee* and *K. C. Bose*, for the Respondents.

JUDGMENT.—In Civil Execution No. 37 of 1924, of the District Court of Magwe, the 1st respondent firm in execution of a decree against the appellants had certain properties belonging to the latter attached and brought to sale. At first the sale proclamation was issued on the 3rd February, 1925, fixing the sale at 7 A. M. on the 8th March, 1925, at Yenangyaung. This sale, however, had to be stayed. Later another proclamation of sale was issued on the 1st June, 1925. In it, it was announced that the sale would be held at 7 A. M. on the 12th July, 1925, but there was no mention of the place where it would be held. The sale was conducted by the Bailiff of the Court commencing at 11 A. M. on the appointed day at Yenangyaung and all the items of the property sold were knocked down to the 2nd respondent for a total sum of Rs. 16,100. It may be mentioned that one of the items was sold subject to the mortgage in favour of the 1st respondent (decree-holder) to the extent of Rs. 50,500.

On the 7th August, 1925, the appellants filed the application out of which this appeal has arisen praying that the said sale might be set aside. The matter was at first laid before the District Judge himself, who on the 12th August, 1925, fixed the case for enquiry and production of witnesses on the 28th September, 1925. The parties cited several witnesses for the enquiry but owing to pressure of other work the District Judge was unable to hold the enquiry on the day fixed and transferred the case to the file of the Additional District Judge.

On subsequent occasions when the case came on, the learned Additional District Judge merely heard the arguments of the Advocates and no witnesses were examined; but he proceeded to pass the order, now under appeal, refusing to set aside the sale.

Out of the many grounds on which the appellants sought to get the sale set aside

only two have been urged before us. They relate to:—

(1) The omission of the place of the proposed sale in the proclamation of 1st June, 1925; and

(2) the sale having taken place four hours after the time mentioned in the proclamation.

If any one of these two amounts to material irregularity in publishing the sale, it will follow that the lower Court erred in not taking evidence on the question of substantial injury, if any, sustained on account of such irregularity.

As regards the second point we are clearly of opinion that it does not amount to material irregularity. We can conceive of many circumstances for which the auctioneer cannot be blamed which will defeat his desire for punctuality. There is no hard and fast rule that a sale must start punctually at the appointed time. Such delay as in this case cannot be regarded as unusual or extraordinary.

As regards the first point under O. XXI, r. 66, of the Code of Civil Procedure, the necessity for mentioning the place of the intended sale in the proclamation is imperative. By the omission of the place of sale in the proclamation a very material information to the intending purchasers is kept back. In our judgment such omission forms a serious flaw in publishing the sale and constitutes material irregularity therein in the same way as the omission to mention the hour of the sale in such proclamation, as held in *Surno Moyee Debi* v. *Dakhina Ranjan Sanyal* (1).

The learned Advocates for the respondents relying on the rulings in *Arunachellam* v. *Arunachellam* (2) and *Raja of Kalahasti* v. *Maharajah of Venkatagiri* (3) submitted that the appellants who allowed the sale to be completed without raising any of the objections now raised by them, should be estopped from complaining of any irregularity resulting from the defective proclamation. We have examined the cases cited by them and we are satisfied that they do not apply to the case before us. They deal with questions relating to insufficient or erroneous statement or description of the property put up for sale which the judgment-debtor had the opportunity of correcting. In the present case we are concerned with an omission of a material part of a sale proclamation which, in our opinion, is quite a different thing.

In the result we allow this appeal and set aside the order of the lower Court dismissing the appellants' application. And the case is sent back to the lower Court with the direction that it shall dispose of the appellants' application after taking such evidence as may be adduced on the question relating to substantial loss or injury sustained by the appellants.

Respondents to pay the appellants' costs in this appeal, Advocates' fee three gold *mohurs*.

A. N. A. *Appeal allowed.*

(1) 24 C. 291; 12 Ind Dec. (N. S.) 861.
(2) 12 M. 19; 15 I. A. 171; 5 Sar. P. C. J. 265; 12 Ind. Jur. 371; 4 Ind. Dec. (N. S.) 363 (P. C.).
(3) 21 Ind. Cas. 389; 38 M. 387; 14 M. L. T. 320; 25 M. L. J. 198.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 536 OF 1926.

December 6, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice.

THE FIRM AMAR SINGH-DHUNI MAL—PLAINTIFFS—PETITIONERS

versus

THE SAT DHARAM PARCHARAK PRESS, DELHI—DEFENDANT—RESPONDENT.

Interest—Contract rate—Power of Court to reduce.

A Court cannot arbitrarily reduce the rate of interest which parties have contracted for.

Petition for revision of the decree of the Judge, Small Cause Court, Delhi, dated the 17th February, 1926.

Mr. *Shamair Chand*, for the Petitioners.

JUDGMENT.—The learned Judge, Small Cause Court, finds that the plaintiffs have proved a contract by which the defendants were liable to pay interest at the rate of Re. 0 12-6 per cent. per mensem, but he has arbitrarily reduced the amount of interest by Rs. 20. The judgment contains no reasons whatsoever for making this reduction, and the respondents have not appeared to show cause why the claim of the plaintiffs should not be decreed in full.

A perusal of the written statement filed by the defendants shows that they claimed a reduction of interest on the ground that the price of the paper was, in pursuance of a special agreement, made between the

parties, payable after three months and not after two months. There is, however, not an iota of evidence in support of the contract relied upon by them.

I accordingly accept the application for revision and decree the suit of the plaintiffs for Rs. 168-1-3 with costs.

A. N. A. *Application accepted.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. OF 1926.

October 22, 1926.

Present:—Mr. Justice Iqbal Ahmad.

PRABHU DAYAL—APPLICANT

versus

MUNSHI LAL—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Interference—Error of law—Award not signed by one arbitrator—Referring Court, power of, to determine validity of award.

A High Court cannot, in revision, set aside a decree of a lower Court passed in accordance with an award on the ground that the award was not signed by one of the *punches*, inasmuch as the question whether an award is valid or not is one especially reserved for the decision of the Court making the order of reference and even if it has erred on a question of law in coming to a decision on that point, that, in itself, is not a ground for the exercise of the revisional jurisdiction of the High Court

Civil Revision from the order of the Munsif, Ghaziabad, dated the 2nd of September, 1926.

Mr. *S. C. Goyle*, for the Applicant.

JUDGMENT.—By this application it is sought to get a decree passed by the learned Munsif of Ghaziabad revised. That decree was passed in accordance with an award. One of the objections to the award that was taken before the learned Munsif, and that has been reiterated in the course of the arguments before me, was that one of the three *punches* having refused to sign the award, the award was bad in law. The learned Munsif overruled this objection and the other objection of the applicant, and as stated above passed a decree in accordance with the award.

In my opinion this Court cannot interfere with the decree so passed in the exercise of its revisional jurisdiction. The award having been made and not having been found invalid by the learned Munsif for the reasons given by him, the only course open to the learned Munsif was to pass a decree in terms of the award and in so doing he has not exercised a jurisdiction not vested in him by law, nor has he failed to exercise a jurisdiction so vested, nor has he acted in the exercise of his jurisdiction illegally or with material irregularity. *Vide Ghulam Khan* v. *Muhammad Hussan* (1).

As has been pointed out by the learned Chief Justice in the case of *Lutawan Kubar* v. *Lachiya* (2): "It was the clear intention of the Legislature.....that objections to the award on the ground of invalidity from any cause whatever should be decided by that Court (*i. e.*, the Court which had made the order of reference to arbitration and passed a decree in accordance with the award) and by no other Court."

The question whether or not the award was valid was one especially reserved for the decision of the Court below and even if it has erred on a question of law in coming to a decision on that point, that in itself is not a ground for the exercise of revisional jurisdiction by this Court.

The application is rejected.

A. N. A. *Application rejected.*

(1) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2266 OF 1926.

December 9, 1926.

Present :—Mr. Justice Zafar Ali.

SANT SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

HARI DATT AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI, r. 5—Stay of execution, refusal of—Appeal, whether lies.

No appeal lies from an order refusing to stay execution of a decree. [p. 77, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lyallpur, dated the 6th October, 1926.

Mr. *Nihal Singh*, for the Appellants.

Mr. *Abdul Rashid*, for the Respondents.

JUDGMENT.—The appellants-judgment-debtors have filed a suit for a declaration that the decree against them was obtained by fraud and is null and void

and they made two applications to the Court executing that decree, one for stay of execution pending decision of that suit, and the other for stay on their furnishing security for satisfaction of the decree. Both applications having been refused the judgment-debtors have come up to this Court with an appeal.

In the first place, it may be observed that no appeal lies from an order refusing stay of execution as was held in *Janardan Trimbak* v. *Martand Trimbak* (1), *Husain Bibi* v. *Beltie Shah Gilani* (2) and *Rajendra Kishore Choudhury* v. *Mothura Mohan Choudhury* (3). According to Mulla this is the correct view of s. 47 of the Civil Procedure Code from which the words "or to the stay or execution thereof" which occurred in s. 244 of the old Civil Procedure Code, have been omitted. But even if the appeal lies there appears to be no sufficient reason for staying execution. I, therefore, order that if the judgment-debtors should deposit in Court the decretal amount within a fortnight from to-day, the money should be paid to the decree-holders on their furnishing security for restitution and not otherwise. The appeal is otherwise dismissed with costs and the *ad interim* order staying execution is discharged.

Z. K. *Appeal dismissed.*

(1) 59 Ind. Cas. 523; 45 B. 241; 22 Bom. L. R. 1212.
(2) 83 Ind. Cas. 1035; 46 A. 733; 22 A. L. J. 706; A. I. R. 1924 All. 808; L. R. 5 A. 482 Civ.
(3) 55 Ind. Cas. 228; 25 C. W. N. 555.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 25, 1926.

Present:—Lord Phillimore, Lord Sinha, Lord Blanesburgh and Mr. Ameer Ali.

KACHIREDDI NAGIREDDI—APPELLANT

versus

SAKIREDDI CHINNA NARAYANAREDDI AND OTHERS—RESPONDENTS.

Practice—Admission of fresh evidence at late stage—Applicant's duty to prove diligence.

When application is made at a late stage of a case to put in fresh evidence, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before. [p. 81, col. 1.]

Appeal from the judgment of the High Court, Madras.

Messrs. *E. B. Raikes* and *S. C. Chaudhuri*, for the Appellant.

Messrs. *L. De Gruyther* and *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.

Lord Phillimore.—The appellant in this case, claiming to be the nearest agnate, brought a suit to recover the estate of one Kachireddi Balireddi against Sakireddi Peddasubbareddi, now deceased, of whom the present respondents are representatives.

The deceased defendant denied that the plaintiff was an agnate of Balireddi and further relied upon a Will which the said Balireddi had made in his favour. The plaintiff said that Balireddi had made no such Will and further that he was a minor and incapable of making a Will.

The Subordinate Judge decided that the plaintiff had made out his title as agnate, and that the alleged Will was not proved. With regard to the question of the majority or minority of Balireddi he held that the burden of proof was upon the defendant who set up the Will, and that that burden had not been discharged.

On appeal, the High Court came to the conclusion that the plaintiff had not proved that he was an agnate and was, therefore, not entitled to maintain the suit.

This was enough to dispose of the case; but the learned Judges proceeded to the questions relating to the Will, and they found that the Will was genuine, but, on the other hand, they agreed with the Subordinate Judge in holding that the majority of Balireddi was not proved. Therefore, the genuineness of the Will was not material. The High Court dismissed the suit.

The appellant has, if he is to succeed, to prove in the first instance that he was the nearest agnate. If he progresses so far, he has then to meet the contention of the respondents that they can rely upon the Will; and their Lordships will proceed to discuss these questions in their logical order.

The plaintiff's case is that he had a grandfather named Kachireddi Bangarureddi, who married one Akkamma and had three sons, Subbareddi, Seshireddi and Balasubbareddi; that he is the son of the last named, while the deceased was the great-grandson of Subbareddi and, therefore, the great-great-grandson of Bangarureddi.

The descent of the plaintiff and his relationship to Seshireddi are admitted, and the descent of the deceased from Subbareddi is admitted; but it is denied that Subbareddi was the son of Bangarureddi, the case for the defendant being that the father of Subbareddi, who would be the deceased's great-great-grandfather, was one Venkatareddi.

The deceased, who, whether major or minor, was certainly young, had been brought up since his father's and mother's death in the house of the defendant, who was his maternal uncle and would, therefore, have no claim to succeed to his property unless, as he alleged, a Will had been made in his favour.

Much oral evidence was given on both sides, but the only written evidence consisted in documents relating to certain properties.

The deceased died on the 25th May, 1918, and the suit was brought on the 18th November following.

Previously to this there had been a dispute as to the guardianship of the deceased, both the plaintiff and defendant applying, the plaintiff then alleging that he was the nearest agnate and the defendant then denying this. In the event, the Judge who tried this matter appears to have come to the conclusion that neither was a fit guardian and made no order, and the defendant remained *de facto* guardian.

The plaintiff, who was 60 years old when he gave his evidence, had the opportunity of recollecting the family for some time back. In the opinion of the Subordinate Judge, who heard him, "he gave his evidence about the relationship and division and enjoyment of properties in a straightforward manner, and it left a favourable impression in my mind that his evidence about plaint relationship was true."

A point was made against the plaintiff that he at first said that his father had no sisters, and then on second thoughts said that he had one named Pullamma, but denied that there was another sister named Guramma.

Now, upon the defendant's story, Guramma was the sister of the deceased grandfather and would, therefore be, if the two families were related, the plaintiff's aunt.

The plaintiff knew Guramma, but said she was the sister of Kesamma, who was the wife of the deceased's great-grandfather.

There is this piece of documentary evidence as to Guramma that in an award by arbitrators made in June, 1896, to which nobody connected with the plaintiff was a party, it was stated that the father of the deceased filed a deposition to the effect that Guramma was his father's paternal aunt, but there is nothing in the award which is consequential on this statement.

With regard to the other witnesses in the case, the Subordinate Judge did not apparently think that much trust could be placed upon them. Many were interested, they were all in a humble position in life with no documents and nothing special to call their attention or fix their memory. Some gave evidence of reputation, the admissibility of which is questioned, and which their Lordships without any definite pronouncement have laid aside. The rest could only speak as to the attendance or non-attendance at funerals and the observance or non-observance of pollution upon the death of a relation. And one at least of the defendant's witnesses, while insisting that the deceased's male ancestor was Venkatareddi, accepted for his wife Akkamma, which was the name of the plaintiff's ancestress.

There was one matter on which the oral testimony was valuable, and that was in relation to certain property. This is a point on which their Lordships will make further observations.

The testimony of the Subordinate Judge to the apparent honesty of the plaintiff is of further value because of the charge made against him by the defendant.

In the guardianship matter, the defendant's brother had taken the plaintiff's side and was even a co-petitioner with him, and the defendant's case was that he and his brother had quarrelled, and that the plaintiff was a man of straw and a mere tool of his brother, who had invented the whole case out of spite. This case was clearly disbelieved by the Subordinate Judge

The other evidence to which the Subordinate Judge attached weight—and in their Lordships' opinion rightly—was on two points. First, it was said that there was an ancestral common house, now divided into three parts, one for each of the descendants of Bangarureddi, the father of the deceased having one, and the plaintiff two parts in virtue of his father and of his uncle Seshireddi under a partition, to which reference will be made.

The three houses are certainly touching each other, and between the plaintiff's house and Seshireddi's there is nothing but a partition wall. It is not clear whether there are two walls between Seshireddi's former house and the deceased's father's house or whether there is merely a partition wall. There is some difference in the shape of the third house, and its door is now to the west, while the doors of the other two houses are to the south. It is said that at one time the third house had a door to the south, but, as the Subordinate Judge says, this third house has been largely altered and re-built since it was sold, and it is not possible to speak definitely.

It is not suggested that this block of three is touched by other houses on either side. Without attaching too much weight to the proximity of the houses, there appears to be, as the Subordinate Judge thought, at least a consistency in their occupation with the case of the plaintiff.

The High Court dismissed this part of the case rather summarily, relying on the fact that the witnesses described the houses as separate but adjoining. This, however, at the time that the witnesses spoke, must on any view have been a correct description.

The plaintiff's stronger point is with regard to certain lands. If, as the plaintiff says, there was a common ancestor, the lands would be found to have been held in common or to have been divided between the three lines, that of the plaintiff's father, the deceased's great-grandfather and the line of Seshireddi.

Now Seshireddi had no son, but he had a daughter who, if there had been a previous partition, would succeed to a third share for a Hindu woman's estate; and upon her death Seshireddi's share would be divisible in halves between the line of the plaintiff and the line of the deceased.

There were certain properties held under two *pattas*, one dated 1878 and the other in 1884. The first *patta* comprises four separate fields, and it was granted to Nagireddi, the deceased's grandfather, Balasubbareddi, the plaintiff's father, and Seshireddi. The second *patta* was granted to Nagireddi and Balasubbareddi and to Seshireddi's daughter and also to two Muhammadans.

The fact that these two strangers are found as co-holders diminishes the strength of the inference which would otherwise be drawn from the joint tenure, but does not wholly destroy it.

The plaintiff says that there must have been, and indeed was, one partition when Seshireddi or his daughter were alive, which would be into thirds, and that if you give two fields of which the deceased was in possession to his great-grandfather and leave the other two fields of the first *patta* and the one field of the second *patta* to the other two lines, you will get a very nearly equal division—the deceased's line would get 8 acres and 29 cents. and each of the other lines would get 8 acres and 97½ cents.

The High Court says that this is too uneven; but as Counsel for the appellant has pointed out, if you look at the revenue rather than at the acreage, the division is nearly equal.

Following out this line of argument, the appellant then suggests a second division after the death of the daughter of Seshireddi. Under this arrangement a third field in *patta* No. 1 goes to the deceased's father, the 4th field goes to the plaintiff's branch, and so much of the field in *patta* No. 2 as is not allotted to the Muhammadan tenants is divided as to an area equalling quarter to the deceased's branch and as to three-quarters to the plaintiff's branch, the plaintiff also taking the whole of Seshireddi's house. The acreage here is again not even, because the deceased's branch gets 14 acres and 49 cents. and the plaintiff's branch 11 acres and 77 cents. But there are materials upon which one can see that the house was of value and might reasonably form a compensation.

The defendants insist upon the fact that the plaintiff said that his father got the house because he had a larger family and was poor, and because the deceased's ancestor had sold his house or share of house and gone away. But this statement does not seem inconsistent. It would not have been practical to divide the house—one would have to take it and naturally would expect to make compensation in land.

It is true that the land of the second *patta* is not inherited as in a quarter and three-quarters, but in definite portions, the deceased's branch having one acre 87 cents, and the plaintiff's branch the rest. But it is remarkable that the *patta* extends over two survey numbers and each takes a fraction of each. This jointness of holding

with no explanation offered other than that of common descent is, in their Lordships' opinion, of considerable weight.

Here again the credibility of the plaintiff becomes important. The case for the defendant was that this was all moonshine, that there had been no partitions, and that his branch had enjoyed their fields and shares as far back as memory went; and witnesses were called on both sides as to this. But the plaintiff, who must have known, deposed positively as to the second partition, and it is with regard to, amongst other things, the division and enjoyment of properties that the Judge said that he gave his evidence in a straightforward manner.

As regards the High Court, it is not as if the learned Judges had come to the conclusion that the defendant's case was right. They founded their judgment upon a perfectly correct ground if it could be maintained that the plaintiff had not given sufficient evidence to prove his case. Their Lordships agree with the Subordinate Judge in holding that he had given sufficient evidence, and that his relationship was proved.

With regard to the defendant's case under the Will, the matter stands in this way. It is useless to enquire whether the High Court was right in saying that the Will had been executed, or the Subordinate Judge was right in thinking that it was not shown to be a genuine document. If the deceased was not of age at the time that it was supposed to be made, the defendant's case fails.

Now both Courts are in agreement that the majority of the deceased was not proved, and there being considerable evidence both ways, their Lordships would follow their usual rule of not displacing a conclusion of fact upon which both Courts in India had concurred.

But on behalf of the respondents, application had been made for leave to produce further evidence and to put in a register of birth which, if it were a genuine record and related to this particular youth, would be conclusive proof that he was of full age when the Will was made. He died on the 25th May, 1918, and the Will is supposed to have been made two days before, on the 23rd. The age of competency is 18, and it is suggested on behalf of the respondents that he was born on the 17th April, 1899.

When the case stood for trial, this issue having been clearly raised, there was produced on behalf of the plaintiff an extract from a register of another village which was said to be that of the birth of this youth there, and at a later date. The names, however, do not wholly correspond and the Subordinate Judge was not able to rely upon it.

The defendant produced no certificate, but he put in evidence two applications which he had made to the *Tahsildar* of the District that a search should be made in the birth register of the village in which the deceased lived and died for the years 1898 and 1899 and for copies of the extract, with a further request that if they were not in the office the *Tahsildar* should summon the *karnam* of the village and get copies.

The first of these applications was made on the 17th February, 1919, and the reply made from the office was that the birth registers were not in the office. A second application for the registers of the three years 1898, 1899 and 1900 was made shortly before the 22nd October, 1920, when again the answer was made that the birth registers of the village for the three years were not in the office. The advisers of the defendant took no further step, and the case went to trial without production on his behalf of any birth register.

The defendant gave evidence that he was the Village Munsif and that he and the *karnam* used to prepare the registers, sign them and send them to the *taluk* office, that he himself noted in the register the birth of the deceased and that of one of his own sons, who was born a few days after the deceased. In fact, it was because his own wife was expecting her confinement that he could not have the deceased's mother confined in his house. He further said that he could fix his own son's birth because it was on the anniversary of his father's death. He died shortly after the decision in the Court of first instance. After the case had been heard in the High Court and while the appellant was taking steps to bring his appeal before His Majesty in Council, application was made on behalf of the respondents to the High Court to include in the record what was said to be an extract from the birth register showing that the boy had been born on the 17th day of April, 1899, and was consequently of full age. The appellant did not appear upon the application and the order was accordingly made. Thereupon he did take action and filed a counter-petition and affidavit and applied that the original birth register

should be sent to England, suggesting that upon inspection it would be found to have been tampered with.

The High Court refused to order the original register to be sent, but their Lordships directed it to be brought, and it has been before them.

They cannot, however, pronounce any opinion upon its genuineness *ex facie*. It is a document kept for European months, with the dates of the month written in European figures. In it on the proper dates, the 17th April and an early day in May, are found the entries of the two births, while on the 16th of April there appears another birth which becomes important. The entries were translated to the Board out of the vernacular by the respondents' junior Counsel. There is no comment to make upon them; and it being the practice to add up the totals for each month, though there is no special place for this purpose, the addition for April corresponds, three boys and two girls.

All that can be said against this is that all three entries appear in blacker ink than other entries, and ink a good deal less faded than one would expect.

When, however, application is made at a late stage in the case to put in evidence *res noviter ad notitiam perventa*, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before.

Here the respondents are in serious difficulty. The applications made on behalf of their father while he was alive to the *Tahsildar* were that he should send certified copies or, if he had not the registers, should send to the *karnam* and summon him. The answers from the office made no reference to this latter request.

Now the defendant said that he and the *karnam* acted together, made entries, kept the registers and sent them in due course to the *Tahsildar*.

If these registers had not been sent, they would still be with him or with the *karnam*, and he had only to produce them, or, if the latter gave trouble, remind the *Tahsildar* of the second branch of his application.

If, on the other hand, he knew that they had been sent to and should be in the *Tahsildar's* office, he would not have let the matter rest, he would have issued a *subpœna* to the record-keeper, a step which did produce the register later, as will be stated, or he would have asked for an enquiry, or with less formality (for all were in the same village) he would have talked to the record keeper.

The failure to take any of these steps lends colour to the suggestions made for the appellant, that at that time the register either was silent or had entries made in such obviously new ink that it was too dangerous to produce them, at least, till all other means failed.

Then the explanation of the discovery is a strange one. On the 2nd of March, 1923, (after the decision in the High Court, but while the present appellant was taking steps to prosecute his appeal to the Privy Council), a suit was brought in the Small Cause District Munsif's Court against the person (his name does not appear) whose birth is apparently recorded the day before the supposed date of the birth of the deceased Balireddi. The suit was on a promissory note, and the defendant pleaded that he was a minor. To prove his majority, a *subpœna* was issued, the register was forthwith produced, and then the Pleader, who happened to be the Pleader for the respondents in this cause, saw Balireddi's name and realised its importance. So at least it is said, for the Pleader has made no affidavit himself.

Now strange coincidences do occur, but this is a remarkable one. The appellant says that this suit was a sham one, brought to give a reason for the supposed discovery of the register, and that the parties or several of them are connected with the respondents; and his Counsel points to the surprising rapidity with which judgment in it was obtained, if it was a really genuine contested suit.

Some explanation also would seem to be required of the contrast between the facility with which the register was acquired in the later case and its non-production on the earlier occasions.

The respondents have some answer to this. The first respondent says that the *karnam* was at enmity with his father, and that the record-keeper has been changed, with an innuendo that his predecessor was also faithless in the discharge of his office.

These charges and counter-charges might have been examined by the Judges of the High Court to whom it appears that some suggestion of an enquiry was made. Their Lordships cannot deal with them adequately on the materials before them.

But on the whole the circumstances are so suspicious and the burden on the applicants of showing that their father showed due diligence has been so imperfectly discharged, that their Lordships decided not to admit the document. In these circumstances the genuineness or otherwise of the Will of deceased does not call for decision, and the conclusion is that their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge should be restored with costs here and below.

Z. K. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent:—Mr. *H. S. L. Polak.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 271 OF 1925.

February 25, 1926.

Present:—Mr. Justice Devadoss and Mr. Justice Waller.

PANDIRI VIRANNA—APPELLANT

versus

GRANDHI SATTIRAJU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 64 Expl., O. XXI, r. 89—Mortgagee from judgment-debtor after attachment and before sale, whether entitled to apply to set aside sale.

A person who obtains a mortgage of a judgment-debtor's property after it is attached in execution but before the date of its sale, is entitled to apply under O. XXI, r. 89, Civil Procedure Code, for setting aside the sale. [p. 82, col. 2.]

Arumalla China Subba Reddi v. *Vasireddi Jayaramayya* (1), followed.

Sundaram v. *Mamsa Mavuthar* (5), relied on.

A transfer of interest in immoveable property after attachment and before sale is void only against the decree-holder who applies for attachment and if his decree amount is paid in full with costs and charges of attachment and sale, the transferee acquires a good title. The explanation to s. 64, Civil Procedure Code, does not control the clear provisions of O. XXI, r. 89 of the Code. [p. 83, col. 2; p. 84, col. 1.]

Appeal against the order of the District Court, East Godavary at Rajahmundry, dated the 17th April, 1925, in E. A. No. 81 of 1925, in E. P. No. 76 of 1923, in O. S. No. 38 of 1920.

Mr. *S. Varadachariar*, for the Appellant.

Messrs. *A. Krishnaswami Iyer* and *K. Kameswara Rao*, for the Respondents.

ORDER.

Devadoss, J.—The only point in this appeal is whether a person who obtains a mortgage of the judgment-debtor's property after the date of attachment and before the date of sale is entitled to apply under O. XXI, r. 89 for setting aside the sale. The learned District Judge held that he could not, relying upon a decision of Mr Justice Odgers *Arumalla China Subba Reddi* v. *Vasireddi Jayaramayya* (1). It was held in that case that by virtue of s. 64, Civil Procedure Code, any transfer of property attached was void and, therefore, the person who acquired a title after attachment had no *locus standi* to apply under r. 89. With very great respect we are unable to agree with Odgers, J. Section 64 makes any private transfer of property or delivery of property attached or any interest therein void against all claims enforceable under the attachment. Where a decree-holder attaches the property of his judgment-debtor, any transfer after the date of attachment is void against him. He could ignore such transfer and bring the property to sale as if there was no transaction in respect of the property. If the transferee or the mortgagee of the judgment-debtor's property pays off the whole of the decree amount the attachment will be raised. Under O. XXI, r. 55:

"Where the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court or satisfaction of the decree is otherwise made through the Court or certified to the Court.....the attachment shall be deemed to be withdrawn."

Under r. 69, cl. (3):

"Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale."

This rule enables the judgment-debtor to pay the decree amount and costs into Court and avert the sale and r. 55 says that if the amount of the decree and costs and charges are paid, the attachment shall be deemed to be withdrawn. The result of these two rules is that as soon as the whole of the decree amount and costs and charges are paid into Court, not only the sale is stopped but the attachment shall

(1) 76 Ind. Cas. 853; 17 L. W. 680; A. I. R. 1923 Mad. 659.

be deemed to be withdrawn. Can it be said that a person who buys the property of the judgment-debtor or who acquires a title in the property after attachment and before sale is in a worse position than the judgment-debtor himself? To hold that there is a distinction between the case of a judgment-debtor and that of a person acquiring interest from him with regard to rr. 55 and 69 would be to make the latter pay the decree amount and costs and charges in the name of the judgment debtor. We do not think that the Legislature intended to make any such distinction between the judgment-debtor and a person who acquires an interest in the judgment-debtor's property after attachment and before sale.

The Explanation to s. 64 relied upon for the contention that r. 89 does not apply to a person who acquires any interest in the judgment-debtor's property after attachment and before sale, is as follows:

"For the purpose of this section claims enforceable under an attachment include claims for the rateable distribution of assets."

The Explanation is to be considered with regard to the state of the law at the time when it was enacted, and cannot be held to control the clear provisions of r. 89. If the Legislature intended that when an attachment of immoveable property is made and the decree-holders who apply for rateable distribution should have the benefit of such attachment and that the transferee from the judgment-debtor should not by paying off the decree-holder attaching his property release the property from attachment except by paying in full the amount due to all the decree-holders who have applied for rateable distribution, it should have said so in clear terms. As observed by Kumaraswami Sastri, J., in *Annamalai Chettiar* v. *Palamalai Pillai* (2):

"Assuming that the Legislature intended the attachment under s. 64 to enure for the benefit of all persons entitled to rateable distribution who had applied for execution prior to the private alienation it has not gone far enough when it introduced the Explanation to s. 64 worded as it is and made no provision for the continuance of the attachment in O. XXI in cases where the attaching creditor was paid off. The result is not very happy, but the remedy is in the hands of the Legislature."

In that case it was held by a Full Bench that the decree-holders who had attached the property of the judgment-debtor were not entitled to question the alienation of the property by the judgment-debtor after attachment and before sale. Section 64 makes any private transfer or delivery of the property attached or of any interest therein void against all claims enforceable under the attachment, but under r. 83 any private sale, mortgage or lease of the judgment-debtor's property with the sanction of the Court is valid.

The person who acquires an interest before attachment need not apply under r. 89, for, if the transfer of property or of any interest therein is a *bona fide* and valid one the transferee acquires a good title and the attachment would not take away the right of such person and, therefore, he need not apply under r. 89 [*vide Erode Manikkoth Krishnan Nair* v. *Puttiedeth Chembakkoseri Krishnan Nair* (3)]. Where a judgment-debtor purports to convey or transfer any interest in immoveable property already sold in execution of a decree he can convey no title to the transferee and the transferee cannot be said to acquire an interest in the property for, all his interest has been sold and he has no interest to convey or transfer. Rule 89 does not apply to a transfer after sale for it clearly says "holding an interest therein by virtue of a title acquired before such sale."

Section 310 A of the Civil Procedure Code of 1882 corresponding to r. 89 was held applicable to a purchaser subsequent to attachment and prior to sale under the attachment. *Mulchand Dagadu* v. *Govind Gopal* (4) It was held by a Full Bench of this Court in *Sundaram* v. *Mamsa Mavuthar* (5) that a judgment-debtor who after the sale transfers his interest in the property sold in execution of the decree retains sufficient interest within the meaning of O. XXI, r. 89 to allow him to apply under the rule and the purchaser of that property after Court-sale is precluded from applying under the rule. The principle of these decisions is that a transfer of interest

(2) 43 Ind. Cas. 539; 41 M. 265 at pp. 285, 286; 22 M. L. T. 461; 33 M. L. J. 707; (1917) M. W. N. 882; 7 . W. 298 (F. B.).

(3) 26 M. 365.

(4) 30 B. 575; 8 Bom. L. R. 578.

(5) 63 Ind. Cas. 937; 44 M. 554; 40 M. L. J. 497; 13 L. W. 498; 29 M L. T. 269; (1921) M. W. N. 272 (F. B.).

in immoveable property after attachment and before sale is void only against the decree-holder who applies for attachment and if his decree amount is paid in full with costs and charges of attachment and sale, the transferee acquires a good title. This point has been specifically decided in *Gosta Behari* v. *Sankar Nath* (6). The learned Judges Sir Austosh Mukerjee and Mr. Justice Cuming observed at page 129*:

"If an application is made under r. 89 and is allowed, the first condition for the grant of the application is that the entire decree should be satisfied. Consequently, by no stretch of language can it be said that when an application is made in conformity with r. 89 any question arises as to a claim enforceable under the attachment within the meaning of s. 64."

Mr. A. Krishnaswami Iyer's contention is that the auction purchaser ought to be protected and, therefore, any person who acquires any interest in the property after attachment should not be held to be entitled to apply under r. 89. His argument is that the auction-purchaser purchased the property and his right should not be defeated by his being paid off 5 per cent. of the purchase-money and he relies strongly upon the Explanation to s. 64 as supporting his contention. This argument overlooks the fact that the purchaser in Court-auction does not acquire a title to the property till the sale is confirmed and such sale would not be confirmed till the whole purchase-money is paid by him. It is well-settled that 25 per cent. paid by the auction-purchaser would not be considered assets within the meaning of s. 73. It is only after the full amount has been paid that the decree-holder would be entitled to proceed against the money paid by the auction-purchaser. It cannot, therefore, be said that the auction-purchaser acquires a title merely by paying the amount of his bid and he knows that the sale is subject to confirmation by the Court and is liable to be set aside if the judgment-debtor pays the decree amount and costs and charges under r. 89 or for fraud or irregularity under r. 90. The auction-purchaser, therefore, cannot complain if the sale is set aside by the Court and s. 64 does not protect him against any relief claimable by the judgment-debtor either under r. 89 or under r. 90. The relief open to the judgment-debtor under r. 89 cannot be denied to a person who acquires a title to the property before sale and after attachment.

The appellant, therefore, is entitled to have the sale set aside under r. 89. The appeal is allowed with costs to be paid by respondents Nos. 1, 2, 5 and 6.

Waller, J.—I agree.

V. N. V. *Appeal allowed.*

(6) 36 Ind. Cas. 510; 26 C. L. J. 127.

*Page of 26 C. L. J.—[*Ed.*]

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1943 OF 1922.

November 20, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Agha Haidar.

Musammat NANDAN—DEFENDANT—APPELLANT

versus

WAZIRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 125—Alienation by Hindu or Muhammadan female not governed by Hindu or Muhammadan Law—Specific Relief Act (I of 1877), s. 42—Declaration granted to reversioner—Alienor dying during pendency of appeal—Reversioner becoming entitled to possession—Decree for mere declaration, whether should be set aside—Appellate Court, discretion of.

Article 125 of Sch. I of the Limitation Act is not confined in its operation to cases where the female making the alienation is governed by Hindu or Muhammadan Law but covers every case where the female making the alienation is a Hindu or a Muhammadan and the immediate reversioners who bring the suit also profess the same faith. [p. 85, col. 2.]

Where a reversioner has obtained a decree for declaration to the effect that a gift will not affect his reversionary rights after the donor's death, the Appellate Court, on appeal by the donee, cannot set aside that decree on the mere ground that, by the death of the donor during the pendency of appeal the reversioner has become entitled to immediate possession. [p. 85, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Gujranwala, dated the 15th May, 1922.

Diwan *Mehar Chand* and Lala *Kidar Nath Chopra*, for the Appellant.

Messrs. *Mukand Lal* and *Shambhu Lal*, for the Respondents.

JUDGMENT.—In October 1894, one Gulab Singh, a *Jat* of the village Mahya in the Gujranwala District, made a gift of 790 *kanals* and 4 *marlas* of land to Bahali the husband of his sister, and in August, 1895, his reversionary heirs obtained a declaratory decree to the effect that the

gift would not affect their rights when the succession opened out. At the time when the gift was made, Gulab Singh retained an area of about 160 *kanals* of land, and when he died in May 1909, this area came into the possession of his step-mother *Musammat* Rajan. In January 1910, the aforesaid reversioners brought an action against Bahali to recover possession of the land gifted to him on the allegation that *Musammat* Rajan had abandoned her rights to the property, and that they were, therefore, entitled to immediate possession. Their claim was negatived on the ground that, though the lady was quite willing to let her daughter *Musammat* Nandan and the latter's husband Bahali enjoy the use and benefit of the land, her action did not indicate that she had given up all rights to the property or was prepared to abandon the estate in favour of Gulab Singh's reversioners.

In February, 1912, *Musammat* Rajan made a gift of the entire estate, which originally belonged to her step-son Gulab Singh, in favour of her daughter *Musammat* Nandan and on the 20th May, 1921, the reversioners brought the present action praying for a declaratory decree that the gift should not affect their right of succession after the death of the donor. The trial Judge has passed a decree in their favour, and in this appeal by *Musammat* Nandan we are asked to dismiss the suit on the short ground that by reason of the death of the donor during the pendency of the appeal in this Court, the reversioners are entitled to the immediate possession of the estate, and that the Court should decline to grant a declaratory decree which is a purely discretionary remedy. It must be remembered that the plaintiffs have been successful in the trial Court, and the Appellate Court cannot set aside the decree in their place subsequent to that decree. Nor can the suit for a declaration be dismissed because some of the reversioners have now accepted the validity of the gift and recognized the title of the donee. Their action cannot adversely affect the claim of the other reversioners, any one of whom could bring a suit for, and obtain, a declaratory decree.

The main question debated before us is whether the suit brought by the plaintiffs was barred by time. Now, it is common ground that the suit is not governed by the Punjab Limitation (Ancestral Land Alienation) Act I of 1900; and that it would not be barred under the Punjab Limitation (Custom) Act I of 1920, if it was governed by Art. 125 of the Indian Limitation Act, 1908. The dispute between the parties, is, therefore, narrowed down to the issue as to whether Art. 125 or Art. 120 of the Indian Limitation Act prescribes the period of limitation for the suit. It is incontrovertible that Art. 120, being the residuary Article, can have operation only if no period of limitation is provided for the suit elsewhere in the Statute.

Article 125 prescribes a period of twelve years for a suit brought during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who if the female died at the date of instituting the suit, would be entitled to the possession of land to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage. Mr. Mehar Chand for the appellants seeks to take the case out of the scope of the Article by contending that it applies only to those cases in which the female making the alienation is governed by the Hindu or the Muhammadan Law, and that the parties to the present case are governed, neither by the Hindu Law, nor by the Muhammadan Law. But the Article covers every case where the female making the alienation is a Hindu or a Muhammadan, and the immediate reversioners, who bring the suit, also profess the same faith. There can be no doubt that under the Muhammadan Law a female never succeeds to a life-estate, and it is clear that if the contention of the learned Advocate be accepted, the Article would be rendered superfluous in so far as it refers to Muhammadans.

Mr. Mehar Chand has expressed his inability to cite a single judicial authority which would support his contention. The suit is certainly brought by Hindu reversioners to impeach an alienation made by a Hindu female, and it is conceded that on her death they will be entitled to the possession of the estate. The case satisfies all the requirements of Art. 125 and consequently is not barred by time.

We accordingly confirm the decree of the lower Court and dismiss the appeal with costs.

R. L. *Appeal dismissed.*

A. N. A.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 30, 1926.

Present:—Lord Phillimore, Lord Sinha, Mr. Ameer Ali, and Lord Salvesen.

Dewan Bahadur PANAGANTI RAMARAYANIMGAR—DEFENDANT—APPELLANT

versus

Sri Rajah VELUGOTI GOVINDA KRISHNA VACHENDRA BAHADUR VARU, MAHARAJA OF VENKATAGIRI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 61, 62—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage—Usufructuary mortgage and lease back—Same transaction—Arrears of rent, whether payable on redemption—Separate suit, whether necessary—Usufructuary mortgage with personal covenant, nature of.

K mortgaged three items of immoveable properties to *T* with possession, under a deed which contained also a personal covenant to pay the principal and interest due under the mortgage. On the same day another deed was executed by which *K* took the properties back on lease from *T* agreeing to pay a fixed yearly rent which was equivalent to the interest on the mortgage amount. In default of payment of the rent reserved it was to be recovered from the income of the villages leased and by means of the lessee's other properties besides the properties mortgaged. In a suit for redemption by an assignee of the mortgagor's interest:

Held, (1) that the mortgage-deed and the lease-deed should be read together as they formed parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest; [p. 89, col. 2.]

(2) that the mortgage in question was something more than a usufructuary one inasmuch as it contained personal covenants on the part of the mortgagor to pay principal and interest, being either an anomalous mortgage or a combination of a simple and usufructuary mortgage; [p. 89, col. 2; p. 90, col. 1.]

(3) that under the provisions of O. XXXIV, r. 1, Civil Procedure Code, all claims affecting the equity of redemption should be disposed of in one and the same suit and that, therefore, the mortgagee was entitled to be paid the arrears of rent due under the lease-deed, with interest thereon, along with the mortgage amount, and was not bound to institute a separate suit to enforce his charge therefor. [p. 90, col. 1.]

Section 62 of the Transfer of Property Act applies only to the case of usufructuary mortgages pure and simple; and is not in any way inconsistent with s. 61 of the Act. [p. 89, col. 2.]

Appeal against the decree of the High Court, Madras (Sir John Wallis, KT., Chief Justice and Mr. Justice Seshagiri Aiyar) dated the 19th April 1920 reported in 61 I. C. 512 varying that of the Subordinate Judge, North Arcot, dated the 31st March, 1917.

Messrs *W. H. Upjohn* and *Kenworthy Brown*, for the Appellant.

Messrs. *Herbert, A. M. Dunne* and *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.

Lord Sinha.—This is an appeal against a decree of the High Court of Madras, dated the 19th of April, 1920, varying a decree of the Subordinate Judge of North Arcot, dated the 31st March, 1917, made in a suit filed in that Court on the 21st December, 1915.

That suit arose out of a transaction between the Raja of Kalahasti and the Raja of Tuni, which was embodied in Ex. A and Ex. I in the case.

Exhibit A purports to be a deed of "mortgage with possession" of immoveable properties described in Schedules A, B, C and D (hereafter called the A, B, C and D properties) for a sum of 11 lakhs of rupees, with interest at 10 annas per cent. per month, to be recovered from the rents and profits. The mortgagor was to have liberty to pay off the mortgage-money at the end of four years, with option to defer payment for a further period of two years. If the money was not paid on the 13th of March, 1915, the entire amount then due was to carry interest at 1 per cent. per mensem—10-annas from the rents and profits and the remaining 6 annas to be payable by the mortgagor personally being also charged upon the properties.

Exhibit I purports to be a *muchilka* or counterpart lease, by which the mortgagor Raja takes a lease from the mortgagee of the "A" properties for a period of four years, from the 1st July, 1909, to the 30th of June, 1913. The lessee was to pay a fixed yearly rent of Rs. 18,750, in three equal instalments, which is equivalent to interest on $2\frac{1}{2}$ lakhs at 10 annas per cent. per month. In default of payment of the rent reserved, the amount was to be recovered from the income of the *ijara* villages, and by means of the lessee's other property "*besides*" the property which was mortgaged with possession.

There was considerable controversy as to the precise meaning of the Telugu word "Gaka" in Ex. I, translated above as "*besides*." It may mean "in addition to" or "excepting." Their Lordships feel no doubt that in the context that word means "*in addition to*."

The circumstances under which the transaction embodied in Exs. A and I took place were as follows:—

The Raja of Kalahasti was heavily in debt at the time. Decrees for sale had been obtained by mortgagees against the "A," "B" and "C" properties. The "B"

and "C" properties had been actually sold, though proceedings to set aside the sales of the "B" properties were pending. To pay off all these encumbrances and to meet the expenses in connection with the proceedings to set aside the sales which had already taken place and other immediate necessities, it was necessary for the Raja of Kalahasti (the mortgagor) to raise a sum of 11 lakhs of rupees. That money was to be applied as follows:—

(*a*) 2½ lakhs for payment of three mortgage-decrees against the "A" properties and expenses in connection therewith;

(*b*) 2½ lakhs to satisfy the mortgage-decree against the "B" properties, and to meet all expenses in connection with the proceedings to set aside the auction-sales thereof, as also other necessities of the mortgagor; and

(*c*) 6 lakhs to satisfy a mortgage against the "C" properties in favour of a *Sowcar* of Hyderabad, who was in possession of those properties with an agreement to re-convey the same on receipt of 6 lakhs of rupees.

The Raja of Tuni agreed to lend this amount of 11 lakhs of rupees and to apply the same for the above purposes, on the security of the "A," "B" and "C" properties, with the addition of another small property described in Schedule D of Ex. A, this last, it is suggested, being included merely with a view to registration in the District in which it was situated.

The terms of this agreement were embodied in the two deeds, Ex. A and Ex. I, which were executed and registered on the same date—the 13th March, 1909.

Thereafter, the mortgagee paid off the three mortgage-decrees against the "A" properties and certain other expenses in connection therewith and the amount so applied was more or less 2½ lakhs of rupees.

He also paid into Court a sum of Rs. 1,93,617 in respect of the mortgage-decree against the "B" properties.

These properties (23 villages in *Taluk* Pamur) had been sold, together with 4 other villages in the same *Taluk*, in Court-auction and the mortgagor had applied to set aside those sales. The first Court confirmed the sales of the 4 villages and set aside the sales of the "B" villages (23 in number). Both sides appealed to the High Court, which confirmed all the sales (*i.e.*, of all 27 villages and the mortgagee lost his possession of the "B" properties. He could not, however, get back the money he had paid into Court, as stated above, till the 24th April, 1912, when his widow and representative got back from the Court Rs. 1,80,412-10-0 out of the Rs. 1,93,617 paid in. It is admitted that he did not receive any interest on the latter sum for the period while it was in Court, *i.e.*, until the 24th April, 1912, nor any interest thereafter on the balance which remained unpaid, *i.e.*, on the difference Rs. 13,205-6-0.

The mortgagee did not pay the 6 lakhs of rupees to the Hyderabad *Sowcar* and consequently the "C" properties never came under the operation of the mortgage (Ex. A), and no question arose in the suit with reference thereto.

The mortgagor remained in possession of the "A" properties under the lease (Ex. I), but did not pay any portion of the stipulated rent. The mortgagee (lessor) obtained a money-decree in respect of seven instalments of the rent, but it is common ground that that decree as well as the remaining five instalments of rent remained unsatisfied.

The mortgagee died in 1911, and in 1913 his widow and representative transferred all his interest in the mortgaged properties to defendant No. 1, who thereafter sub-mortgaged it to defendant No. 2. Defendants Nos. 3 and 4 are the representatives of the original mortgagor and mortgagee respectively.

The equity of redemption of the "A" properties was sold in execution of a money-decree against the mortgagor and purchased by the plaintiff, who instituted the present suit on the 21st December, 1915, against the defendants above described for redemption and possession.

The plaintiff alleged that defendant No. 1 was claiming a great deal more than the sum (Rs. 2,34,150) which he admitted to be due on the mortgage of the "A" properties; and he asked that an account might be taken of the amount due to the defendant No. 1 on the security of the properties and that on payment of the same by the plaintiff, the defendants be directed to deliver to the plaintiff the mortgage instruments and all documents in their possession relating to the properties and to deliver possession of the said properties to the plaintiff without any encumbrance and to execute and register

an acknowledgment in writing to the effect that the interest created by the mortgage has been extinguished.

The defendant No. 1 annexed an account to his written statement under which he claimed that a sum of Rs. 5,63,172-15-11 was due on the mortgage, including the arrears of rent above mentioned, and he also asked that an account should be taken of all monies due to him and the plaintiff declared entitled to redeem only on payment of the whole amount found due, together with his costs of suit.

Now, a portion of the defendant's account consisted of claims for compensation based on several grounds, such as the alleged misdescription of one of the villages mortgaged, the fact that another of the villages was allowed to be sold for arrears of revenue on the alleged fraudulent compromise of the litigation for setting aside the sale of the "B" villages and so forth. These formed the subject of Issues Nos. 7, 8 and 9 in the trial Court and were all decided in favour of the plaintiff. Both the Subordinate Judge and, on appeal, the High Court held that these were all claims for breach of contract sounding in damages and were not in any way charged upon the property. They, therefore, held that the plaintiff, as assignee of the equity of redemption, could not be required to pay such damages as a condition of redemption. Some of these claims were repeated in the case for the appellant-defendant before this Board, but as Mr. Upjohn, on behalf of the appellant, abandoned them at the hearing their Lordships need not deal with them except in connection with the question of the costs of this appeal.

The questions remaining for consideration are: 1st, Is the defendant entitled to credit in the mortgage account taken in this suit for the amounts he paid in connection with the "B" properties and, if so, at what rate and for what period is he entitled to interest thereon? And, 2nd Is the defendant similarly entitled to credit for the arrears of rent remaining unpaid in respect of the "A" properties? These formed the subject of Issues Nos. 4, 5 and 12 in the first Court, which decided them all against the defendant.

That Court held, as a matter of construction, that Ex. A amounted to three different mortgages for three different amounts on three distinct properties, and that the mortgage for 2½ lakhs on the "A" properties was distinct and separate from the other two items of 2½ lakhs and 6 lakhs, which were similarly received for the respective purposes of relieving the "B" and "C" properties from the encumbrances subsisting thereon. In that view the Subordinate Judge disallowed the claims in connection with the "B" properties and went to the length of splitting up the stamp duty on Ex. A, allotting half of it only, *viz.*, Rs. 6,000 out of Rs. 12,000 to the claim against the "A" properties.

On the second point, he held that the mortgage (Ex. A) and the lease (Ex. I) were separate and severable transactions, that the arrears of rent payable under Ex. I were not charged upon the "A" properties, either as to principal or interest, and that the plaintiff was not bound to pay the sums claimed in respect of such arrears.

Taking the account on this basis, the Subordinate Judge decreed that (1) "if the plaintiff pays into Court on or before the 30th June, 1917, the amount declared due, *viz*, Rs. 2,70,752-1-9, the defendants should deliver up to the plaintiff.....all documents in his possession or power relating to the mortgaged property and should, if so required, re-transfer the property to the plaintiff free from the mortgage and from all encumbrances, etc., and shall put the plaintiff in possession of the property, and (2) that if such payment was not made on or before the 30th June, 1917, the said mortgaged property should be sold."

The defendant appealed to the High Court. The learned Judges in that Court, differing from the Subordinate Judge, held as a matter of construction that Ex. A could not be treated as creating three distinct mortgages and that there was nothing in its provisions to cut down the plain words of the instrument by which the properties in the four schedules were charged in respect of the whole debt. They, therefore, modified the decree of the first Court by including in the mortgage-debt the difference between the amount paid into Court by the mortgagee in respect of the "B" properties and the amount drawn out by him *viz.*, Rs. 13,201-6-0, with interest thereon at 10 annas per cent. per mensem from the 31st January, 1911, up to 19th April, 1920 (date of High Court decree). They further modified the lower Court's decree by giving to the defendant the whole of the Rs. 12,000 for stamps, etc.—the

additional sums thus allowed amounted, with interest, to Rs. 29,711-8-2.

The only objection to this part of the High Court's decree urged before this Board is that the appellant is entitled to interest on the entire amount paid into Court by the mortgagee (Rs. 1,93,617) from the time he lost possession of the "B" properties, *i.e.*, to the 24th April, 1912, at 10 annas per cent. per month, in addition to the interest on the difference (Rs. 13,204) allowed by the High Court. Their Lordships are of opinion that this contention is well founded and the High Court decree must be varied so as to give effect to it.

A second claim urged on behalf of the defendant-appellant to a sum of Rs. 5,572-14-8, is based on the ground that the mortgagor had collected a portion of the rents of the "A" properties between the 13th March, 1909, and the 30th June, 1909, and that this portion amounting to Rs. 5,572-14-8 was payable under Ex. A to the mortgagee. The Subordinate Judge, as well as the learned Judges of the High Court, found against the defendant-appellant in respect of this claim and their Lordships see no reason to disturb this concurrent finding of fact.

A more important point in the case relates to the arrears of rent payable under the lease (Ex. I). As stated above, the mortgagor never paid any of the instalments of rent payable under the lease (Ex. A). For seven of these instalments a decree was obtained in O. S. No. 17 of 1912 and a small sum of money realised in execution of that decree; the remaining five instalments also remained unpaid and the defendant claimed that two sums of Rs. 30,997-14-1 and Rs. 38,684 11-0 remained due in respect of these arrears of rent with interest thereon. Their Lordships understand that there is no dispute as to the amount, but the plaintiff contends that these sums are not in any way charged upon the "A" properties and that he was not bound to pay the same for the purposes of redemption.

The Subordinate Judge decided in favour of the plaintiff on the ground that the lease (Ex. I) did not create any charge on the *corpus* of the "A" properties. The High Court upheld that part of his decision, but on different grounds. The learned Chief Justice (the other learned Judge not dissenting) rejected the Subordinate Judge's construction of the lease and held that the annual payments thereby provided were charged on the land in question by Ex. I. The Chief Justice held, however, that by virtue of s. 62, cl. (*b*), of the Transfer of Property Act, the plaintiff had a statutory right to redeem the usufructuary mortgage created by Ex. A without paying off the charge for arrears of rent under Ex. I. Mr. Justice Seshagiri Ayyar agreed with the Chief Justice and was further of opinion that apart from s. 62, cl. (*b*), on which the Chief Justice relied, the defendant's claim on this head failed because there was no right in Indian law in a mortgagee to require all the mortgages on a property to be redeemed together.

It is contended before this Board on behalf of the defendant-appellant that the two deeds, Exs. A and I, should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest due on the mortgage. Further, that s. 62 of the Transfer of Property Act has no application to the case as it applies only to a case of an usufructuary mortgage pure and simple, which Ex. A is not, as it contains covenants for payment both of principal and interest. The section which the appellant's Counsel urges as being applicable to the facts of this case is s. 61 of the Transfer of Property Act, which enacts by implication that a mortgagor seeking to redeem shall not be entitled to do so without paying any money that may be due under a separate mortgage or charge, if the latter relates to the same property.

Their Lordships are of opinion that these contentions on behalf of the appellant must prevail. A number of authorities on the sections of the Transfer of Property Act were cited which their Lordships have considered, but upon which they think it unnecessary to comment. In their Lordships' view, s. 62 of the Transfer of Property Act applies only to usufructuary mortgages pure and simple, and is not in any way inconsistent with the provisions of s. 61.

The mortgage in question, Ex. A, no doubt, is usufructuary, but it is something more, inasmuch as it contains covenants on the part of the mortgagor to pay both principal and interest. Their Lordships are disposed to agree in the view taken

of the mortgage by the learned Chief Justice of Madras that it was an anomalous mortgage or at least a combination of a simple mortagage and an usufructuary mortgage. In no other view could the preliminary decree of the Subordinate Judge directing a *sale* of the property in default of payment, or the final decree of the High Court which embodies such direction, be made. If, again, apart from the usufructuary mortgage there is a simple mortgage or a charge subsisting on the properties in favour of the defendant by virtue of Ex. I, the decrees both of the Subordinate Judge and of the High Court must be held to be erroneous in so far as they direct that on payment of the amount due under Ex. A the defendant should deliver possession of the property free from encumbrance and all documents relating to the mortgaged property. Counsel, on behalf of the first respondent, conceded that that portion of the decree should be set aside, but argued that the plaintiff should be relegated to a separate suit to enforce the simple mortgage or charge under Ex. I.

It seems to their Lordships that the course suggested by the first respondent's Counsel would lead to a circuity of action and would be contrary to the provisions of Order XXXIV, r. 1, of the Code of Civil Procedure, which requires all persons having an interest in the mortgage security to be joined as parties to any suit relating to the mortgage. The object of that provision is that all claims affecting the equity of redemption should be disposed of in one and the same suit. If the defendant did not set up his charge for the arrears of rent in this suit serious questions might well arise as to whether he would be entitled subsequently to bring a suit to enforce that charge. Their Lordships are of opinion that the defendant-appellant is entitled to add the sums in question to his claim in this suit with interest thereon, from the due date of the mortgage, *viz.*, 13th of March, 1915.

The judgment of the High Court should be varied on the points mentioned above and the case remitted to that Court in order to make a decree on the above basis, and their Lordships will humbly advise His Majesty accordingly.

The respondent No. 1 must pay the appellant's costs of this appeal, less a sum of £50, which their Lordships assess as being payable to him by the appellant in respect of unsustainable claims abandoned only at the hearing of this appeal.

A. N. A. *Appeal allowed in part.*

Solicitors for the Appellant:—Messrs. *Douglas, Grant* and *Dold.*

Solicitor for the Respondents:—Mr. *H. S. L. Polak.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1589 OF 1923.

July 26, 1926.

Present:—Mr. Justice Devadoss.

SIRIGINEEDI SUBBARAIDU—DEFENDANT—APPELLANT

versus

Srimat TIRUMALA VENKATA-SREENIVASACHARLU AYYAVARU—PLAINTIFF—RESPONDENT.

Defamation—Words of abuse—Candidate at election abusing rival candidate as drunkard—Privilege, extent of.

The plaintiff and the defendant were candidates at an election. At the election meeting the plaintiff called the defendant a rowdy and a suspect. The defendant retorted by saying that the plaintiff was a drunkard and unfit to be a candidate. The defendant was successful at the election. After the election meeting was over, the defendant was asked by some people outside as to what happened inside and defendant said that the plaintiff was a drunkard. In an action for damages by the plaintiff:

Held, that in respect of the abuse at the meeting, defendant who was defending himself against the plaintiff's attack was privileged; but that privilege did not extend to what was said by the defendant outside the meeting and after the election was over, and that, therefore, the word used outside the meeting hall was actionable. [p. 91, col. 2.]

Dwyer v. *Esmonde* (2), distinguished.

Words of abuse used during the course of a heated quarrel are not actionable inasmuch as the person using them cannot be said to intend to defame the person whom he abuses. [p. 91, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 260 of 1922, preferred against that of the Court of the District Munsif, Ellore, in O. S. No. 249 of 1921 (O. S. No. 50 of 1921, Court of the District Munsif, Kovur)

Mr. *Rajamannar*, for Mr. *P. Venkatramana Rao*, for the Appellant.

Mr. *V. Govindachari*, for the Respondent.

JUDGMENT.—The plaintiff and the defendant were rival candidates at an election and the plaintiff called the defendant "a rowdy and a suspect." The defendant plaintiff was a "drunkard." The defendant retorted by saying that the was elected as one of the *Panchayatdars*

at the meeting. After the election was over, the defendant was asked by some people as to what happened inside and he seems to have told them that the plaintiff was a drunkard. The plaintiff has brought this suit for damages on account of the expression used by the defendant. The District Munsif gave a decree to the plaintiff for a sum of Re. 1 as damages and also costs of the suit. The Subordinate Judge has, on appeal, confirmed the decree of the District Munsif but varied the order as regards costs. The defendant has preferred this second appeal.

The contention of Mr. Rajamannar for the appellant is that there was a vulgar abuse at the time and that the word "drunkard," therefore, is not actionable. Reliance is placed on *Konce Subhadra* v. *Subbarayudu* (1). In that case a Bench of this Court held that if words of abuse are used during the course of a heated quarrel such words of abuse would not be actionable. In the case of vulgar abuse in the course of a quarrel, no doubt, it cannot be said that the person using the words intends to defame the person whom he abuses. But the case is different where a person in order to injure another person's reputation uses any expression which is defamatory, and which he knows is likely to lower the other in the estimation of others. The District Munsif has rightly disallowed the plaintiff's claim as regards the use of the word at the meeting. He has given a decree in respect of the word used after the meeting was over and outside the meeting hall.

The question is whether the defendant was justified in telling the people who asked him as to what happened inside, that the plaintiff was a drunkard. Reliance is placed upon *Dwyer* v. *Esmonde* (2). That case does not apply to the present case. In that case the defendant in order to justify his conduct in ejecting the plaintiff told the circumstances under which he had to eject him. There was an election pending and the plaintiff published in the *Freemans' Journal*, which had a large circulation in Waterford, statements which would go to show that the defendant was an undesirable landlord and was unfit to be a candidate. The defendant in order to justify his conduct wrote to the Journal detailing the real circumstances under which the plaintiff was evicted from his holding. He also explained why he could not get a tenant for his land. The Court of Appeal held that the defendant was justified in writing the article in order to explain his conduct In other words, he pleaded privilege and the Court of Appeal upheld the plea of privilege. In this case the defendant cannot set up the plea of privilege with regard to the expression used outside the meeting. So far as the expression used inside the meeting is concerned he was no doubt privileged because he was directly attacked by the plaintiff and he retorted by saying that the plaintiff was an undesirable candidate inasmuch as he was a "drunkard." But that privilege does not extend to anything which the defendant did outside the meeting and after the meeting was over. I, therefore, hold that the defendant's action was not justifiable and the lower Courts were right in awarding the plaintiff nominal damages.

The next question is whether I should allow the costs of this appeal. In ordinary cases, no doubt, costs would follow the event. But in this case the two parties are on a par. It is like the pot calling the kettle black and I do not think I would be justified in allowing costs to the respondent.

The second appeal is dismissed without costs. The memorandum of objections is also dismissed without costs.

V. N. V. *Appeal dismissed.*

(1) 10 M. L. J. 83.
(2) 2 Ir. R. 243.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 9, 1926.

Present:—Lord Phillimore, Lord Sinha, Lord Blanesburgh and Lord Salvesen.

PATHUMSA AMMAL—APPELLANT

versus

RAJAGOPALA MUDALIYAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 7—Redemption suit—Preliminary decree—Account, whether must be taken.

In a suit for redemption it is usual to have an account taken, but if at the time of the passing of the preliminary decree the Court can arrive at the exact sum payable by the plaintiff, it is not necessary to make a direction that an account should be taken. [p. 92, col. 1.]

Appeal against the judgment of the High Court, Madras.

Messrs. *L. De Gruyther* and *K. V. L. Narasimham*, for the Appellant.

of the mortgage by the learned Chief Justice of Madras that it was an anomalous mortgage or at least a combination of a simple mortagage and an usufructuary mortgage. In no other view could the preliminary decree of the Subordinate Judge directing a *sale* of the property in default of payment, or the final decree of the High Court which embodies such direction, be made. If, again, apart from the usufructuary mortgage there is a simple mortgage or a charge subsisting on the properties in favour of the defendant by virtue of Ex. I, the decrees both of the Subordinate Judge and of the High Court must be held to be erroneous in so far as they direct that on payment of the amount due under Ex. A the defendant should deliver possession of the property free from encumbrance and all documents relating to the mortgaged property. Counsel, on behalf of the first respondent, conceded that that portion of the decree should be set aside, but argued that the plaintiff should be relegated to a separate suit to enforce the simple mortgage or charge under Ex. I.

It seems to their Lordships that the course suggested by the first respondent's Counsel would lead to a circuity of action and would be contrary to the provisions of Order XXXIV, r. 1, of the Code of Civil Procedure, which requires all persons having an interest in the mortgage security to be joined as parties to any suit relating to the mortgage. The object of that provision is that all claims affecting the equity of redemption should be disposed of in one and the same suit. If the defendant did not set up his charge for the arrears of rent in this suit serious questions might well arise as to whether he would be entitled subsequently to bring a suit to enforce that charge. Their Lordships are of opinion that the defendant-appellant is entitled to add the sums in question to his claim in this suit with interest thereon, from the due date of the mortgage, *viz.*, 13th of March, 1915.

The judgment of the High Court should be varied on the points mentioned above and the case remitted to that Court in order to make a decree on the above basis, and their Lordships will humbly advise His Majesty accordingly.

The respondent No. 1 must pay the appellant's costs of this appeal, less a sum of £50, which their Lordships assess as being payable to him by the appellant in respect of unsustainable claims abandoned only at the hearing of this appeal.

A. N. A. *Appeal allowed in part.*

Solicitors for the Appellant:—Messrs. *Douglas, Grant* and *Dold.*

Solicitor for the Respondents:—Mr. *H. S. L. Polak.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1589 OF 1923.

July 26, 1926.

Present:—Mr. Justice Devadoss.

SIRIGINEEDI SUBBARAIDU—DEFENDANT—APPELLANT

versus

Srimat TIRUMALA VENKATA-SREENIVASACHARLU AYYAVARU—PLAINTIFF—RESPONDENT.

Defamation—Words of abuse—Candidate at election abusing rival candidate as drunkard—Privilege, extent of.

The plaintiff and the defendant were candidates at an election. At the election meeting the plaintiff called the defendant a rowdy and a suspect. The defendant retorted by saying that the plaintiff was a drunkard and unfit to be a candidate. The defendant was successful at the election. After the election meeting was over, the defendant was asked by some people outside as to what happened inside and defendant said that the plaintiff was a drunkard. In an action for damages by the plaintiff:

Held, that in respect of the abuse at the meeting, defendant who was defending himself against the plaintiff's attack was privileged; but that privilege did not extend to what was said by the defendant outside the meeting and after the election was over, and that, therefore, the word used outside the meeting hall was actionable. [p. 91, col. 2.]

Dwyer v. *Esmonde* (2), distinguished.

Words of abuse used during the course of a heated quarrel are not actionable inasmuch as the person using them cannot be said to intend to defame the person whom he abuses. [p. 91, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 260 of 1922, preferred against that of the Court of the District Munsif, Ellore, in O. S. No. 249 of 1921 (O. S. No. 50 of 1921, Court of the District Munsif, Kovur)

Mr. *Rajamannar*, for Mr. *P. Venkatramana Rao*, for the Appellant.

Mr. *V. Govindachari*, for the Respondent.

JUDGMENT.—The plaintiff and the defendant were rival candidates at an election and the plaintiff called the defendant "a rowdy and a suspect." The defendant plaintiff was a "drunkard." The defendant retorted by saying that the was elected as one of the *Panchayatdars*

at the meeting. After the election was over, the defendant was asked by some people as to what happened inside and he seems to have told them that the plaintiff was a drunkard. The plaintiff has brought this suit for damages on account of the expression used by the defendant. The District Munsif gave a decree to the plaintiff for a sum of Re. 1 as damages and also costs of the suit. The Subordinate Judge has, on appeal, confirmed the decree of the District Munsif but varied the order as regards costs. The defendant has preferred this second appeal.

The contention of Mr. Rajamannar for the appellant is that there was a vulgar abuse at the time and that the word "drunkard," therefore, is not actionable. Reliance is placed on *Konce Subhadra* v. *Subbarayudu* (1). In that case a Bench of this Court held that if words of abuse are used during the course of a heated quarrel such words of abuse would not be actionable. In the case of vulgar abuse in the course of a quarrel, no doubt, it cannot be said that the person using the words intends to defame the person whom he abuses. But the case is different where a person in order to injure another person's reputation uses any expression which is defamatory, and which he knows is likely to lower the other in the estimation of others. The District Munsif has rightly disallowed the plaintiff's claim as regards the use of the word at the meeting. He has given a decree in respect of the word used after the meeting was over and outside the meeting hall.

The question is whether the defendant was justified in telling the people who asked him as to what happened inside, that the plaintiff was a drunkard. Reliance is placed upon *Dwyer* v. *Esmonde* (2). That case does not apply to the present case. In that case the defendant in order to justify his conduct in ejecting the plaintiff told the circumstances under which he had to eject him. There was an election pending and the plaintiff published in the *Freemans' Journal*, which had a large circulation in Waterford, statements which would go to show that the defendant was an undesirable landlord and was unfit to be a candidate. The defendant in order to justify his conduct wrote to the Journal detailing the real circumstances under which the plaintiff was evicted from his holding. He also explained why he could not get a tenant for his land. The Court of Appeal held that the defendant was justified in writing the article in order to explain his conduct In other words, he pleaded privilege and the Court of Appeal upheld the plea of privilege. In this case the defendant cannot set up the plea of privilege with regard to the expression used outside the meeting. So far as the expression used inside the meeting is concerned he was no doubt privileged because he was directly attacked by the plaintiff and he retorted by saying that the plaintiff was an undesirable candidate inasmuch as he was a "drunkard." But that privilege does not extend to anything which the defendant did outside the meeting and after the meeting was over. I, therefore, hold that the defendant's action was not justifiable and the lower Courts were right in awarding the plaintiff nominal damages.

The next question is whether I should allow the costs of this appeal. In ordinary cases, no doubt, costs would follow the event. But in this case the two parties are on a par. It is like the pot calling the kettle black and I do not think I would be justified in allowing costs to the respondent.

The second appeal is dismissed without costs. The memorandum of objections is also dismissed without costs.

V. N. V. *Appeal dismissed.*

(1) 10 M. L. J. 83.
(2) 2 Ir. R. 243.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 9, 1926.

Present:—Lord Phillimore, Lord Sinha, Lord Blanesburgh and Lord Salvesen.

PATHUMSA AMMAL—APPELLANT

versus

RAJAGOPALA MUDALIYAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 7—Redemption suit—Preliminary decree—Account, whether must be taken.

In a suit for redemption it is usual to have an account taken, but if at the time of the passing of the preliminary decree the Court can arrive at the exact sum payable by the plaintiff, it is not necessary to make a direction that an account should be taken. [p. 92, col. 1.]

Appeal against the judgment of the High Court, Madras.

Messrs. *L. De Gruyther* and *K. V. L. Narasimham*, for the Appellant.

Messrs. *A. M. Dunne* and *E. L. Thornton*, for the Respondent.

JUDGMENT.

Lord Phillimore.—Their Lordships need not trouble Counsel for the respondent.

The greater number of the numerous and serious charges made in the plaint in this action have been disposed of in the Courts of first and second instance. Amongst those charges is the charge of negligence against the present plaintiff's guardian. The decree which is now complained of is admitted to have been well-founded and right, excepting in respect of two matters, the amount actually put into the decree and the short period of redemption. That it is usual to have a taking of accounts is, no doubt, the case; but if the result of taking them would be to give the same sum as that passed in the decree, there is no serious point in the Court not directing the account to be taken; and if the decree be rectified in respect of that amount, all that can be contended for is done. It is quite possible that the Judge who passed this decree did not quite, at the moment, see clearly how far the compromise went and how far he was bound, in dealing with the three defendants not parties to the compromise, to see that every item of the account and every point found against them was proved by evidence and not founded upon the compromise. His decree could have been appealed against in respect of such matters as were not warranted by the evidence, because he could not, in reliance upon the compromise, give any judgment against those three defendants.

Now their Lordships would desire to see whether or not serious mischief would result from the fact that the decree erred in these respects. The way to do that is to imagine the decree to have been settled and to have been properly drawn. It ought, on the contention of the appellant, to have found a lesser sum due to the extent of perhaps Rs. 1,100. This their Lordships will assume, and, also that, though it is not an absolute rule of law, there should in the circumstances have been given the fullest possible term for redemption, that is, six instead of one month. Their Lordships will suppose that the decree is altered in those two points,—they still find no reason to suppose that the appellant would have benefited if the decree had put her in that position. The appellant has not shown that she or her guardian could have done anything to save the property from sale. The sale proceedings are admitted to be regular; and the mortgagee is not making any personal claim against the defendant in respect of the deficiency still due on the mortgage. On the whole, their Lordships think that the High Court, very largely for the reasons which appear in the judgment of the learned Judges came to the right conclusion and this appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent:—Mr. *H. S. L. Polak.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2181 OF 1926.

January 13, 1927.

Present:—Mr. Justice Addison.

TUMAN SINGH—PLAINTIFF—APPELLANT

versus

BIJA—DEFENDANT—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 41—First Appellate Court lacking pecuniary jurisdiction—Second appeal, whether lies.

Want of pecuniary jurisdiction on the part of the first Appellate Court is a good ground for second appeal. [p. 93, col. 1.]

Second appeal from the decree of the Senior Sub-Judge, Ambala, reversing that of the Sub-Judge, Third Class, Ambala, dated the 9th May, 1925.

Mr. *Gullu Ram*, for the Appellant.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—The plaintiff sued the defendant for the recovery of a sum of Rs. 1,200 principal and interest, on book account. A decree was passed for Rs. 758 with proportionate costs in the plaintiff's favour. Against this decision the defendant appealed in the Court of the District Judge. It was noted in the appeal that the value of the suit for purposes of jurisdiction was Rs 1,200, but Court-fees were only paid on Rs. 758 as that was the sum decreed. The District Judge sent the appeal to the Senior Sub-Judge in order that he should decide it. Now, the Senior Sub-Judge in ques-

tion, under Notification No. 90-G, dated the 9th of February, 1926, had power to hear appeals from decrees passed by any Sub-Judge, other than one of the First Class, in small causes of the value not exceeding Rs. 1,000. This, however, was a small cause of the value of Rs. 1,200 and obviously jurisdiction for purposes of appeal follows the jurisdictional value of the suit. The Senior Sub-Judge accepted the appeal and dismissed the suit with costs throughout. Against his decision this second appeal has been presented.

It was not contested before me that the Senior Sub-Judge had no jurisdiction to hear the appeal. It has been held that in cases, in which the wrong Appellate Court has heard the appeal, this Court need not interfere on the Revision Side unless it can be shown that there has been injustice or prejudice resulting therefrom. This is, however, not a revision but an appeal, and it was admitted that the fact that the Senior Sub-Judge had no jurisdiction to hear the appeal was a good ground for a second appeal. As, therefore, the Senior Sub-Judge had no jurisdiction to hear the first appeal, I accept this appeal and setting aside his judgment and decree I order the first appeal to be heard and decided by the District Judge, Ambala. In fact it was owing to his mistake that the appeal was wrongly sent to the Court of the Senior Sub-Judge. The Court-fee on this second appeal will be refunded. Other costs will be borne by the parties themselves as neither of them can be blamed for what has happened.

R. L. *Appeal accepted.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 19, 1926.

Present:—Lord Atkinson, Lord Carson and Sir John Wallis.

KRISHNENDRA NATH SARKAR SINCE DECEASED (NOW REPRESENTED BY SURENDRA NATH SARKAR AND ANOTHER) AND OTHERS—DEFENDANTS—APPELLANTS

versus

Rani KUSUM KAMINI DEBI, SINCE DECEASED—PLAINTIFF—RESPONDENT.

Landlord and tenant—Enhancement of rent—Construction of pottah.

Prima facie the rent of a tenancy is liable to enhancement on the application of the landlord or to reduction on the application of the tenant, unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively. [p. 94, col. 2.]

The word usually employed in creating a fixed rent in perpetuity is *mokurari* but the absence of this word is not conclusive if other words are found in the grant which clearly show that a fixed rent was intended to be created. [*ibid.*]

A *pottah* contained the following clause: "This *pottah* is granted in respect of the above-mentioned *mouzah* and the aforesaid *jotes* by fixing the annual rent thereof at Rs. 418-9-15 *gundas* in the Company's coin as per details in the schedule, and you also submit a *kabuliyat* of your own accord. You shall pay the rent year after year according to the *kistbundi* given in the schedule below. Should you make default in payment of the *kists*, you shall pay the rents in arrear with interest according to law. You and your sons and grandsons, etc., in succession, will remain in enjoyment and possession by keeping the boundaries intact as they have been from before. All profits and losses shall be yours, and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the Survey and Settlement of rent to be made by me when necessary. If you should make any plea of payment unsupported by *dakhilas*, the same shall be rejected. You shall not do any improper act, and should you do any, you shall be answerable for it. Should any new tax be imposed by Government, you shall pay the same separately in addition to the rent mentioned in the *pottah*":

Held, that on the true construction of the *pottah* there were no terms used in it from which it could be inferred that the landlord had abandoned his right to enhancement of the rent, whilst the express provision that the rent would not be reduced negatived any such construction. [p. 95, col. 1.]

Appeal from the judgment of the Calcutta High Court.

Messrs. *L. De Gruyther* and *E. B. Raikes*, for the Appellants.

Messrs. *A. M. Dunne*, *J. M. Parikh* and *K. Ali Afzal*, for the Respondents.

JUDGMENT.

Lord Carson.—The suit was brought by the plaintiffs (respondents) as the *zemindars* and owners of certain lands, against the tenure-holders thereof, to enhance the rent of the tenure created in favour of the latter under a *jote pottah*, dated 5th January, 1870. The question for determination in the appeal is whether the rent of the said tenure was, as the appellants contend, fixed by the *pottah* in perpetuity or was, as the respondents contend, not fixed in perpetuity, but was liable to enhancement in accordance with the provisions of the Bengal Tenancy Act VIII of 1885, s. 7, sub-s (1).

The said *pottah*, which was in the *Bengali* language, was granted by the predecessor of the respondents, and the material part of it upon which the rights of the parties depend is as follows:—

"This *pottah* is granted in respect of the above-mentioned *mouzah* and the aforesaid

jotes by fixing the annual rent thereof at Rs. 418 9-15 *gundas*, in the Company's coin, as per details in the schedule, and you also submit a *kabuliyat* of your own accord. You shall pay the rent year after year according to the *kistbundi* given in the schedule below. Should you make default in payment of the *kists*, you shall pay the rent in arrear with interest according to law. You and your sons and grandsons, etc., in succession, will remain in enjoyment and possession by keeping the boundaries intact as they have been from before. All profits and losses shall be yours, and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the Survey and Settlement of rent to be made by me when necessary. If you should make any plea of payment unsupported by *dakhilas*, the same shall be rejected. You shall not do any improper act and should you do any, you shall be answerable for it. Should any new tax be imposed by Government, you shall pay the same separately in addition to the rent mentioned in the *pottah*."

The plaintiffs-respondents also claimed in the suit the imposition of a fair rent for land alleged to be held by the appellants by encroachment in excess of the lands leased under s. 52 of the same Act. As regards this second claim, there was a finding in favour of the appellants by the Subordinate Judge, and the point was abandoned at the hearing of the first appeal. It was not disputed that under the terms of the said *pottah* the tenure created was a perpetual and hereditary one, having regard to the terms "you and your sons and grandsons, etc., in succession, will remain in enjoyment and possession," etc. This, however, does not in law involve that the rent specified is, therefore, fixed in perpetuity, and it was contended that upon the true construction of the *pottah* there was nothing to show that the rent was fixed in perpetuity, and that the plaintiffs-respondents were entitled to sustain their claim for an enhancement of the rent. The whole question, therefore, turns upon the true construction of the *pottah*. The Subordinate Judge of Bogra by his judgment, dated the 27th August, 1917, dismissed the plaintiffs-respondents' suit with costs, holding on the construction of the *pottah* that the rent was fixed in perpetuity and was not liable to enhancement. On appeal, however, to the District Judge of Pabna, he, on the 5th April, 1919, delivered judgment and passed a decree setting aside the decree of the Court below, holding on the construction of the *pottah* that the plaintiffs-respondents were not precluded from claiming an enhanced rent, and his judgment was upheld by the High Court of Judicature at Fort William in Bengal by a judgment and decree dated the 16th May, 1923; hence the present appeal.

It appears to be common ground that *prima facie* the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant, unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively.

The learned Subordinate Judge was of opinion that the grant was clearly intended to create:—"an absolute, hereditary and '*mokurari*' tenure, inasmuch as it contains the essential words 'generation to generation,' which have always been considered to have that effect. The expression 'the profit or loss is yours' clearly shuts out the idea of enhancement and indicates to show that the rent is fixed in perpetuity." Apparently the word usually employed in creating a fixed rent in perpetuity is the word *mokurari*, though, no doubt, the absence of such word is not conclusive if other words are found in the grant which clearly show that such a rent was intended to be created.

The learned District Judge, however, took a different view, holding that, taking the *pottah* as a whole, there was nothing to show that the landlord had precluded himself from claiming an enhancement of rent. This view was maintained by the two Courts of Appellate Jurisdiction of the High Court of Judicature at Fort William who heard the case.

Briefly stated, the learned Judges, in their respective Courts were unable to find in the grant any words which have, as the word *mokurari* would have, the effect of indicating that the rent was intended to be fixed in perpetuity. On the contrary they point out that the words following those quoted by the Subordinate Judge, *viz.*, "and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the Survey and Settlement of rent to be made by me when necessary," indicate that whilst the lessee was precluded from claiming reduction the landlord was specifically maintaining

his right to claim enhancement. Their Lordships agree with the opinions expressed by the Judges of the District Court and the High Court respectively, and are of opinion that on the true construction of the *pottah* there are no terms used from which it can be inferrred that the landlord abandoned his right to enhancement, whilst the express provision that the rent would not be reduced seems to negative any such construction. Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *Watkins & Hunter.*

Solicitors for the Respondents:—Messrs. *W. W. Box & Co.*

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 3 OF 1926.

June 29, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr Justice Percival.

PANDHARINATH MANIKSHET AND ANOTHER—PLAINTIFFS

versus

AJAMKHA SARDARKHA—DEFENDANT.

Limitation Act (IX of 1908), s. 6—Document taken in name of minor, suit on—Extension of limitation.

Where on the true construction of a document which is the basis of a suit the Court is of opinion that the document was taken in the name of the plaintiff, who was then a minor, or in the name of the plaintiff, acting by his guardian, then the plaintiff is entitled to the benefit of the provisions of s. 6 of the Limitation Act. But if, on the other hand, the Court is of opinion that the document was taken solely by the guardian of the minor, then the minor would not be entitled to take the benefit of the section. [p. 97, col. 1.]

Reference made by the District Judge, East Khandesh.

Mr. *Y. V. Bhandarkar*, for the Plaintiffs.

Mr. *G. B. Chitale*, for the Defendant.

JUDGMENT.—This is a reference under O. XLVI, r. 1, of the Civil Procedure Code, by the learned District Judge of East Khandesh. The point in question is, whether, under the document Ex. 3 in the case, the minors, who are there mentioned, are excluded by limitation from bringing a suit on the document, or whether they had three years from attaining their majority in which to bring a suit. The learned Judge has felt a difficulty in consequence of a decision of this High Court by Sir Norman Macleod and Mr. Justice Shah in *Vishnu Narayan Deo* v. *Keshav Gajanar Patbhari* (1) and has consequently referred this point to us, more especially as he states that other cases in the District are pending on the right decision of this particular point. *Vishnu Narayan Deo* v. *Keshav Gajanar Patbhari* (1) purported to follow the case of *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2). The latter was a case where a promissory note had been taken by the mother and guardian of an infant in her own name. As I read the report, it does not even appear that the minor's name was mentioned at all. Accordingly, the Court there held that the holder of the promissory note was the mother, that she was the proper person to sue on the note and not the minor, and that, accordingly, the ordinary period of limitation applied, and the minor did not get an extended three years after the period of limitation had expired.

Again, as I read the decision in *Vishnu Narayan Deo* v. *Keshav Gajanar Patbhari* (1) the Court there considered that the note was given to and taken by the guardian alone. Sir Norman Macleod in various parts of his judgment says:—

"The promissory note was taken by his guardian when he was a minor...The note was given to his guardian, and his guardian could have sued on it...The guardian having taken the note, he is the person entitled to sue on it."

We have seen the record in that case, and it may well be that the Court acted on the statement of facts in para. 1 of the petition for revision in which it was said that the pro note was passed in favour of the guardian of the minor.

Now, it may be admitted that, if one turns to the promissory note itself, which was Ex. 3 A in that suit, there is a considerable doubt as to whether, in fact, this was the true effect of the note. Unfortunately, we have not got the original which, of course is in the vernacular, but according to the translation on the record the note begins:—

"Promissory note dated *Shake* 1828 *Jeshth Vadya* 10th, May 16, 1906, on that day taken in writing by Vishnu Narayan Deo, minor by *vahiwatdar* of his estate Sadashivrao Raghunath, *to him* the promissory note

(1) 80 Ind. Cas. 474; 26 Bom. L. R. 426; A. I. R. 1924 Bom. 468.

(2) 28 M. 205; 15 M. L. J. 249.

is given in writing by Vishnu Moreshwar Potbhare."

On that translation the important words would seem to be "to him." If those words refer to the manager or guardian, then one can quite understand the Court holding that he was really the holder of the note. If, on the other hand, they refer to the minor, then different considerations may well apply. But whether that particular promissory note was construed in the same way as we ourselves might be disposed to construe it, is immaterial. We are concerned with the general principle, and we consider that *Vishnu Narayan Deo* v. *Keshav Gajanar Patbhari* (1) can only be considered an authority in a case where a promissory note has been taken in the name of the guardian alone, and where consequently the facts are similar to *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2) which that decision purports to follow.

If, on the other hand, the promissory note is taken in the name of the minor alone, then we think it reasonably clear that the minor would have three years from attaining his majority in which to sue. That point was in effect decided in *Yeknath Ramchandra* v. *Waman Brahmadev* (3) a decision of Sir Charles Sargent and Mr. Justice Nanabai, which was not cited apparently in *Vishnu Narayan Deo* v. *Keshav Gajanar Patbhari* (1). There, through the instrumentality of the guardian of a minor, a bond was obtained in the minor's name alone. It was argued that the minor's brother could have sued on the bond and given a valid discharge, and consequently the suit was time-barred. But the Court held that the plaintiff's brother not being a party to the bond, s. 8 of the Limitation Act, 1877, did not apply, and that time did not begin to run against the minor until the latter attained his majority.

So, too, in *Mahipatrav Chandrarav* v. *Nensuk Anandrav Shet Marvadi* (4) an account current was continued after the death of a lender for the benefit of the lender's son, and eventually a balance was struck by the mother and guardian of the infant. It was there held that, although the balance was struck by the guardian, the minor would have an extended time after attaining his majority in which to sue.

It must also be borne in mind that, under s. 26 of the Negotiable Instruments Act, a minor may, *inter alia*, endorse and negotiate promissory notes so as to bind all parties except himself. And in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (5) it was held that it was not open to the defendant to plead that a payee or indorsee, who, on the face of the document, purported to be a principal, was, in fact, a mere *benamidar*.

In our view, therefore, if the note had been *simpliciter* to and for the benefit of the minor, the minor would not have been barred until three years after he attained his majority.

What, then, is the true construction of the note we have to deal with here? It is Ex. 3, and is described as a debt instalment bond. The parties are thus mentioned: "(1) Pandharinath Manikshet Vaishya Sonar, (2) Bhanudas Manikshet Vaishya Sonar, both minors their guardian mother Saibai." Then the husband's name is given. They are described as the persons who took the bond. Then the person giving the bond is mentioned as Ajamkha, and his address is given. Then the body of the document shows that a particular buffalo had been bought for Rs. 60; that Rs. 10 had been paid, and a balance of Rs. 50 remained. Then follows a promise to pay the balance by certain instalments.

In our opinion that document on its true construction is not a document given solely to the guardian within the meaning of *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2). It is a document given to the minors acting by their mother and guardian Saibai. Accordingly, in our view, it has substantially the same effect as if it was given to the minors alone. We cannot accept the contrary argument that we must ignore the minors altogether and treat the document as if it was given to the guardian alone. One must remember that in the ordinary course of events a minor does, for certain purposes, at any rate, contract by his guardian, and that, as pointed out in argument, a common form of writing taken in India where minors are concerned, is A B minor, acting by his guardian X.

Under these circumstances the view which we take is that this case falls within the principle of *Yeknath Ramchandra* v. *Waman Brahmadev*, (3) and not within the principle of *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* (2) and that, consequently,

(3) 10 B. 241; 5 Ind. Dec. (N. S.) 548.
(4) 4 B. H. C. R. A. C. J. 199.
(5) 36 M. 88; 1 M.L. T. 377; 16 M. L. J. 508 (F. B.).

in this particular case the minors had three years from attaining majority in which to bring their suit. That is the result of s. 6 of the Limitation Act.

To guard against any misconception, I am not here considering whether the younger minor will have an additional period of limitation from that of his elder brother. I assume that even in the case of the elder brother the suit was brought within three years from the elder brother attaining his majority.

Accordingly, I would prefer not to answer the question submitted to us in the rather general form in which it is framed, but to answer that the suit on this particular bond may properly be brought within three years after the elder minor attained his majority; and that in general where any Court is of opinion, on the true construction of the document in question, that it is taken in the name of a minor or in the name of a minor acting by his guardian, then a similarly extended period would apply. But, if, on the other hand, a Court is of opinion that the document is taken solely by the guardian, then that extended period would not be open for the benefit of the minor.

As regards costs, O. XLVI, r. 4, provides that the costs, if any, consequent on a reference for the decision of the High Court, shall be costs in the case. Mr. Chitale is instructed by the defendant, and Mr. Bhandarkar, who has given us the benefit of his arguments for the plaintiffs, is appointed by the Registrar. Consequently, the plaintiffs, have not incurred any costs in respect of this reference. We, therefore, think the proper order under O. XLVI, r. 4, will be that the defendant's costs of this reference are to be costs in the cause.

Z. K. *Answered accordingly.*

LAHORE HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 551 OF 1926.

December 18, 1926.

Present :—Mr. Justice Broadway and Mr. Justice Zafar Ali.

THE DELHI CLOTH AND GENERAL MILLS COMPANY, LIMITED, DELHI—PETITIONER

versus

THE COMMISSIONER OF INCOME TAX, —DELHI AND ANOTHER—RESPONDENTS.

Income Tax Act (XI of 1922), 66 A as amended by Act XXIV of 1926, object of—Appeal to Privy Council—Question of great private or public importance.

The intention of the Legislature in adding s. 66A to the Income Tax Act is to enable an appeal to His Majesty in Council in cases in which the High Court can certify that the question of law involved is one of great private or public importance. [p. 98, col. 1.]

The fact that a decision of a particular question of law may affect not only the parties to the suit but also other persons similarly situated is not by itself a ground for granting leave to appeal to the Privy Council. [p. 98, col. 2.]

Petition, under ss. 109 and 110, Civil Procedure Code, for leave to appeal to His Majesty's Privy Council against the order of this Court, passed in Civil Reference No. 2 of 1925 by Mr. Justice LeRossignol and Mr. Justice Martineau, on the 6th January, 1926, holding that the learned Chief Commissioner is correct in his views, that the item Rs. 1,00,000 was assessable to income tax as part of the income for the year ending December, 1922.

Original case referred under s. 66 (2) of the Income Tax Act of 1922 by E. R. Abbot, Esquire, Chief Commissioner and Commissioner of Income Tax, Delhi, with his letter No. 7518 financial, dated the 23rd December, 1924.

Mr. *Mehr Chand Mahajan*, for the Petitioner.

The Government Advocate for the Respondents.

ORDER.—This is an application for leave to appeal to His Majesty in Council. It purports to be made under ss. 109 and 110 of the Civil Procedure Code, but really is an application under s. 66 (2), sub-cl. (2) of Act XI of 1922 as amended by Act XXIV of 1926 which came into force on the 1st day of April, 1926. The facts are that a reference was made under s. 66 of the Income Tax Act of 1922 by the Chief Commissioner of Delhi in connection with the assessment made on the Delhi Cloth and General Mills Company, Limited, Delhi. The Company had set aside a sum of Rs. 1,00,000 in the year 1918 as a provision against bad and doubtful debts. In the year 1922 this sum of Rs. 1,00,000 was brought into account and shown as profits. At the same time the Company contended that this amount was not assessable in the year 1922 inasmuch as the said sum of Rs. 1,00,000 had accrued as profit in the year 1918. It was held by a Division Bench of this Court, by a judgment dated the 6th January, 1926,* that the claim made by the

Company was erroneous and that the said sum of Rs. 1,00,000 had been rightly included in the profits for the year 1922 and correctly assessed to income-tax. It is against this judgment of the Division Bench of this Court that the Company desires a certificate for leave to appeal to His Majesty in Council. Now, at the date when this decision was pronounced, the order of this Court was final and not open to appeal to the Privy Council. Act XXIV of 1926 added to the Income Tax Act of 1922, s. 66 A, sub-cl. (2) of which is to the following effect:

"An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under s. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council."

This in terms is the same as s. 109 (c) of the Civil Procedure Code. Inasmuch as a reference under s. 66 of the Income Tax Act postulates the existence of a question of law, it is perfectly clear that the intention of the Legislature in adding s. 66A to the Income Tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance. It has been laid down by their Lordships of the Judicial Committee that the grant of a certificate under s. 109 (c), Civil Procedure Code, is not a matter which is left entirely in the discretion of the Court but is a judicial process which could not be performed without special exercise of that discretion [*vide Banarsi Prasad* v. *Kashi Krishna Narain* (1)]. In *Nattu Kesava Mudaliar* v. *Govindachariar* (2), a case decided by a Division Bench of the Madras High Court, it was pointed out that s. 109 (c) of the Civil Procedure Code contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance. In another case decided by a Full Bench of the Madras High Court, namely, *Rajeswara Sethupathi* v. *Tiruneelakantam* (3), it was pointed out that where, in a case the point in issue appears to be one of general importance, but not of sufficient importance to the proposed respondent to warrant putting him to the expense of an appeal to the Privy Council, leave to appeal should be refused. Again, in *Mritunjoy Praharaj* v. *Balmakund Kanungoe* (4) a Division Bench of the Patna High Court held that it was not enough to entitle a High Court to grant special leave to appeal to His Majesty in Council under s. 109 (c), Civil Procedure Code, that a decision upon the construction of a section of a Tenancy Act will affect incidentally the rights of those who have holdings or tenures subject to the Act. It may be that in the present case the decision sought to be appealed against might affect the action or the position of other Companies who sought to evade the payment of income tax by adopting the method that was adopted by the present petitioner. We do not think, however, that the point of law which is involved in the present case is one of such universal or paramount importance as would warrant the grant of the certificate prayed for and we, therefore, dismiss this petition with costs.

We would note that the application in this as well as in another case with which we are about to deal, was filed in a very incomplete condition. It was filed on the 26th April, 1926, but was not ultimately put into proper form till the 22nd July, 1926. As, however, the learned Government Advocate did not press the question of limitation we have refrained from expressing any opinion on the point.

R. L. *Petition dismissed.*

(1) 23 A. 227; 3 Bom. L. R. 154; 5 C. W. N. 193; 11 M. L. J. 50; 28 I. A. 11; 8 Sar. P. C. J. 447 (P. C).

(2) 76 Ind. Cas. 811; 18 L. W. 348; 45 M. L. J. 514; A. I. R. 1924 Mad. 231; (1924) M. W. N. 3.

(3) 72 Ind. Cas. 250; 44 M. L. J. 217; 32 M. L. T. 126; A. I. R. 1923 Mad. 232; (1923) M. W. N. 415; 17 L. W. 775.

(4) 61 Ind. Cas. 663; 6 P. L. J. 125; 2 P. L. T. 657.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 381 OF 1924.

July 5, 1926.

Present:—Justice Sir Lallubhai Shah, Kt., and Mr. Justice Fawcett.

MANIBHAI GOVINDBHAI PATEL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE NADIAD CITY MUNICIPALITY—AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bombay District Municipal Act (III of 1901), ss. 58,

178—Duty of Municipality to provide for public education—Governor-in-Council, power of, to frame rules—Order directing Commissioner to prescribe date within which duty must be performed—Order of Commissioner directing payment of money to officer appointed to carry out duty, legality of.

It is not essential under sub-s. (3) of s. 178 of the Bombay District Municipal Act that an order directing that a certain sum of money out of Municipal funds be paid to an officer who has been appointed to carry out the duties of the Municipality in a certain matter should be addressed to a Municipal servant. It is enough if the order is addressed to an officer who has custody of the Municipal funds on behalf of the Municipality. [p. 101, col. 1.]

Under s. 58 of the Bombay District Municipal Act power is conferred upon the Governor in Council to prescribe the extent of the independent authority of any Municipality in respect of public education and the necessary implication is that the observance of that prescription is an obligation on the Municipality under the Act, even though it may not have been expressly so laid down by the Act. [p. 101, col. 2.]

Under s. 178 of the Act there is an obligation on a Municipality to observe the rules framed by the Governor-in-Council under s. 58 of the Act for the purpose of prescribing the extent of the independent authority of the Municipality in respect of public education. [*ibid.*]

Where a Municipality has made a default in performing any duty imposed on it by or under the Bombay District Municipal Act, the Governor in Council has power under s. 178 of the Act, to direct the Commissioner to fix a period for the performance of such duty and if the Municipality fails to perform the duty within that period, an order can be made by the Commissioner directing any officer who has custody of Municipal funds on behalf of the Municipality to place such funds as may be necessary at the disposal of such officer as may be appointed in order to perform the duty left unperformed by the Municipality. [p. 102, cols. 1 & 2.]

First appeal from the decision of the Joint Judge at Ahmedabad, in Civil Suit No. 6 of 1923.

Mr. *G. N. Thakor* (with him Mr. *M. H. Mehta*), for the Appellants.

Messrs. *N. P. Desai* and *Kanga*, Advocate General, with them *S. S. Patkar*, Government Pleader, for the Respondents.

JUDGMENT.

Shah, J.—This appeal arises out of a suit filed by the plaintiffs as rate-payers within the Municipal limits of the Nadiad City Municipality for a declaration that the order made by the officer of defendant No. 2, dated December 17, 1921, for the maintenance of primary schools within the limits of the Nadiad Municipality out of the funds belonging to defendant No. 1, *i. e.*, the Nadiad Municipality, was illegal, and for a true and proper account of the moneys withdrawn under this order, and for a refund to the Municipality of the moneys so withdrawn from the Municipal funds.

The defendants, the Nadiad City Municipality, and the Secretary of State for India in Council, filed a written statement in which various points were raised, including the point of limitation and the contention that the order complained of by the plaintiffs was not *ultra vires*.

It is not necessary to refer in detail to the various points which were raised in the lower Court. But the trial Judge has decided the suit on the first issue as to limitation. It has been found that the plaintiffs' suit is barred by limitation. Issue No. 6 in the lower Court, *viz.*, "whether the order passed by the Commissioner, N. D., on December 17, 1921, is illegal and *ultra vires?*" was not decided. The result was that the plaintiffs' suit was dismissed.

The plaintiffs have appealed to this Court, and it is contended on behalf of the plaintiffs that the view taken by the lower Court on the question of limitation is not correct. It is urged that the order complained of is *ultra vires*, as, under s. 178 of the Bombay District Municipal Act III of 1901, there was no default on the part of the Municipality in performing any duty imposed by or under this Act. It is further urged that the order directing the Sub-Treasury Officer at Nadiad to pay a certain sum is not within the powers of the Commissioner, N. D., because the order, to be legal, must be directed to a person who for the time being had custody of any moneys on behalf of the Municipality as required by sub-s. (3) of s. 178, while in the present case it was directed to an officer of Government, with whom there were Municipal funds. Further, it is urged that the suit was substantially a suit for accounts of money improperly drawn by the officer appointed by the Commissioner, N. D., and applied towards expenses incurred in connection with schools which were started by Government within the Municipal area before the date of the order.

As regards this last argument, it may be stated at once that there is no suggestion in the plaint that any part of the funds withdrawn from the Municipal funds under the order of the Commissioner, N. D., has been applied towards the expenses of schools, which were started by Government before the disputed action was taken by the Commissioner. In the absence of any such allegation, the suit cannot be treated as being a suit to recover the amount said to

have been so misapplied. The suit, as I have already stated, is directly for the purpose of testing the legality of the order made by the Commissioner, N. D., and for a proper account of the funds drawn by defendant No. 2 out of the funds belonging to defendant No. 1 under that order for the purpose of maintaining the Municipal primary schools.

With regard to the question of limitation on behalf of respondent No. 2, it has been urged that the order in question is *intra vires*, and that the suit brought to have that order set aside more than a year after the date of the order is beyond time under Art. 14 of the Indian Limitation Act, Sch. I. It is also urged that, even if the order were *ultra vires*, still the suit would be time-barred.

Before dealing with these points, it will be convenient to refer to the orders in question. On December 7, 1921, the Government passed the following Resolution:—

"Whereas the Government of Bombay are informed that the Municipality of Nadiad have, in contravention of r. 3 of the rules made by Government under s. 58 of the Bombay District Municipal Act, 1901, resolved in their Resolution No. 4, dated October 8, 1920, that the Municipal Schools shall not be open to Inspection and examination by the Government Inspecting Staff, and have given effect to the said Resolution, and have thereby made default in performing the duty imposed on them under the said Act of maintaining primary schools subject to and in accordance with the rules made under the said section of the said Act.

"And whereas the Government of Bombay after due inquiry, are satisfied that the said Municipality of Nadiad have been and continued to be guilty of the said default. Now, therefore, in exercise of the powers conferred by s. 178 of the said Act, the Government of Bombay are pleased to direct the Commissioner, Northern Division, to fix a period for the performance of that duty."

In pursuance of this Resolution, on December 8, 1921, the Commissioner proceeded to fix the period within which the duty was to be performed. He fixed the period ending at 5 P. M. on December 17, 1921, within which that duty was to be performed by the Municipality. The Municipality having failed to comply with that direction, on December 17, 1921, the Commissioner, N. D., made the following order:—

"In the Commissioner's order dated December 8, 1921, a period upto December 17 was fixed within which the Municipality should perform the duty in respect of which they have been found guilty of default by the Government of Bombay—the duty, namely, of maintaining primary schools subject to and in accordance with the rules under s. 58 of the Municipal Act.

"It now appears from the Resolution of the Municipality that they have definitely refused to perform their duty within the period fixed and have proceeded to commit further gross illegalities.

"I, therefore, in exercise of the powers conferred by s 178 (2) of the District Municipal Act hereby appoint the Deputy Educational Inspector of the Kaira District to perform the duty of managing, administering and maintaining the Nadiad City Municipal primary schools, and further direct that the Nadiad City Municipality shall forthwith pay to the Deputy Educational Inspector, an advance of Rs. 9,000 for defraying the expenses of performing that duty —such payment to be made by a deposit account to be opened in favour of the Deputy Educational Inspector in the Sub-Treasury at Nadiad."

It may be mentioned that, prior to the Government Resolution, the Municipality had resolved not to allow any inspection by the Government Educational Inspector of the primary schools in their charge. Rule No. 3 of the rules made by the Governor in Council under the proviso to s. 58 of the District Municipal Act is in these terms:—

"Municipal schools shall, subject to the proviso in r. 2, be provided for all castes and classes of the community, and shall be open to inspection and examination at all times by the Government Inspecting Staff. The Municipality shall in each case make suitable arrangements in communication with the Deputy Educational Inspector for the annual examination required by the Educational Department."

These rules purporting to be made in exercise of the powers conferred by s. 58 of the Bombay District Municipal Act, 1901, are published in the *Bombay Government Gazette*, 1921, Part I, pages 1258 to 1260. It was in virtue of the position taken up by the Municipality with reference to r. 3 that the Resolution of the Government above referred to was passed and the subsequent orders referred to above were made.

It may be mentioned that, under s. 54, cl. (*p*) of the Bombay District Municipal Act, it is the duty of the Municipality to establish and maintain primary schools. Under s. 58, the management, control and administration of every public institution exclusively maintained out of Municipal property and funds would vest in the Municipality by which it is maintained, provided that the extent of the independent authority of any Municipality in respect of public education and their relations with the Government Educational Department shall from time to time be prescribed by the Governor in Council.

As regards the question of limitation, it seems to me that the question whether the order of the Commissioner, N. D., is illegal and *ultra vires* has to be considered. Having regard to the decisions of this Court of which *Dhanji Jairam Mali* v. *Secretary of State for India* (1) is a type, the question, whether this order requires to be set aside or not, would depend upon the question whether it is *intra vires* and operative or *ultra vires*, and, therefore, inoperative in law. The question, therefore, which I propose to deal with in the first instance is whether this order is *intra vires* or not.

I may state at once that I do not think there is any substance in the point made by the learned Counsel for the appellants that this order was not directed to a person who had custody of the Municipal funds on behalf of the Municipality. It was, in fact, directed to the Sub-Treasury Officer who had custody of the Municipal funds on behalf of the Municipality. It is not essential under sub-s. (3) of s. 178 that the person to whom the direction is given must be a Municipal servant. Exhibit 23 in the case, which is the order directed to the Sub-Treasury Officer, appears to me to be free from any objection, provided the main order by the Commissioner, N. D., on December 17, is shown to be *intra vires*.

This question in its turn depends upon the question as to whether the Government Resolution purporting to have been made in the exercise of the powers conferred by s. 178 is within the scope of the powers conferred upon the Government by that section. Under s. 178, sub s. (1), when there is a default in performing a duty imposed on the Municipality by or under the Bombay District Municipal Act, the Governor in Council may exercise the powers conferred upon the Government under that sub-section. It is not denied in this case that there was a default on the part of the Municipality in so far as the Municipality refused to allow inspection by the Government Inspecting Staff of their primary schools as required by r. 3 of the rules made by Government under the proviso to s. 58. But it is argued that the duty imposed by this rule on the Municipality is one which is not imposed upon them "by or under this Act." It is urged on behalf of the appellants that simply because under the proviso to s. 58 the Governor-in-Council has the power to prescribe from time to time the extent of the independent authority of any Municipality in respect of public education, and their relation with the Government Educational Department, it does not follow that any departure on the part of the Municipality from that prescription is a breach of any duty imposed upon the Municipality by or under the Act. It is argued that the only duty in this respect imposed by the Act is one which is stated in s. 54, cl. (*p*), with reference to primary schools. It is true that the duty of 'establishing and maintaining primary schools' is directly laid by the Act on the Municipality. It is true that in s. 58 there are no express words stating that it shall be the duty of the Municipality, not to transgress the extent of the independent authority of the Municipality with regard to the management, control and administration of public education, prescribed by the Governor in Council under that proviso.

But it seems to me a reasonable interpretation of the section that when the power is conferred upon the Governor in Council of prescribing the extent of the independent authority of any Municipality in respect of public education, the necessary implication is that the observance of that prescription is an obligation on the Municipality under the Act, even though it may not have been expressly so laid down by the Act. That being my view of s. 58, it follows that, under s. 178, there was an obligation on the Municipality under the Act to observe the rules framed by the Governor in Council for the purpose of prescribing the extent of the independent authority of the Municipality in respect of public education.

Mr. Thakor has, however, relied upon the decision of this Court in *Secretary of State*

(1) 61 Ind. Cas. 347; 45 B. 920; 23 Bom. L. R. 279.

for India v. *Manilal Harivallavdas Bhagat* (2) in support of his argument that the breach of these rules does not involve default on the part of the Municipality in the performance of any obligation under the Act within the meaning of s. 178. It may be stated that that was a decision with reference to the meaning of the word "misapplication" in s. 42 of the Bombay District Municipal Act, and the question in that case was whether the moneys used by the Municipality, which declined to observe r. 3 of these rules, and had used these funds in maintaining primary schools, according to their view, independently of the Government control, were misapplied by the Municipal Councillors within the meaning of s. 42. It was held that there was no misapplication of the funds simply because the Municipality had refused to accept the control by way of inspection of their schools by the Inspecting Staff of the Government. This particular r. 3 has been referred to by the learned Chief Justice in his judgment at page 377* as merely prescribing the proper method whereby Government are enabled to satisfy themselves that the Municipality are doing their duty. In other words, it is a rule of procedure and its infringement could in no way affect the character of the schools referred to in the plaint.

The point that we have to consider here, however, is quite different. It is possible that if this decision in *Secretary of State for India* v. *Manilal Harivallavdas Bhagat* (2) had been before the Government at the time when the Government Resolution above referred to was passed, they may not have thought it fit, in the exercise of their discretion, to take the action which, in fact, they did under s. 178 and they may have passed over the default without taking any serious notice of it. But we have nothing to do for the purpose of this point with the question whether, having regard to the nature of the default, the discretion was properly exercised by the authorities.

The question that we have to consider is whether it is within the scope of s. 178 for the Governor in Council to direct the Commissioner to fix a period for the performance of this particular duty under s. 178; and I am of opinion that it is open to the Governor in Council to direct that to be done, provided that the Municipality have made a default in performing any duty imposed on them by or under the Act. In this case it is not suggested that there is any other enactment by or under which this obligation is laid upon the Municipality. But the obligation to observe r. 3 of the rules made by the Governor in Council prescribing the extent of the independent authority of the Municipality in respect of public education is one which appears to me to be laid on the Municipality under the Act. Therefore, the order made by the Commissioner in pursuance of the Resolution which is complained of is within the powers of that officer conferred by sub-s. (2) of s. 178. It follows, therefore, that the order is legal and operative; and the plaintiffs' suit must fail because the whole basis of their action is that this order is illegal. It also follows that the suit, which has been filed more than twelve months after the cause of action arose, making due allowance for the period of notice as contemplated by s. 80 of the Civil Procedure Code, is beyond time.

In this view of the case, it is not necessary to deal with the further point which has been raised on behalf of respondent No. 2, that even if the order were *ultra vires*, the suit would be time-barred in view of the decision of this Court in *Ganesh Shesho Deshpande* v. *Secretary of State for India* (3). I feel considerable difficulty in following this argument. If the order is *ultra vires*, it is void and has no operation in law. If any action is taken in pursuance of the order, it is such action that gives rise to the cause of action; and appropriate relief can be claimed with reference to such action. But there would be no order to be set aside. If the decision in *Ganesh Shesho Deshpande* v. *Secretary of Stale for India* (3) is to be read as the learned Advocate-General has asked us to read it, it would be difficult to reconcile it with the decisions of which *Dhanji Jairam Mali* v. *Secretary of State for India* (1) is a type. In this connection I desire to add a word with reference to the reasoning of the learned District Judge. He says:—

"On a careful consideration of these authorities I am of opinion that if the order of the Commissioner was not immediately acted upon, and was merely an administrative order, limitation would not run from

(2) 88 Ind. Cas. 43; 27 Bom. L. R. 371; A. I. R. 1925 Bom. 278

*Page of 27 Bom. L. R.—[*Ed.*]

(3) 57 Ind. Cas. 587; 44 B. 451; 22 Bom. L. R. 212.

that date. On the other hand, if the order was immediately acted upon, and the plaintiff could not seek relief without having it set aside, limitation would run from the date of the order as per Art. 14 of the Limitation Act."

I am not satisfied that this is a correct test to apply, if it is meant to convey that an illegal order requires to be set aside. This reasoning of the learned District Judge may derive some support apparently from the observations in *Ganesh Shesho Deshpande* v. *Secretary of State for India* (3). But I have indicated the difficulty with reference to that case, if it is sought to be read as laying down that even though the order be illegal it requires to be set aside if it is acted upon. I do not propose to pursue this point any further, as I hold that the order in question is *ultra vires*. Thus the suit fails on the merits as also on the point of limitation.

I would, therefore, dismiss the appeal with costs to respondent No. 2. Respondent No. 1 to bear his own costs.

Fawcett, J.—I agree that the suit fails both on its merits and on the point of limitation, and that the appeal should be dismissed, as proposed by my learned brother. That there was a duty imposed on the Municipality by r. 3 of the Government rules under s. 58, and that there was default in performing that duty, cannot be, and is not, controverted, for r. 3 is put in a direct imperative form, *viz*:—

"Municipal schools shall, subject to the proviso in r. 2, be provided for all castes and classes of the community, and shall be open to inspection and examination at all times by the Government Inspecting Staff. The Municipality shall in each case make suitable arrangements, in communication with the Deputy Educational Inspector, for the annual examination required by the Educational Department."

It is not denied that the Municipality deliberately departed from that rule, so that really the whole question is whether this duty can be said to be one imposed on the Municipality "by or under" the Municipal Act within the meaning of s. 178, sub-s. (1). The learned Advocate-General's contention was that the duty under this rule was one "imposed by" the Act within the meaning of s. 178; but I do not concur with that contention. There are no provisions in the Act similar to this r. 3, saying that the Municipality shall keep school open for Government inspection, nor is there any provision which necessarily implies such a duty. The words of the proviso to s. 58 are wide and confer on the Government a general power to prescribe to what extent and in what manner Government or its Educational Department can exercise authority over educational institutions of a Municipality. The rules prescribed by Government for this purpose might rely on other means than inspection of Municipal schools for the exercise of that control. Accordingly, I think it cannot properly be said that the duty is one "imposed by" the Act.

In this view, the main question is whether it is a duty "imposed under" the Act. I think it is obvious that the Legislature in using the expression "by or under this Act" did not use the word "under" simply to repeat what would be expressed by the word "by." The word "under" must have been intended to include some duties which would not be covered by the words "duty imposed by the Act." In its primary meaning the word "under" does, I think, cover the case of a duty imposed by some authority which is recognized by the Act, for instance, the common case of the Act giving power to Government or some person or body to make rules for the purposes of the Act. In such a case there may be duties imposed by those rules, and certainly such duties can be said to be imposed "under the Act," although they are not imposed "by the Act." I reject the contention of Mr. Thakor for the appellant that the words "by or under this Act" are limited to duties imposed by some provision of the Act itself. That, I think, obviously cannot have been intended. For instance, proviso (*a*) to s. 51 of the Act provides that "nothing in this section or in s. 50 shall in any way affect any obligations accepted by or imposed upon any Municipality by any declarations of trust executed by or on behalf of such Municipality, or by any scheme settled under the Charitable Endowments Act, 1890, for the administration of any trust." That recognizes that the Municipality may accept a duty under some declaration of trust or by a scheme settled under the Charitable Endowments Act. Suppose, for instance, the Municipality accept an obligation to pay annually a sum of Rs. 1,000 in support of some institution, say a Hospital, and the Municipality make default in paying such sum, and suppose

the founder of that institution, or somebody interested in its maintenance, makes a complaint to the Government and asks them to exercise their power under s. 178 to enforce payment, is it to be said that in such a case the Government and the Commissioner cannot act under s. 178, because this is a duty imposed not by any provision of the Act, but by a declaration of trust or by a scheme? The answer is obviously in the negative, because the duty is one "imposed under" the Act by virtue of the authority conferred in proviso (*a*) to s. 51.

Again take s. 55 of the Act which says: "Every Municipality shall also, out of the Municipal property and fund, make payments at such rates as the Governor in Council from time to time by general or special orders prescribes, for the maintenance and treatment either in the Municipal District or at any asylum, hospital or house ...(*a*) of lunatics...and (*b*) of lepers."

Suppose that the Governor in Council prescribes such rates at Rs. 10 a month per lunatic, or leper, and the Municipality deliberately decline to pay at that rate, can it be said that the duty of paying at the rate prescribed by the Governor in Council is not a duty imposed on the Municipality 'under' the Act? To my mind, it is clearly a duty so imposed, in view of s. 55, giving express authority to the Governor in Council to prescribe the rate.

In s. 58, which is the one with which we are now concerned, authority is given to the Governor in Council to make rules as regards the extent of the independent authority of a Municipality in respect of public education and their relations with the Government Educational Department. That, I think, clearly implies that the Government have power to impose certain obligations or duties upon the Municipality for the purpose of the exercise of the Government control, which is authorised by the section. The prescription of a duty to keep open Municipal schools for inspection is a fundamental method of exercising such control. In England it is a statutory obligation on the local education authority maintaining a public elementary school to keep it open to Government inspection: see Elementary Education Act, 1870, 33 & 34 Vic. c. 75, s. 7 (3). Rule 3, therefore, follows a well-established precedent. Section 58, to my mind, directly authorises a rule like r. 3; and in such a case the duty imposed on the Municipality is, in my opinion, a duty imposed upon it under the Municipal Act. In support of this view, I may refer to the case of *The Fulham* (4). An Act used the words "salvage due under this Act," and the Court of Appeal in England held that those words covered "salvage recoverable in a Court recognized by the Act." That is a very different thing to saying that the words should be construed as "salvage recoverable by virtue of an express provision of Act."

Accordingly, I think that the order complained of was *intra vires*, and also that the suit is barred by limitation. The case of *Secretary of State for India* v. *Manilal Harivallavdas Bhagat* (2) dealt with an entirely different point, as has been shown by my learned brother.

Z. K. *Appeal dismissed.*

(4) (1899) P. 251; 68 L. J. P. 75; 47 W. R. 598; 81 L. T. 19; 15 T. L. R. 404; 8 Asp. M. C. 559.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 613 OF 1926.

January 5, 1927.

Present:—Mr. Justice Addison.

BUTE SHAH—DECREE HOLDER—PETITIONER

versus

GURANDITTA—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (c)—Execution of decree—Attachment, exemption from—House of agriculturist—Burden of proof.

Where it is claimed that a house is exempt from attachment in execution of a decree by virtue of the provisions of s. 60 (*c*) of the Civil Procedure Code, the burden of proof lies on the judgment-debtor to establish that he is an agriculturist not merely in name but in the strict sense of the term and that the house is occupied by him as such agriculturist. [p. 105, col. 1.]

Petition for revision of an order of the Senior Subordinate Judge, Sialkot, dated the 25th May, 1926, reversing that of the Subordinate Judge, Fourth Class, Narowal, District Sialkot, dated the 15th February, 1926.

Mr. *J. N. Malhotra*, for the Petitioner.

JUDGMENT. — The decree-holder attached two houses belonging to his judgment-debtor in order to bring them to sale in execution of his money-decree. The judgment-debtor objected that they were not liable to attachment and sale as he was an agriculturist. The executing Court held that the judgment-debtor was

only an agriculturist in name as he had mortgaged the whole of his holding and had no cattle. It considered that one house was sufficient for the judgment-debtor and released the house, marked 'X' on the plan, from attachment. It ordered the second house to be sold. The judgment-debtor appealed to the Senior Subordinate Judge. He accepted the appeal as regards the house ordered to be sold by the executing Court on the ground that it was the residential house of the judgment-debtor who was an agriculturist. The lower Appellate Court, however, has accepted the finding that he was only an agriculturist in name as his land was all under mortgage and he had no cattle. Against this decision revision petition has been presented in this Court.

It was held in *Jamna Prasad Raut* v. *Raghunath Prasad* (1) that it lay on the judgment-debtor to prove that the house was strictly of the nature contemplated by the provisions of s. 60 (*c*) of the Civil Procedure Code, *i. e.*, the burden of proof lay on the judgment-debtor to establish that he was an agriculturist not in name but in the strict sense of the term and occupied the house as such agriculturist. A similar view seems to have been taken by the Punjab Chief Court in *Attar Singh* v. *Bhagwan Das* (2). See also *Pandurang Balaji* v. *Krishnaji Govind* (3). Following these authorities I hold that it was for the judgment-debtor to establish that he was an agriculturist in fact and not in name before he could claim exemption. I, therefore, accept this revision petition and setting aside the order of the Appellate Court restore that of the executing Court. The respondent has not appeared and, therefore, I order the parties to bear their own costs here and before the Appellate Court.

Z. K. *Order set aside.*

(1) 19 Ind. Cas. 125; 35 A. 307; 11 A. L. J. 437.
(2) 2 Ind. Cas. 983; 65 P. R. 1909; 104 P. W. R. 1909; 141 P. L. R. 1909.
(3) 28 B. 125; 5 Bom. L. R. 799

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 13, 1926.

Present:—Lord Sinha, Lord Blanesburgh, Lord Salvesen and Sir John Wallis.

T. V. KALYANASUNDARAM PILLAI—APPELLANT

versus

KARUPPA MOOPPANAR AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 122, 123—Registration Act (XVI of 1908), s. 47—Hindu Law—Gift, deed of, execution of—Adoption—Registration of deed after adoption, effect of.

Where a donor of immoveable property has handed over to the donee an instrument of gift duly executed and attested and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument. [p. 107, col. 2.]

While registration is a necessary solemnity in order to the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with. [*ibid.*]

The adoption of a son by a Hindu made after the execution and delivery of a deed of gift of immoveable property, but before registration thereof, does not render the deed void as against the adopted son [*ibid.*]

Consolidated Appeals from the judgment and decrees of the Madras High Court (Sir Walter Schwabe, KT., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Kumaraswami Sastri), dated the 13th November, 1922, in Appeals Nos. 1 and 2 of 1921 and reported as 73 Ind. Cas. 206.

Messrs. *L. DeGruyther* and *B. Dube*, for the Appellant.

Messrs. *G. R. Lowndes* and *K. V. L. Narasimham*, for the Respondents.

JUDGMENT.

Lord Salvesen.—These are two consolidated appeals from a judgment and two decrees dated 13th November, 1922, of the High Court of Judicature at Madras. It is unnecessary to re-state the prior procedure or judgments which dealt with a number of contentions in law, and questions of fact now either finally disposed of or no longer insisted upon. It is sufficient to say that when leave to appeal was granted by the order of the High Court of 19th April, 1923, it was on the specific

ground that it raised the substantial question of law, namely, "whether an adoption of a son by a Hindu made after the execution and delivery of a deed of gift, but before registration thereof, renders a deed void as against the adopted son." This is the only ground of appeal which is set forth in the appellant's case, and the respondents in their case, para. 2, take up the same position. Although, therefore, other grounds were indicated in the argument addressed to the Board which might have been equally fatal to the appeal, their Lordships think it right, in all the circumstances, to deal only with that which was the ground of judgment of the High Court, and in respect of which leave to appeal was given.

The relevant facts, which are no longer disputed, lie within a short compass. On the 9th September, 1891, a certain Vaithilingam Pillai executed a trust deed by which he appointed trustees to administer a trust for charity in the wide sense, including the maintenance of religious services at certain temples. In order to provide the necessary funds for the maintenance of these services, and for discharging the other duties imposed upon the trustees, he set apart certain immoveable properties belonging to him, the income of which was to be devoted to the purposes of the trust. At the date of the deed, Vaithilingam had no son. The deed, however, was executed on the footing that it was his immediate intention to adopt a son for the perpetuation of his lineage, as although he had two wives, one of whom was living with him at the time, he was still childless and despaired of having issue. There is no question now that this constituted a gift of immoveable property within the meaning of s. 123 of the Transfer of Property Act, 1882, nor is there any question that the trust deed, on the day of its execution, was duly delivered to the trustees named therein.

On 10th September, 1891, Vaithilingam, by a deed executed on that day, adopted the appellant, then five years old, as his son. On 11th September, he executed a deed of guardianship to the newly adopted son, and on the 12th, a partition deed between himself and the guardian of that son, the effect of which need not, for the purpose of this judgment, be further referred to. On 15th September, three days later, the deed of gift was registered. On this it was contended for the appellant that the deed of gift was not complete until registration, and that, as the grantor had before registration adopted the appellant as his son, the latter's rights in the family property had intervened so as to revoke or invalidate the gift. The leading statutory provisions on which the solution of the question depends are ss. 122 and 123 of the Transfer of Property Act, 1882, and ss. 47 and 49 of the Indian Registration Act III of 1877. Section 122 of the Transfer of Property Act is as follows:—

"'Gift' is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void."

Section 123 is in these terms:—

"For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

The controversy in the numerous cases in the Courts of India which have dealt with this point has always centred round the words in this section:—

"The transfer must be effected by a registered instrument," and it has been forcibly argued that, until registration, there is no complete gift, and that if the donor dies or revokes or becomes incapable of making the gift before registration, it cannot take effect. On the other hand, attention must be directed to s. 47 of the Indian Registration Act of 1877, which is in these terms:—

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

The learned Chief Justice in the Court below, after referring to the above sections, said:—

"The effect of those sections, in my judgment, is that, if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor, as the case may be, can defeat the title which, on registration, becomes an

absolute title dating from the date of the execution of the document."

The other two Judges concurred in this view, making special reference to the case of *Venkati Rama Reddi* v. *Pillai Rama Reddi* (1) which, being a decision of the Full Bench, was binding upon them. In that case the donor died on the day following the execution of the deed of gift, and the deed was not presented for registration until a period of six months had elapsed from the date of his death; facts which, as it appears to their Lordships, were certainly not less cogent in favour of incompleteness than are those in the present case; and there the District Judge held that the gift deed, not having been registered by the donor during her lifetime, was void, and that the *post-mortem* registration was of no effect. This judgment was, however, reversed on appeal by the unanimous decision of the Full Bench. There was no express finding of fact, so far as appears from the report, that the deed of gift had been delivered to and accepted by the donee prior to the death of the donor, although, perhaps, this may be implied from the circumstances. In the present case, fortunately, there is no room for doubt on this point, because the learned Judges of the High Court remitted this question of fact to the Subordinate Judge and he reported that the deed had been delivered over, on the day of its execution, to one of the trustees appointed under it on behalf of himself and the other trustee. The decision of the Full Bench in 40 Madras is thus summarized in the head-note :—

"There is nothing in s. 123 of the Transfer of Property Act which requires the donor to have the deed registered. All that is required is that he should have executed the deed. Once such an instrument is duly executed, the Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of execution."

Their Lordships think that this statement of the law needs qualification by reference to s. 122 of the Transfer of Property Act, and is only correct upon the footing that the gift had been accepted by or on behalf of the donee during the lifetime of the donor. A deed of gift executed in accordance with the terms of s. 123 of immoveable property but never communicated to the intended donee, and remaining in the possession of the grantor, undelivered, would, in their Lordships' opinion, not come within the ruling of the Full Bench in the case in question.

The only other case to which it is necessary to refer is a Full Bench decision of the High Court of Bombay in 1924, namely, *Atmaran Sakharam Kalkye* v. *Vaman Janardan Kashelikar* (2). The circumstances in that case were very much the same as in the present, and the decision is thus correctly expressed in the head-note :—

"Where the donor of immoveable property has handed over to the donee an instrument of gift duly executed and attested, and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument."

This case was very fully argued and the argument on behalf of the appellant in the present appeal could not be better stated than it was in the dissenting judgments of Shah, Acting C. J., and Mulla, J.; and these arguments were all brought very forcibly under their Lordships' notice and supplemented by the learned Counsel for the appellant. Their Lordships, however, cannot accept them. They are unable to see how the provision of s. 123 of the Transfer of Property Act can be reconciled with s. 47 of the Registration Act, except upon the view that, while registration is a necessary solemnity in order to the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer appointed by law for the purpose, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor the express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with. Their Lordships

(1) 38 Ind. Cas. 707; 40 M. 204; 31 M. L. J. 690; 4 L. W. 465; 20 M. L. T. 450; (1917) M. W. N. 112.

(2) 87 Ind. Cas. 490; 49 B. 388; 27 Bom. L. R. 290; A. I. R. 1925 Bom. 210 (F. B.).

accordingly find themselves in complete agreement with the judgment of the Full Bench of the Bombay High Court in the case cited. As this decision, and the similar decision of the Full Bench of the Madras Court, had settled the law for these Presidencies, it is unnecessary to refer to the various conflicting decisions of inferior tribunals which were overruled. Their Lordships apprehend that the Judges of the High Court of Madras, in allowing leave to the appellant in the present case to proceed with his appeal, desire to elicit an authoritative opinion as to the soundness of the two latest decisions in the Madras Courts, and their Lordships think it desirable that a point which has occasioned so much controversy in the past should be settled by a decision, which will apply to the whole of India.

Their Lordships will accordingly humbly advise His Majesty that the judgment and decree of the High Court should be affirmed, and that this appeal should be dismissed. The appellant must pay the costs.

Z. K. *Appeal dismissed.*

Solicitor for the Appellant:—Mr. *H. S. L. Polak.*

Solicitors for the Respondents:—Messrs. *Douglas Grant* and *Dold*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2223 OF 1926.

January 6, 1927.

Present:—Mr. Justice Addison.

PALO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BAWA *alias* INDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Ancestral property—Land held by brothers jointly at the time of earliest Settlement—Presumption.

Where it is found that a certain piece of land was held at the time of the first Settlement jointly by persons who were real brothers, the presumption, in the absence of any indication that the land was the self-acquired property of the brothers, is that it was held by their father.

Second appeal from the decree of the District Judge, Gurdaspur, dated the 7th May, 1926, affirming that of the Subordinate Judge, Second Class, Gurdaspur, dated the 6th March, 1925.

Mr. *Shamair Chand*, for the Appellants.

Mr. *S. R. Laul*, for the Respondents.

JUDGMENT.—The plaintiffs who are the minor sons of one Tara (see the pedigree-table attached to the judgment of the District Judge) sued for the usual declaration that the sale effected in 1920 by their father Tara and his cousins Indar Singh and Wadhawa, should not affect their reversionary rights. Both the Courts below have concurred in dismissing the suit on the ground that the land has not been proved to be ancestral. Against this decision the plaintiffs have presented this second appeal.

As regards the area of 12 *kanals* 3 *marlas* which the District Judge has pointed out can be traced back to 1852, it seems to me that the appeal must succeed. In that year this land was held by Khazana and Jodha and a deceased brother of theirs. The presumption, therefore, is, in the absence of any indication that the property was self-acquired, that it was held by Labha their father. That being the case, this area of 12 *kanals* 3 *marlas* or rather 12 *kanals* 6 *marlas* as shown in the Settlement of 1852, must be held to be ancestral. The authorities are *Jiwan Singh* v. *Har Kaur* (1) and *Maryam Bibi* v. *Ghulam Mahomed* (2).

As regards the area of 30 *kanals* 13 *marlas* which was only traced back to 1910-11, the appeal must be dismissed, for though it has been shown that in that year this area was held by Alu and Tara, sons of Khazana, and Dittu and Wadhawa, sons of Jodha, there is a clear indication that in 1882, it was acquired by these four persons by pre-emption. That being the case, it follows that this area is not ancestral.

Owing to the fact that some of the records have been eaten by whiteants and for other reasons the remaining area of about 16 *kanals* has not been traced at all. It follows that it was properly held not to be ancestral.

In the result I accept the appeal to the extent of holding that the area of 12 *kanals* 6 *marlas* shown in 1852 Settlement is ancestral. I, therefore, set aside the order of the District Judge and remand the appeal to him for further orders in view of my finding that 12 *kanals* 6 *marlas* are ancestral. Parties will bear their own costs here.

Z. K. *Appeal accepted.*

(1) 22 Ind. Cas. 415; 41 P. R. 1914; 51 P. L. R. 1914; 34 P. W. R. 1914.

(2) 73 Ind. Cas. 881; 5 L. L. J. 446; A. I. R. 1924 Lah. 175.

BOMBAY HIGH COURT.

CIVIL REVISION APPLICATION No. 8 OF 1926.
July 2, 1926.
Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

AMBADAS HARIRAO KARANTE —PLAINTIFF—APPLICANT
versus
VISHNU GOVIND BARAMANIKAR AND OTHERS—DEFENDANTS—OPPONENTS.

*Jurisdiction—Decree passed in excess of pecuniary jurisdiction of Court—*Mala fide *undervaluation, absence of—Decree, whether nullity—Execution Court, duty of.*

Where in a suit which is properly instituted in a particular Court on its valuation, a decree is passed which is in excess of the pecuniary jurisdiction of the Court, then in the absence of any intentional *mala fide* undervaluation by the plaintiff, the decree cannot be treated as a nullity and the execution Court cannot refuse to execute it. [p. 110, col. 1.]

Civil Revision application against the order passed by the Joint Subordinate Judge of Sholapur in Darkhast No. 1768 of 1924.

Mr. *G. S. Rao*, D. B., for the Applicant.

Mr. *G. S. Mulgaonkar*, for the Opponents.

JUDGMENT.

Madgavkar, J.—This is an application under s. 115 of the Code of Civil Procedure by the decree-holder-applicant against the order of the Joint Second Class Subordinate Judge of Sholapur, dismissing the *darkhast* on the ground that the decree sought to be executed was passed by a Court beyond jurisdiction, and was, therefore, a nullity. The proceedings in the original suit are not before us. But it is admitted that the suit was properly instituted in the Court of the Second Class Subordinate Judge without objection or challenge by the opponents-defendants judgment-debtors. The parties tendered terms of compromise, and a decree was passed accordingly under O. XXIII, r. 3, for an amount of Rs. 5,700. How this excess valuation of Rs. 700 arose, there is nothing before us to show. The Subordinate Judge in execution held, on the authorities as he understood them, that this very fact sufficed to render the decree a nullity for want of jurisdiction.

This view is sought to be supported for the opponents in this Court on the authority of cases such as *Rajlakshmi Dasee* v. *Katyayani Dasee* (1) and *Hirjibhai* v. *Jamshedji* (2). Diwan Bahadur Rao for the applicant relies, on the other hand, on the principles of decisions such as *Lakshman Bhatkar* v. *Babaji Bhatkar* (3) and *Shamrav Pandoji* v. *Niloji Ramaji* (4).

On the materials such as they are, it is clear that the plaintiff's valuation was not challenged in the first instance by the defendants or questioned by the Court. Nor in the two previous *darkhasts* did the judgment-debtors raise the present question of jurisdiction. We are unable to agree with the learned Subordinate Judge that the mere fact that the decree was for an amount of Rs. 5,700 and was passed by the Second Class Subordinate Judge was *ipso facto* proof that it was beyond jurisdiction and a nullity. For instance, if a suit has commenced within the jurisdiction and by the addition of mesne profits after the date of institution the amount is increased to an amount beyond the jurisdiction, a decree for the full amount is, nevertheless, perfectly valid and with jurisdiction. The jurisdiction in the first instance is determined under the Bombay Civil Courts Act by the valuation in the plaint and not by the result of the decree, whatever it might turn out to be. It is true that deliberate and *mala fide* undervaluation or overvaluation might cause the decree to be a nullity, as in the case above, *Rajlakshmi Dasee* v. *Katyayani Dasee* (1). In regard to the observations of Beaman, J., in *Hirjibhai* v. *Jamshedji* (2) the facts of that case were shortly, that the plaintiff sued for accounts and not knowing the exact amount of his claim, valued it at Rs. 101 and instituted the suit in the Court of the Second Class Subordinate Judge. After adverse decisions up to the High Court, he contended, for the first time, that the subject-matter was over Rs. 10,000 and entitled him to leave to appeal to the Privy Council. The Court held that, having deliberately instituted the suit in the Court of the Second Class Subordinate Judge, he must be taken to have conceded the subject-matter to be a maximum of Rs. 5,000 and that he would not now be allowed to turn round and say that it was over Rs. 10,000. The proposition enunciated by Beaman, J., is that the subject-matter of the suit cannot exceed in value the pecuniary limit of the jurisdiction of a Court in which the suit was instituted,

(1) 12 Ind. Cas. 461; 38 C. 639.

(2) 21 Ind. Cas. 783; 15 Bom. L. R. 1021.
(3) 8 B. 31; 4 Ind. Dec. (N. S.) 395.
(4) 10 B. 200; 5 Ind. Dec. (N. S.) 519.

That proposition, as we understand it, is perfectly consistent with the proposition of law enunciated in the two previous cases, *Lakshman Bhatkar* v. *Babaji Bhatkar* (3) which was followed by Sargent, C. J., in *Shamrav Pandoji* v. *Niloji Ramaji* (4). In the latter case Sargent, C. J., observed (page 202*):—

"The subject-matter of the suit, which was the sum due on the mortgage sought to be redeemed, was within the jurisdiction of the Second Class Subordinate Judge; and his jurisdiction would continue, whatever might be the result of the suit, in all such matters in the suit as, by the Code of Civil Procedure, are brought within his cognizance, amongst which are matters in execution in that suit."

We are unable to agree with the argument for the opponents that, if from whatever cause the value of the subject-matter increased subsequent to the date of institution, jurisdiction, *ipso facto*, ceases, and the only proper procedure is to apply to the District Judge for transfer to a different Court which has jurisdiction, having regard to the altered subject-matter of the suit. Reference may also be made in the facts of this particular case to the provisions of O. XXIII, r. 3, although they are doubtless subject to s. 6 of the Code of Civil Procedure.

On the record as it stands, we are of opinion that the mere fact of the compromise decree being for Rs. 5,700 does not, in the absence of any intentional *mala fide* undervaluation by the plaintiff, cause the decree to be a nullity. The learned Subordinate Judge is, therefore, in our opinion, wrong within the meaning of s. 115, Civil Procedure Code, in questioning in execution the validity of the decree sought to be executed and in not exercising the jurisdiction, which, in our opinion, he possessed, and ought to have exercised. Against such an order not dealing with the merits in execution, no appeal would lie: *Shamrav Pandoji* v. *Niloji Ramaji* (4).

We, therefore, allow the application, set aside the order of the Subordinate Judge, and direct that the Subordinate Court should take it back on the file and proceed with the execution on the merits.

Costs of the application on the opponents. Costs in the Subordinate Judge's Court to be costs in the *darkhast*.

Fawcett, J.—I would only add that I have grave doubt whether in any case the point in question should not be held to be *res judicata* on the principle of Explanation IV to s. 11, Civil Procedure Code, which can apply even in an execution matter: *cf. Gadigappa Chambasappa* v. *Shidappa Gurushidappa* (5). However, this point has not been argued, so I merely mention it.

Z. K. *Application allowed.*

*Page of 10 B.—[*Ed.*]

(5) 83 Ind. Cas. 155; 48 B. 638; 26 Bom. L. R. 817; A. I. R. 1924 Bom. 495.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1704 OF 1926.

January 6, 1927.

Present:—Mr. Justice Addison.

Musammat PIAR BAI—APPLICANT OBJECTOR—APPELLANT

versus

FIRM TULSI DAS-TARLOCHAN MAL AND OTHERS—CREDITORS AND KALA RAM, INSOLVENT AND ANOTHER—RESPONDENTS.

Hindu Law—Joint family—Will, validity of—Insolvency of father—Power to sell son's share in family property, whether vests in Official Receiver.

Where a Hindu father and his son form a joint Hindu family and continue to be joint until the death of the father, any Will made by the father is inoperative and invalid so far as the joint property is concerned and the son takes his father's estate by survivorship. [p. 111, col. 1.]

The power of a Hindu father to sell his son's share in the joint family property for paying off his just and proper debts vests, on the insolvency of the father, in the Official Receiver. [*ibid.*]

Miscellaneous First Appeal from an order of the District Judge, Jhang at Sargodha, dated the 17th April, 1926.

Bakhshi *Sohan Lal*, R. B., for Dr. *Nand Lal*, for the Appellant.

Mr. *J. N. Aggarwal*, for the Respondents.

JUDGMENT.—Kala Ram was adjudicated an insolvent on the 9th December, 1924. Ten days later on the 19th December, 1924, his father Devi Das made a Will of all his properties in favour of his own wife, *Musammat* Piar Bai, and in case of her death in favour of the insolvent's minor son, Lajpat Rai. Eleven days later the testator Devi Das died and the Receiver in the insolvency took possession of his estate on the ground that it came to the insolvent by survivorship. Devi Das's widow, *Musammat* Piar Bai, asked for its release on the basis of the Will. The

creditors denied the Will, asserted that it was executed to defraud them and further pleaded that the father and son continued to be a joint Hindu family until the insolvent's father died. The Insolvency Court has held that the Will was made, but that the father and his insolvent son continued joint and that thus the Will was invalid as the insolvent succeeded to his father by survivorship. The Insolvency Court further held that the fact that the insolvent consented to the Will did not matter as at that time he was an insolvent whose estate had vested in the Receiver. The Insolvency Court refused to decide the question of the wife's right of maintenance and residence as that would have been going beyond the objection. Against this decision this appeal has been admitted.

It was first contended that the Insolvency Court was wrong in holding that there was a joint Hindu family, but the learned Counsel who appeared for the appellant was unable to show how the decision arrived at was wrong. On the evidence it is clear that the deceased father and his insolvent son were members of a joint Hindu family and continued as such until the death of Devi Das. That being the case, the Will was invalid and the insolvent took his father's estate by survivorship.

It was next argued that the insolvent's son's half share did not vest in the Receiver and should not be allowed to be sold. There is ample authority against this contention, the latest of which is the Madras Full Bench decision, *Balavenkataseetharama Chettiar* v. *Official Receiver, Tanjore* (1). There are also two decisions of this Court, namely, *Khem Chand* v. *Narain Das* (2) and *Sat Narain* v. *Sri Kishan Das* (3). I hold that the insolvent's power to sell his son's share for paying his just and proper debts vests in the Official Receiver.

The third point argued was that the widow was entitled to residence and maintenance. The question has not, so far, been decided by the Insolvency Court and does not arise in this appeal.

For the reasons given I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 97 Ind. Cas. 825; 49 M. 849; 51 M. L. J. 269; 24 L. W. 345; (1926) M. W. N. 743; A. I. R. 1926 Mad. 994 (F. B.).

(2) 89 Ind. Cas. 1022; 6 L. 493; A. I. R. 1926 Lah. 41.

(3) 93 Ind. Cas. 612; 7 L. 376; A. I. R. 1926 Lah. 364.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 378 OF 1924.

October 21, 1926.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

MULUKUTLA ANNAPURNAMMA—PETITIONER—APPELLANT

versus

MULUKUTLA ATCHUTARAMMAYYA GARU—RESPONDENT.

Court Fees Act (VII of 1870), s. 19-I (1), Sch. III —Probate and Administration Act (V of 1881), s. 23—Will of Hindu father—Application for Probate—Court-fee payable, whether calculated on father's share only or on entire property.

An application for Probate should bear a stamp duty on the value of the right, title and interest of the testator in the property bequeathed, and where the testator is a Hindu father with sons, so far as joint property is concerned, duty is payable on the testator's share in the property at the date of his death and not on the entire property including the share of the sons. *In re Dasu Manavala Chetty* (2), followed.

Appeal against the order of the District Court, Kistna at Masulipatam, dated the 30th April, 1924, in O. P. No. 111 of 1923 (S. C. P. No. 21 of 1923).

FACTS.—A Hindu father who had three sons executed a Will by which he bequeathed his entire property in favour of his three sons, making his wife executor under the Will. On an application by the wife as executor for Probate, she paid stamp duty only on ¼th of the property dealt with under the Will on the ground that, although the testator had dealt with the entire property, he was entitled only to ¼th of it.

The learned District Judge, however, relying on *Kashinath Parashram* v. *Gourabai* (1) held that the petitioner was bound to pay stamp duty on the value of the entire estate and that the decision in *In re Dasu Manavala Chetty* (2) relied on by the petitioner was applicable only to Letters of Administration and not to Probate. The petitioner appealed.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—The learned District Judge has overlooked that *Kashinath Parashram* v. *Gourabai* (1) has been overruled by *Keshavlal Punjalal* v. *Collector of Ahmedabad* (3). We think we must

(1) 28 Ind. Cas. 473; 39 B. 245; 17 Bom. L. R. 169.

(2) 4 Ind. Cas. 1064; 33 M. 93; 6 M. L. T. 286; 19 M. L. J. 591.

(3) 77 Ind. Cas. 749; 48 B. 75; 25 Bom. L. R. 1240; A. I. R. 1924 Bom. 228.

follow the principle laid down in *In re Dasu Manavala Chetty* (2) and hold that petitioner is only bound to pay stamp duty for Probate on the amount of the right, title and interest of the testator in the property bequeathed and so far as ancestral property is concerned that would be ¼th of the ancestral estate. If, of course, there is other separate non-ancestral property, separate fee will have to be paid on that. There will be no order as to costs. The papers are returned to the lower Court for disposal.

V. N. V. *Order accordingly.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 549 OF 1926.
January 5, 1927.
Present :—Mr. Justice Addison.

HONDA RAM—DEFENDANT—PETITIONER
versus
SHOP KNOWN AS CHIMAN LAL-DUREJA, THROUGH CHIMAN LAL—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 28 (2)—Insolvency of firm—Suit against partner—Leave of Court, whether necessary.

A firm is not a legal entity; nor is it a person. A firm-name is merely a short-hand form for collectively designating all the partners in a firm. Therefore, an order of adjudication passed against the firm is an order against individual partners who constitute the firm and after such an order has been passed a suit cannot be instituted against any of the partners without the leave of the Insolvency Court under s. 28 (2) of the Provincial Insolvency Act.

Official Receiver v. *Naraindas Lota Ram* (2), followed.

Petition, under s. 25, Act IX of 1887, Provincial Small Cause Courts Act, for revision of the decree of the Sub-Judge, Second Class, exercising the powers of a Judge, Small Cause Court, Multan, dated the 10th May, 1926.

Mr. *Hargopal*, for Mr. *S. K. Mukerji*, for the Petitioner.

Mr. *Amolak Ram*, for the Respondent.

JUDGMENT.—The plaintiff firm obtained a decree in the Small Cause Court, Multan for Rs. 72-7-5 against the defendant and against this decision the defendant Honda Ram has presented this revision petition.

It was objected in the Small Cause Court that as the firm of which the defendant was a partner had been adjudicated insolvent, this meant that the defendant personally was adjudicated insolvent and, therefore, the suit could not proceed against him under the provisions of s. 28 (2) of the Provincial Insolvency Act without the leave of the Insolvency Court and on such terms as that Court might impose. The Small Cause Judge repelled this objection on the ground that before the defendant-firm was declared insolvent it specially asked that the firm should be adjudicated insolvent and not each partner.

The law in England is that where a firm is adjudicated insolvent each partner of that firm becomes an insolvent. It was held in *Seodoyal Khemka* v. *Joharmull Manmull* (1) that a firm is not a legal entity. Nor is it a person. It is merely a collective name for the individuals making up the partnership. Further it was held in *Official Receiver* v. *Naraindas-Lota Ram* (2) that a firm name is merely a short-hand form for collectively designating all the partners in the firm and that, therefore, an order of adjudication passed against the firm is an order against the individual partners in that firm. This being the law, it does not matter that the defendant firm applied that the firm should be adjudicated insolvent, for in law the adjudication of their firm as being insolvent was an adjudication of each individual partner as insolvent.

I would also refer to s. 61 (4) of the Insolvency Act. This shows that the partnership property in the first instance is to be applied in payment of the partnership debts and the separate property of each partner is to be applied in the first instance in payment of his separate debts. This also clearly indicates that where a partnership firm is adjudicated insolvent each individual partner becomes an insolvent, and the necessary rule is laid down as to how the partnership and separate property has to be distributed.

It follows that the present suit could not proceed without the leave of the Insolvency Court. I, therefore, accept this petition for revision and, setting aside the order of the Small Cause Court, dismiss the plaintiff's suit with costs throughout. The plaintiff firm can take such action in the Insolvency Court as it cares.

Z. K. *Petition accepted.*

(1) 15 Ind. Cas. 81; 50 C. 549 at p. 558; A. I. R. 1924 Cal. 74.

(2) 89 Ind. Cas. 493; A. I. R. 1926 Sind 31.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1170 OF 1926.
January 11, 1927.
Present:—Mr. Justice Jai Lal.

ABDUL MAJID—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 376, 511—Rape—Partial penetration—Hymen not injured—Rape or attempt to commit rape.

Partial penetration which does not result in any injury to the hymen is sufficient to constitute the offence of rape.

Appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Ambala, dated the 11th October, 1926.

Mr. *Abdul Aziz*, for the Appellant.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Abdul Majid appellant aged 30 years a vegetable seller of Ambala Cantonment has been convicted of the offence of an attempt to commit rape on *Musammat* Saraswati aged 10 or 11 years daughter of Teja Ram of Ambala.

It appears that on the 20th August, 1926, in the evening *Musammat* Saraswati went to buy vegetables in the *bazar* when Abdul Majid called her saying that he would give her something, took her in a room behind his shop, shut one plank of the door, and throwing the girl on the ground sat on her and committed rape on her. The girl raised an outcry which attracted the attention of Gurdial who called Hem Raj. Ram Parshad a Head Constable also arrived at the scene and all three went to the door of Abdul Majid's room and asked him what the matter was. *Musammat* Saraswati came out of the room crying and told them what had happened. The matter was reported at the *Thana* and the girl was examined by a lady Doctor Miss Jacob the same evening, who found injuries on the private parts of the girl, but there was no rupture of the hymen. In her opinion there had been a partial penetration but not sufficient to cause any injury to the hymen.

The case for the prosecution is proved by the statement of *Musammat* Saraswati and is supported by the testimony of Gurdial, Hem Raj and Ram Parshad. The statement of the lady Doctor Miss Jacob strongly corroborates the story told by the girl. The accused was examined by a Doctor, but no injury was found on his person. This under the circumstances does not militate against the truth of the prosecution story.

In a statement before the Magistrate the accused denied the offence, and when asked to explain why a false case had been made out against him he stated that he would file a written statement. In his written statement he says that *Musammat* Saraswati came to his shop to buy vegetables on the evening in question, but he did not molest her at all. He alleged that a false case had been made out by Ram Parshad and Gurdial owing to communal bias. It is impossible to believe this defence. There is no explanation of the injuries on the private parts of the girl and it is inconceivable that she would be a party to the concoction of a false case of this nature. I have no hesitation in agreeing with the conclusion of the learned Magistrate that the case of the prosecution is perfectly true.

The Magistrate, however, has convicted the accused under ss. 376/511, Indian Penal Code. In this he appears to have ignored the definition of rape which provides that penetration is quite sufficient to constitute an offence of rape. It is not, therefore, the case of an attempt to commit rape but one of rape. I alter the conviction to one under s. 376 of the Indian Penal Code.

The sentence is appropriate and I dismiss the appeal.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 270 OF 1925.
July 29, 1925.
Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

NIRMAL CHANDRA DE—ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 120-B—Arms Act (XI of 1878), ss. 19 (f), 22—Conspiracy, what amounts to—Conspiracy to possess fire-arms without license—Fire-arms not in existence—Offence.

Section 22 of the Arms Act deals with persons without license dealing with licensed vendors or purchasers, or with persons with license dealing with unlicensed vendors or purchasers. [p. 114, col. 2.]

An offence under s. 120-B of the Penal Code consists in the conspiracy without a reference to the subject-matter of the conspiracy. [p. 115, col. 1.]

Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law. It is true that the law does not take notice of the intention or the state of mind of the offender and there must be an overt act to give expression to that intention. The overt act in a case of conspiracy, however, consists in the agreement of the parties and in the case of an agreement to commit an offence it is not necessary in order to constitute the offence of conspiracy that the agreement should be followed by some act. [p. 115, col. 1.]

A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means. [p. 115, col. 2.]

Where two or more persons conspire to possess fire-arms without a license, they are guilty of an offence under s. 120-B of the Penal Code read with s. 19 (*f*) of the Arms Act and it is not necessary for the prosecution in such a case to specify in the charge or to prove that the accused conspired to possess any particular arms or that any such fire-arms were actually in existence. [*ibid.*]

Criminal appeal against an order of the Presidency Magistrate, Calcutta, dated the 8th April, 1925.

Babu *Manindra Nath Banerjee*, for the Appellant.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—In this case the accused Nirmal Chandra De *alias* H. K. Roy has been convicted under s. 19 (*f*) of the Arms Act read with ss. 120-B and 116, Indian Penal Code, and sentenced to nine months' rigorous imprisonment. The case for the prosecution shortly put is that the accused Nos. 3 and 4 (who is the present appellant) entered into a conspiracy to possess fire-arms and ammunition and negotiated with accused No. 2, a Chinaman, for the purchase of some 8 pistols and ammunition. There were several meetings between the second accused and the third and the fourth accused but the actual sale for some reason or other did not take place. Some portion of the price was advanced to the second accused but further negotiations broke off because either they could not come to terms or that the accused persons expected some people to come from outside and take delivery of the pistols but they did not come in time. The evidence in the case mainly consists of Police Officers and spies. In a case like this it is difficult for the prosecution to secure outside and independent evidence. The prosecution has to depend upon evidence of people who are engaged in detecting crimes of this sort. In a case like this, therefore, the evidence of such persons should be scrutinised and received with a great deal of caution. We have gone through the evidence and have considered all the submissions made on behalf of the appellant by the learned Vakil appearing for him, and we have come to the conclusion that so far as evidence goes, it has to our satisfaction established the occurrence as related by the prosecution.

The first objection taken to the conviction is with regard to the insufficiency of evidence relating to identification. The two superior Police Officers engaged in this matter, no doubt, were unable to identify the accused because they were hiding themselves in a room from where the accused could not be seen. But the other evidence on the record satisfactorily establishes the identity of the accused. In this connection the statement of the accused must also be taken into consideration. The occurrence took place in a house in Bow Street and he admits that on the day of occurrence he was taken by the other accused who, according to him, asked him to wait within the square near the house and himself went inside the house. The presence of the accused near the place of occurrence and at about the time at which the occurrence took place is particularly admitted.

It is next argued that the conviction ought to have been under s. 22 of the Arms Act and not under s. 19 (*f*). That section says that whoever knowingly purchases any arms ...., or delivers any arms, ..., into the possession of any person without previously ascertaining..... The learned Chief Presidency Magistrate is right in his view that this section deals with persons without licenses dealing with licensed vendors or purchasers or with persons with licenses dealing with unlicensed vendors or purchasers. It is, therefore, not applicable to the present case.

The real question that arises in this case and requires consideration is whether on the facts found by the learned Magistrate an offence under s. 19 (*f*) read with s. 120-B, Indian Penal Code, has been made out. The facts found are that the accused with another person (accused No. 3) went to a place and met the second accused for the purpose of purchasing from him arms and ammunition. The arms and ammunition were not produced at any of the meetings and there is no evidence on

the record that the second accused possessed those arms and ammunition at the time when negotiations were taking place between the parties. On these facts it is argued that the offence of conspiring to possess fire-arms has not been made out. It is contended that there must be some definite property about which the parties were negotiating or which they had conspired to possess. This, in our judgment, is not the correct view of the law. An offence under s. 120-B consists in the conspiracy without any reference to the subject-matter of the conspiracy.

Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law. It is, undoubtedly, true that the law does not take notice of the intention or the state of mind of the offender and there must be some overt act to give expression to that intention. It was observed in the case of *Mulcahy* v. *Reg.* (1) by Willes, J., as follows:—

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means." This dictum has been accepted as good law. The overt act, therefore, in a case of conspiracy, consists in the agreement of the parties; and this is the view which has been adopted by the Indian Legislature in the definition of "conspiracy" as given in s. 120-A (Indian Penal Code), in which the proviso says that "no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof." This definition excludes the agreement to commit an offence from the category of such conspiracies in which it is necessary that the agreement should be followed by some act. This view was taken also in the case of *Amrita Lal Hazra* v. *Emperor* (2) where the accused was charged with conspiracy to possess explosive substances under s. 120-B (Indian Penal Code) and s. 4 of the Explosive Substances Act (VI of 1908). It was there, as here, argued that the explosive substances not being in existence, the charge was bad. Their Lordships after an exhaustive consideration of the authorities observed that where the illegal act charged under s. 120-B is the unlawful and malicious possession of explosive substances, it is not essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control; and that a person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the "crime of conspiracy" consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means. The third and the fourth accused having, according to the finding of the Magistrate, conspired to possess fire-arms, it is not necessary for the prosecution to specify in the charge or to prove that they conspired to possess any particular fire-arms. This objection, therefore, is overruled.

It is contended next that the learned Magistrate was wrong in taking into consideration the statement of the second accused which was an admission of his guilt implicating the present appellant. It does not appear from a perusal of the learned Magistrate's judgment that he has placed reliance upon the statement made by the second accused because though it was a confession of his guilt he refused to accept it and proceeded with the trial against that accused also; and in his finding against the present appellant he has nowhere relied upon the statement of the second accused. Besides we are not convinced that the statement made by the second accused in Court implicating himself as well as the other accused could not be taken into account in considering the guilt of the latter.

We have been asked by the learned Vakil for the appellant to treat the appellant under s. 562, Criminal Procedure Code, as this was his first offence and he is said to belong to a respectable family. Under other circumstances we would have been induced to extend the provisions of s. 562 to the accused in consideration of the fact that he belongs to a respectable family and that he is a law student; but

(1) (1868) 3 H. L. 306.
(2) 29 Ind. Cas. 513; 42 C. 957; 19 C. W. N. 676; 21 C. L. J. 331; 16 Cr. L. J. 497.

considering the nature of the crime we are not disposed to do so. It is a very serious offence for a citizen to possess fire-arms without a license. The very act itself may not be very serious but it may lead to serious consequences.

We are lastly pressed to consider the sentence passed on the accused. The maximum punishment under the section is three years' rigorous imprisonment; and as the offence was not complete the learned Magistrate has in view of s. 116, Indian Penal Code, sentenced the accused to one-fourth of the maximum punishment, namely, nine months. We have given our best consideration to the facts of this case and we do not think that it is a proper case in which we should interfere with the sentence. The accused was trying to get hold of 8 pistols with ammunition for some *mofussil* party. He has not succeeded in his attempt; and we do not know how the weapons were intended to be used.

The appeal is accordingly dismissed.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1178 OF 1926.

January 11, 1927.

Present:—Mr. Justice Zafar Ali.

MEHRAJ DIN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 354, 376, 511—Indecent assault—Attempt to commit rape—Hymen, rupture of, whether necessary to constitute rape.

Though rupture of the hymen is by no means necessary in law to constitute the offence of rape, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured. [p. 117, col. 2.]

A female child aged 5½ years was discovered seated on the naked thighs of the accused who was a lad of eighteen years. The accused had taken off his own trousers and that of the girl. On medical examination of the girl it was found that with the exception of fresh redness at the entrance to the vagina, the girl bore no other mark of injury and her hymen was intact. There were no marks of blood or semen on her person and she did not complain of having felt any pain as the result of the accused's assault upon her:

Held, that under the circumstances the accused was guilty of an attempt to commit rape and not merely of an indecent assault. [*ibid.*]

Criminal appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Lahore, dated the 29th October, 1926.

Mr. *Feroz Din*, for the Appellant.

JUDGMENT.—The appellant, Mehraj Din by name, has been convicted of rape, and sentenced under s. 376 of the Indian Penal Code to rigorous imprisonment for five years. He was an itinerant seller of glass bangles and his victim was a female child aged about 5½ years. He himself is a lad of eighteen years.

On the fateful day at about 2 P. M. he sold some bangles to *Musammat* Sawatri Devi (P. W. No. 3), the mother of the child, for 13 annas. This transaction took place in the *deorhi* of *Musammat* Sawatri Devi's house. She paid him annas 10 and leaving him in the *deorhi* went upstairs to fetch the balance, but instead of returning herself she sent the money by hand of her daughter. As the child did not go back for a long interval, *Musammat* Sawatri Devi herself came down and saw her seated on the naked thighs of the appellant. He was sitting with his knees on the ground. His trousers were half way down. The girl's trousers were lying on the ground close by. Seeing *Musammat* Sawatri Devi the appellant stood up and tied up his trousers. She seized him and began to beat him with shoes. Hearing the noise made by her *Musammat* Sohagwanti (P. W. No. 4) who lived in that very house and her neighbours Babu Charan Das (P. W. No. 5) and Sher Singh (P. W. No. 10) came up. Babu Charan Das left immediately to fetch the father of the child from his office and he came home in about half an hour, and it was he who made the First Information Report to the Police that very afternoon. Dr. D'Abreau, Assistant to the Civil Surgeon of Lahore, examined the girl as well as the appellant the same day. With the exception of fresh redness at the entrance to the vagina, the girl bore no other mark of injury, and her hymen was intact. There were no marks of blood or semen on her person. The mother of the child deposed, on the other hand, that the girl was bleeding from her private parts and that her legs were full of (besmeared with ?) blood and water (semen) and that her *suthan* was soiled with blood and water. *Musammat* Sohagwanti (P. W. No. 4) stated that the child was without any trousers and was bleeding from her private

parts. Babu Charan Das stated "the *suthan* of the girl was in her legs but was loose. The *suthan* was smeared with blood. The legs were clean." Sher Singh (P. W. No. 10) stated "there was a boy (*i.e.*, the appellant) present there with many *choories*. * * * * The girl was wearing only a shirt. Her *pyjama* was lying close to her. There was blood and semen on the upper part of one of her thighs.

As the trousers of the child had been taken off and were lying on the ground close by it is difficult to see how they could be soiled with blood, etc. The trousers had no blood on them when they were made over to the Sub-Inspector of Police, and it was stated that they had been washed by *Musammat* Sawatri Devi before that. But this could not be true, because evidently the trousers could not have been soiled with blood or semen. Further, the child could not have bled as she bore no wound nor was there anywhere a rupture of her skin. After Dr. D'Abreau had been examined *Musammat* Sawatri Devi was re-called and then she stated that there were only two or three drops of blood. The Sub-Inspector of Police found no blood on the trousers of the accused, nor on the trousers of the girl; but the Chemical Examiner detected blood on the trousers of the accused but no semen on either. It cannot be said that the invisible stain of blood on the trousers of the appellant was caused by the blood of the girl. The Doctor when re-called stated "A bruise of the mucuous membrane might cause the exudation of a little blood. There may have been a little exudation of blood but very little." But what the Doctor had originally observed was redness and not a bruise. However, he could not positively say that the redness of the labia was the result of an attempt to effect penetration. As the girl did not cry out, it appears that she felt no pain which an attempt to effect penetration resulting in discharge of blood must have naturally caused. Her mother stated that she began to cry on seeing her. This indicates that she had not cried before that. But at that stage the accused had already gratified his lust if there was semen on the thighs of the child.

It may, therefore, safely be concluded that there was no bleeding from the private parts of the girl and that the redness of the labia might or might not have been the result of the act of the appellant.

Counsel for the appellant concedes that he did make an indecent assault, but he contends that he was not guilty of rape. This, however, was not merely an indecent assault. From the state in which the appellant and the child were found together, it may be inferred that he attempted, though unsuccessfully, to effect penetration. It may be observed here that "though rupture of the hymen is by no means necessary in law, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured." He was, therefore, guilty of an attempt to commit rape and I alter the conviction accordingly.

Having regard to the age of the appellant, whipping appears to be the most appropriate punishment in this case. I, therefore, set aside the sentence of imprisonment and sentence him to receive thirty stripes with a light rattan.

Z. K. *Sentence altered.*

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 194 OF 1926.

September 24, 1926.

Present:—Mr. Justice Chotzner and Mr. Justice Duval.

NIKUNJA BEHARI MULLIK—1ST PARTY

versus

Sreemati USABATI DEVI—2ND PARTY.

Criminal Procedure Code (Act V of 1898), s. 145 (4)—Bengal Tenancy Act (VIII of 1885), s 87—Landlord resuming possession of abandoned holding—Forcible possession.

Where a landlord resumes possession of an abandoned holding after compliance with the procedure laid down in s. 87 of the Bengal Tenancy Act, it cannot be said that he has taken forcible possession of the holding within the meaning of sub-s. (4) of s. 145 of the Criminal Procedure Code. [p. 119, col. 1.]

Reference made by the Additional Sessions Judge, Hooghly, recommending that the order of the Deputy Magistrate, Hooghly, dated the 8th February, 1926, may be set aside for the reasons set forth in the following

LETTER OF REFERENCE.

There is a piece of homestead land with a *pucca* building on it. A *Sanyasi* Gourendra Brahmachari lived there and the premises were known as the *Asram* of the *Sanyasi*. The *Sanyasi* left the *Asram* in *Agrahayan* 1331 and the evidence is that he is dead. His disciples, however, used to visit the *Asram* and the things left by the *Sanyasi* were in

the *Asram*. The second party claims to be the landlord of the homestead. She served a notice under s. 87, Bengal Tenancy Act, on it and entered into possession of the premises by breaking open the padlocks on 3rd June last when there was no one in the *Asram*. Nikunja who is the first party in the case is a resident of Calcutta. The homestead is in Tribeni. Nikunja heard of the entry by the second party that very night, and as the head disciple of the *Sanyasi* and his successor-in-interest filed a petition before the Sub-Divisional Magistrate on the 4th June for an order under s. 144, Criminal Procedure Code, against the second party. The Magistrate granted the prayer and issued an injunction against the second party not to enter the premises. The second party appeared before the Magistrate on the following day and asked for a similar order on the first party which was also granted. On 10th June the Magistrate heard both the parties and initiated proceedings under s. 145, Criminal Procedure Code. The second party moved the Sessions Judge against the proceedings, but the Sessions Judge refused to interfere in the matter. The case was then dragged on till 8th February, 1926, when the Magistrate ordered the first party to get possession of the premises. The second party has then filed the present motion.

The order recommended for revision is the order of the Deputy Magistrate ordering restoration of possession to the first party.

It is admitted that the second party was in possession of the premises from 3rd June, 1925 up to 8th February, 1926, and is perhaps still in possession of it. The learned Magistrate has under cl. (6), s. 145 ordered that the party be restored to possession, as he found that the case fell under the proviso of cl. (4) of the section, but possession does not yet seem to have been delivered. Section 145, Criminal Procedure Code, is intended to prevent probable breach of the peace. The Magistrates are, therefore, not to make any order under the section, unless the order seems necessary to prevent a breach of the peace. In the judgment of the learned Magistrate I do not find anything from which it can be inferred that there was a likelihood of a breach of the peace, at the time when the final order was made, or even at the time when the proceedings were instituted. In the evidence also I do not find anything which may lead to an inference of a likelihood of a breach of the peace. The only evidence is that of Bejoy. He says that—"There is every likelihood of a breach of the peace if we go there," but the question is whether the first party is likely to go there when they know that the *Asram* is in the possession of *durwans* of the second party. There is no evidence that they are likely to do so. In fact there has been never any act by the first party to recover possession of the premises by force or show of force. There is, therefore, nothing to infer that there is likely to be a breach of the peace if an order under s. 145 be not made.

I recommend that the order under s. 145, Criminal Procedure Code, be set aside.

Babu *Mrityunjoy Chatterjee* and Dr. *Bijan Kumar Mukherjee*, for the 1st Party.

Mr. *Narendra Kumar Basu* and Babu *Debendra Narain Bhattacharjee*, for the 2nd Party.

JUDGMENT.

Duval, J.—In this case the Additional Sessions Judge of Hooghly has made a Reference in a proceeding under s. 145, Criminal Procedure Code. It appears that a certain holding was held by a *Sanyasi* who disappeared about two years ago and has not been heard of since. It appears that after that the landlord issued and served on the holding a notice through the Collector's office under s. 87, Bengal Tenancy Act, to resume possession of the abandoned holding and that on the 3rd June her officers went to the land and took *khas* possession of the land and the *Asram* on it. Thereafter one Nikunja Behari Mullik claiming to be a disciple of the *Sanyasi* who has disappeared filed a petition before the Sub-Divisional Magistrate the next day stating that there was a fear of the breach of the peace if he went to the *Asram* again. At first there were certain proceedings forbidding both sides to go near the land under s. 14, Criminal Procedure Code, and subsequently on the 17th June a proceeding was drawn up under s. 145 stating that there was a probability of the breach of the peace and calling upon both sides to produce evidence of possession. The case went on and the Magistrate came to a finding that, as a matter of fact, the landlord had forcibly taken possession within two months of the order and he, therefore, gave possession, to the complainant Nikunja, a disciple of the *Sanyasi*.

Against that order this Reference is made by the Additional Sessions Judge on the ground that there is no expectation of a breach of the peace. At the time of the hearing it is further urged in support of the Reference for questioning the order that the lady is in possession and that she did not forcibly take possession but took possession legally and so cannot be ousted under the provisions of cl. (4) of s. 145. We consider that there is a considerable amount of weight in both these objections. In the first place it appears that Nikunja and his fellow disciples are mainly people of Calcutta and apparently only used to go to the *Asram* occasionally. It is not very clear what right they had to the *Asram* as they did not appear to be *Sanyasis* and the *Asram* belonged to the *Sanyasi* who does not appear to have left any *Sanyasi chela*. The chance of a breach of the peace would only occur if the first party attempts to take forcible possession of the *Asram*. It would also appear that the landlord complied with the provisions of s. 87, Bengal Tenancy Act, and, as she has done so, it cannot be said that she has taken forcible possession within the meaning of the clause I have referred to. She appears to have gone on the land by virtue of the provisions of the Bengal Tenancy Act and that would be a legal entry.

For these reasons we consider that the Reference should be accepted and the order made under s. 145, Criminal Procedure Code, discharged.

Chotzner, J.—I agree.

Z. K. *Reference accepted.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1485 OF 1926.

January 7, 1927.

Present: —Mr. Justice Campbell.

NUR ALI SHAH—PETITIONER

versus

NATHA—RESPONDENT.

Criminal Procedure Code (Act V of 1898) as amended, ss. 133, 139-A—Obstruction to right of way—Denial of public right of way supported by Revenue Records—Magistrate's duty to stay proceedings.

Where in proceedings for removal of obstruction of public way under s. 133, Criminal Procedure Code, the party obstructing the way denies the existence of any public right in respect of the way and is supported by Revenue Records in his denial, the Magistrate is bound to stay the proceedings under s. 139-A, Criminal Procedure Code, till the matter is decided by a competent Civil Court. [p. 120, col. 1.]

Case reported by the Additional Sessions Judge, Lahore, with his No. 694 of 11th August 1926.

REPORT.—A quarrel has arisen in village Kot Murad Khan over a right of way to a well near the village. The most convenient way lies over fields belonging to Nur Ali Shah and others. For some years these fields were uncultivated, and no dispute over their use as a means of access to the well arose. They have since come under cultivation, and Nur Ali Shah has closed the passage across them by means of a thorn fence.

The result of this action was that the public was forced to go round to the well by a longer way which passes over fields belonging to one Natha and others. On this Natha lodged an application for the passing of an order under s. 133, Criminal Procedure Code, to Nur Ali Shah and his companions to remove the thorn fence on the ground that it was an unlawful obstruction to a public way. The application has been very carefully considered on the spot by the two Magistrates who have dealt with it in succession. The Magistrate passing the final order has come to the conclusion, which there is no reason to question that the closed path is the nearest way from the village to the well, that the well to which a small mosque is attached, was in common use by the public up to the date of the obstruction and, that it was not only used by men but also for carts, and that the obstruction has been a nuisance to the public. The party of Nur Ali Shah rely chiefly on the Revenue Records, which show that the fields belong to them, and make no mention of any public path but the learned Magistrate points out that so long as the fields were uncultivated, no objection could be raised to public access and that this does not, therefore, disprove the allegation that the way was a public one. For these reasons he has ordered the removal of the obstruction and the opening of the way to $2\frac{1}{2}$ paces within 14 days from the 13th July, on which the order was passed.

GROUNDS.—The order of the Magistrate does not appear to be sustainable. The Magistrate has only found that the way was in fact being used by the public

up to the date of the obstruction, but has not found that they had any right to do so, except by the tacit consent of the owners. Even if it is considered that this constitutes lawful use by the public within the meaning of s. 133, it has still to be found that the obstruction was unlawful; and it appears to me that if the owner of an uncultivated field wishes to bring it under cultivation, he has every right to close it to public access unless a right of way has been clearly established. In this case there has been no finding as to the time during which the way has been used by the public, and in the absence of any evidence on this point the Revenue Records raise a clear presumption that no such right of way existed.

The case seems to be exactly of the class which s. 139-A, Criminal Procedure Code, was designed to meet. The party causing the obstruction has produced reliable evidence in support of their denial of the existence of any public right in respect of the way. In these circumstances the Magistrate was bound to stay the proceedings until the matter of the existence of such a right had been decided by a competent Civil Court, and he had no jurisdiction to proceed with the enquiry or pass any final order. Rights of ways are obviously matters to be decided by the Civil Courts and not by the Criminal Courts. It is in the interest of public policy that Criminal Courts should not deal with matters which it is compulsory to leave to Civil Courts. No powers of appeal are given in respect of orders under s. 133, Criminal Procedure Code.

Sheikh *Abdul Aziz*, for the Petitioner.

ORDER.—It seems to me clear that the Magistrate has overlooked s. 139-A, Code of Criminal Procedure. As recommended by the learned Sessions Judge I set aside the Magistrate's order and in lieu thereof order under s. 139-A (2) that proceedings be stayed until the matter of the existence of the alleged right of way has been decided by a competent Civil Court.

R. L. *Order set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 811 OF 1926.
(CASE REFERRED No. 82 OF 1926.)
November 18, 1926.
Present:- Mr. Justice Srinivasa Iyengar.
In re LAKSHMANA GOUNDAN —ACCUSED.

Penal Code (Act XLV of 1860), ss. 378, 380, 441, 447, 454—"Building," meaning of—Cattle pound fenced without roofing, whether constitutes building—Rescue of impounded cattle from cattle pound—Offence, nature of.

An open plot of land with a mere boundary fence, even with a masonry wall, cannot, for purposes of either s. 380 or s. 454, Indian Penal Code, be regarded as a building or a house. [p. 121, col. 2.]

The expression 'building', more especially having regard to the expressions 'tent' and 'vessel' that follow, must be regarded as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building or a house within the meaning of either of those two sections. [*ibid.*]

Where the owner of a buffalo which was impounded in an open plot with a mere boundary fence rescued it after opening a door of the pound by slipping the chain over the lock:

Held, that he committed an offence under s. 24, Cattle Trespass Act, and under ss. 378 and 441, Penal Code, but that he cannot be convicted either under s. 380 or s. 454, Penal Code. [p. 122, col. 1.]

Case referred for the orders of the High Court, under s 436 of the Criminal Procedure Code by the District Magistrate, Trichinopoly, in his letter R. O. C. No. 8010 of 1926, dated the 18th October, 1926.

The Public Prosecutor, for the Crown.

ORDER.—This is a reference made by the District Magistrate of Trichinopoly with regard to a conviction by the Sub-Magistrate of Karur of one Lakshmana Goundan of Kolathupalayam.

The facts found are that he was the owner of a buffalo which was impounded and it is also proved that it was rescued by him after opening a door by slipping the chain over the lock. There can be no doubt that the act amounted to a clear offence under s. 24 of the Cattle Trespass Act. The Sub-Magistrate, however, would appear to have further convicted the accused under ss. 454 and 380 of the Indian Penal Code. I am satisfied that the conviction under both these latter sections was wrong. The District Magistrate in his reference refers to the ruling reported in *In re Pacha Sahib* (1). Though it does appear to be a decision bearing on the point, there was no

(1) 1 Weir 716.

discussion in that judgment on the question whether if a person, albeit the owner of the cattle impounded, rescued the buffalo from the pound, his removing the buffalo from the possession of the pound authorities with the dishonest intention of either causing loss to the authorities or causing gain to himself with regard to the amount of the fine payable before the cattle could be removed would or would not amount to a theft. There can be no doubt at all that the owner of property can, under certain circumstances, himself commit the offence of theft in respect of such property when the taking or removing is done with the intention of causing wrongful loss to another person or wrongful gain to himself. I have no doubt whatever, that the rescuing of the buffalo must have been with such dishonest intention. After the buffalo was impounded it should be deemed to have been in possession of the authorities of the pound. His removing the buffalo from the pound was removing it from the possession of the authorities and I, therefore, consider that, in addition to an offence under s. 24 of the Cattle Trespass Act, it is an offence of simple theft as defined by s. 378 and punishable by s. 379 of the Indian Penal Code. But with regard to the question whether the act amounts to an offence under s. 380, Indian Penal Code, or s. 454, Indian Penal Code, there are not, so far as I am able to see, the necessary findings by the Sub-Magistrate for sustaining a conviction under either of these two sections. For the purpose of s. 380, Indian Penal Code, the place in which the theft is charged to have been committed should be a building, tent or vessel used as a human dwelling or for the custody of property. But as the pound in this case is not likely to have been a tent or vessel, there should have been a finding that it was at any rate a building. If the place was one merely fenced off as an enclosure without any wall or roof it cannot be regarded as a building for purposes of that section. I find in some of the commentaries reference made to cases where thefts of property left in the verandah of a house or over the roof of a house have been held not to amount to theft in a building. It is possible to doubt the correctness of such decisions. But I am satisfied that before a conviction can be sustained under s. 380, there must be a finding that the place in which the theft was committed was a building. There is no such finding in this case and, therefore, the conviction under that section must be set aside.

Similarly, as regards the conviction under s. 454, there is no finding in the case that the place where the trespass was committed was a building, tent or vessel within the meaning of s. 442, Indian Penal Code, which defines house trespass, because to constitute an offence of house-breaking there must be house-trespass. If the place where the offence was committed was a building, tent or vessel, then there is in the evidence sufficient to constitute the act of the accused an offence of house-breaking by reason of his entering the passage which the accused knew to have been fastened against such entrance as explained in cl. 6 of s. 445, Indian Penal Code, but in the absence of a finding that the place was a house or building, it follows that the conviction under that section could not be possibly regarded as proper. I have already referred to the difficulty in finding that an open plot of land with a mere boundary fence, even a masonry wall, could not, for purposes of either of the said sections, be regarded as a building or a house. The expression 'building,' more especially having regard to the expressions 'tent' and 'vessel' that follow, must be regarded as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building or a house within the meaning of either of those two sections. Though the facts proved cannot, in my judgment, constitute an offence under either of the said sections, there may, however, arise a question whether the facts proved would or would not amount to an offence of criminal trespass as defined by s. 441, Indian Penal Code. There is no question in this case with reference to this section of any house or building; but it is only property in possession of another and that requisite is satisfied in this case because the pound was, undoubtebly, property in possession of the authorities. The purpose for which the accused entered upon the property was not, however, to intimidate, insult or annoy any person in possession, and, therefore, in order to constitute an offence of criminal trespass the person entering, as in this case

the accused, must have entered with the intention of committing an offence. The word 'offence' is defined under s. 40, Indian Penal Code, as follows: "Except in the Chapter and sections mentioned in cls. 2 and 3 of this section, the word 'offence' denotes a thing made punishable by this Code," *viz.*, the Indian Penal Code. Theft is made punishable by the Penal Code. But for purposes of s. 441, it is provided by cl. 2 of s. 40 that the word 'offence' includes a thing punishable under any special or local law when it is punishable under such law with imprisonment for a term of six months or upwards whether with or without fine.

Under s. 24 of the Cattle Trespass Act, the imprisonment awardable under that section is six months and, therefore, it is an act punishable with imprisonment for a term of six months. It seems to me, therefore, that the acts of the accused constituted also an offence under s. 441, punishable under s. 447, Indian Penal Code.

Though on the reference made by the District Magistrate I have deemed it desirable to discuss the matter not only with regard to the sections referred to in the reference but also with regard to other possible sections, I am not sure that in every case it is necessary for the Magistrate to enter upon a minute and learned examination of all possible offences that under the law might be deemed to have been committed by the act of a particular accused more especially if there is no question in the case of a higher punishment than that intended by the Magistrate to be imposed on the accused. In many cases such a process should really be unnecessary. As, however, the reference has been made, the conviction of the accused under ss. 380 and 454, Indian Penal Code, is hereby set aside and the accused is convicted instead under ss. 378 and 441, Indian Penal Code, in addition to his conviction under the Cattle Trespass Act In respect of his convictions, therefore, under the said three sections. I sentence the accused under ss. 379 and 447, Indian Penal Code, and under s. 24 of the Cattle Trespass Act to the same fine as that imposed by the Sub-Magistrate, namely, Rs. 20 and to the same term of imprisonment as that imposed by the Sub-Magistrate, *viz.*, till the rising of the Court. I do not consider this is a case in which though I have altered the findings of the Sub-Magistrate there can be said to have been by reason of the alteration of the findings any enhancement of the sentence. There is, therefore, no question of the necessity of any notice to the accused.

V. N. V. *Reference answered.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1029 OF 1926.

January 7, 1927.

Present:—Mr. Justice Fforde.

NAURANG SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), s. 19 (f)—Discovery of arms on information from accused—Conviction, legality of.

Where an article, the possession of which is forbidden by the Arms Act, has been discovered by reason of information given by an accused person, the conviction based upon that evidence is legally sound.

Isher Singh v. *Emperor* (1), followed.

Petition for revision of an order of the Additional Sessions Judge, Lyallpur, dated the 10th June, 1926, affirming that of the Magistrate, First Class, Lyallpur, dated the 17th May, 1926.

Lala *Moti Sagar*, R. B., for the Petitioner.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

JUDGMENT.—The petitioner Naurang Singh has been convicted under s. 19 (*f*) of the Indian Arms Act of having been in possession of a revolver, and has been sentenced to two years' rigorous imprisonment.

It appears that the revolver was found, after a very considerable search extending over several days, in a well which the petitioner had pointed out to the Police as being the place in which he had thrown this weapon. The learned Appellate Court has maintained the conviction relying upon a Division Bench decision of the Chief Court in *Isher Singh* v. *Emperor* (1). That case is, undoubtedly, an authority for holding that where an article, the possession of which is forbidden by the Indian Arms Act, has been discovered by reason of information given by an accused per-

(1) 33 Ind. Cas. 823; 72 P. L. R. 1916; 24 P. W. R. 1916 Cr.; 17 Cr. L. J. 183; 50 P. W. R. 1915 Cr.

son, the conviction based upon that evidence is legally sound. Following that decision, in my judgment, the conviction cannot be disturbed on revision. Mr. Moti Sagar has strongly urged that the sentence is excessive. He points out that it was through the assistance of the petitioner himself that the revolver was ultimately discovered, that the Police on their first attempt to find the weapon in the well did not succeed, and it was not until some days after the operation had been started, and until a dredger had been used, that the revolver was ultimately discovered. As the petitioner apparently disclosed the fact that he had disposed of such a weapon, immediately after he was interviewed by the Police, I think the sentence is somewhat severe. I would accordingly reduce it to 12 months' rigorous imprisonment which, I think, would meet the ends of justice. In other respects the petition is dismissed.

R. L. *Sentence reduced.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 329 OF 1926.
(CRIMINAL REVISION PETITION No. 290 OF 1926).
October 28, 1926.

Present:—Mr. Justice Curgenven.

In re MANIKKATH KULAPPURA VEETTIL BHARGAVI AMMA—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 488, 540—Application for maintenance of child—Dispute as to legitimacy—Evidence adduced by parties held by Magistrate to be inconclusive—Examination by Magistrate of fresh witnesses without previous notice—Finding of legitimacy based solely on fresh evidence—Procedure, whether legal—Prejudice.

Section 540, Criminal Procedure Code, confers very wide powers upon the Court to summon any material witness at any stage of a proceeding. The exercise of the powers so conferred is, however, objectionable where the action of the Magistrate in so summoning enables a party to the proceedings to obtain subsequently, to the prejudice of the other party, evidence of persons who might have been included in its list of witnesses. [p. 123, col. 2; p. 124, col. 1.]

In proceedings under s. 488, Criminal Procedure Code, for the maintenance of a child, the question of its legitimacy was raised. Witnesses were examined on both sides but the Magistrate found himself unable to arrive at any definite conclusion on their evidence as to the legitimacy of the child. He, accordingly, took the course of going to the village and examining without previous notice certain residents as Court-witnesses. After doing this, he offered to examine any one else in the village whom the counter-petitioner might want; but he did not want to examine any one whom he had not already called. Solely on such new evidence he found that the child was legitimate and awarded maintenance:

Held, on revision that since the finding of the Court was based exclusively on evidence subsequently obtained, the counter-petitioner who had already produced all the evidence at his command was likely to have been prejudiced by such a course of action and the Court in pursuing it went beyond the reasonable discretion afforded by s. 540, Criminal Procedure Code. [p. 124, col. 1.]

Petition, under s. 488 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Palghat, in M. C. No 7 of 1926.

Mr. *P. Govinda Menon*, for the Petitioner.

The Public Prosecutor, for the Crown.

Mr. *A. Sivarama Menon*, for the Respondent.

ORDER.—This is a Criminal Revision Petition against an order passed by the Sub-Divisional Magistrate of Palghat Division under s. 488, Criminal Procedure Code, in so far as it awards maintenance for the younger of the petitioner's two children. The parties are Nairs and lived together in *sambandam* up to within a certain period of the presentation of the petition. The counter-petitioner's defence was that he was not the father of the younger child. Witnesses were examined on both sides, but the Sub-Divisional Magistrate found himself unable to arrive at any definite conclusion from their evidence as to the legitimacy of the child. He accordingly took the course of going to the village and examining without previous notice four of its residents as Court-witnesses. After doing this he offered to examine any one else in the village whom the counter-petitioner might want; but he did not want to examine any one whom he had not already called. The evidence of these Court-witnesses left absolutely no room for doubt, in the opinion of the Magistrate, as to the legitimacy of the child.

The question is whether the Sub-Divisional Magistrate's action in examining these Court-witnesses after the parties had adduced their evidence can be supported. Section 540, Criminal Procedure Code, confers very wide powers upon a Court but as has been more than once pointed out (see *Sitab Singh* v. *Dalganjan Singh* (1) and *Natabar Ghose* v.

(1) 21 Ind. Cas. 1002; 12 A. L. J. 15; 14 Cr. L. J. 682.

Adya Nath Biswas (2)] the wider the powers the greater the exercise of discretion required of a Magistrate. This principle, I think, is the only assistance which can usefully be derived from the two decisions cited, because in each of these cases the witnesses examined were called by the Court at the instance of a party. It is clearly objectionable that a party should be able in this manner subsequently to obtain evidence of persons who might have been included in its list of witnesses. In *Ananda Chunder Singh* v. *Basu Mudh* (3) the Court in a summons case called a witness after the witnesses for each party had been examined and then convicted the accused of wrongful confinement. The learned Judges seem to have been in some doubt as to the regularity of this action, though they indeed remark that the Magistrate was strictly within his rights under s. 540. Being unable to find that the accused was in any way prejudiced, they declined to interfere. The circumstances of that case differ, I think, considerably from those of the present one inasmuch as the Court did not base its conclusion exclusively or mainly upon the evidence which it called. Here we have no trustworthy materials for a decision arising out of the partie's evidence and the finding of the Court is based exclusively on evidence subsequently obtained. I cannot but think that the counter-petitioner who, before this was done, had already produced all the evidence at his command, is likely to have been prejudiced by such a course of action, and that the Court in pursuing it went beyond the reasonable discretion afforded by s. 540, Criminal Procedure Code.

Under s. 112 of the Evidence Act there is a presumption in favour of the legitimacy of a child born during the continuance of a valid marriage between his mother and any man, or 280 days after its dissolution, the mother remaining unmarried, and this presumption can only be rebutted if it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. It has been argued here that the form of union known as *sambandam* is a valid marriage, and if this be so, and if the child was born within the prescribed time, the counter-petitioner can only rebut the presumption by proving non-access. It is unnecessary for the petitioner, once the validity of the marriage is proved, to establish affirmatively that the child is legitimate. I think that, having regard to this consideration and to the objections raised to the procedure adopted by the trial Court, the best course will be to set aside the order in so far as it relates to the younger child and to remand the case for re-trial in the light of the above observations, and I order accordingly. Opportunity may, of course, be given to the petitioner, if she cannot rest her case upon the validity of her marriage to the counter-petitioner to examine any of the witnesses previously examined as Court-witnesses.

V. N. V. *Order set aside.*

(2) 75 Ind. Cas. 541; 27 C. W. N. 675; 37 C. L. J. 415; A. I. R. 1923 Cal. 690; 24 Cr. L. J. 957.
(3) 24 C. 167; 12 Ind. Dec. (N. S.) 777.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1033 OF 1926.

December 20, 1926.

Present:—Mr Justice Agha Haidar.

AHMAD DIN AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 99—Right of private defence—Importance of the plea—Magistrates, duty of.

In the excitement and confusion of the moment it is not to be expected that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though the counter-attack should not be out of all proportion to the force employed in the original attack. [p. 126, col. 1.]

A Magistrate should not in his zeal to suppress crimes of violence overlook the importance of the provisions of law as regards the right of private defence. [*ibid.*]

Appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Sialkot, dated the 2 st August, 1926.

Mr. *Khurshaid Zaman*, for the Appellants.

Mr. *C. L. Mathur*, for the Government Advocate, for the Respondent.

JUDGMENT.—This is an appeal by Sultan and Ahmad Din father and son respectively, against the order of a Magistrate of the First Class exercising powers under s. 30 of the Code of Criminal Procedure convicting the appellants under s. 307 of the Indian Penal Code. Ahmad Din has been sentenced to six years' rigorous

imprisonment including three months' solitary confinement and Sultan has been sentenced to six months' simple imprisonment on account of his old age and infirmity, he being about seventy years old. Both have appealed.

The case is a difficult one, and I have given it much anxious thought. Without entering into the details of the respective stories set up by the prosecution and the defence as regards the enmity between the party of the accused and the complainant's party, it may be taken that undoubtedly there was ill-feeling existing between Ahmad Din's and Budha's party. On the 28th July, 1926, at about 9 P. M. there was admittedly a fight in one of the streets of Sialkot. Whether it was a chance encounter or the accused came purposely to attack Budha it is difficult to say. We may, however, take it that Budha with one or two others came face to face with Ahmad Din who, according to the prosecution, was accompanied by his father Sultan and his brother Abdullah. What makes the case a baffling one is the fact that two persons one from each party in this melee were injured. Budha, the complainant, got five injuries which, according to the medical evidence, were inflicted with a sharp edged instrument. One of these injuries was in the abdomen and was grievous. The others were also bad cuts but not serious. Ahmad Din, the appellant got no less than seven injuries and one of them in the head was a contused wound which bled very profusely. And yet we find that, with the exception of Budha the complainant, and Muzaffar Din (P. W. No 8) all the other witnesses for the prosecution who profess to have been present at the scene of occurrence are mysteriously silent as to how Ahmad Din came by his seven injuries. Sultan had a very slight abrasion somewhere on one of his arms.

The story for the prosecution is that Budha, after regaling himself at a milk shop, was engaged in conversation with one Ahmad Jan (P. W. No. 5) when he came face to face with Sultan, Ahmad Din and Abdullah. Budha, according to the prosecution story was discussing the alleged improper conduct of Ahmad Din accused in having assaulted a woman *Musammat* Hussain Bibi the wife of one Saifa. Ahmad Din remonstrated saying that Budha had no business to discuss him. There was an exchange of abuse, and the prosecution alleges that Sultan the old man, gave a *dang* blow to Budha which was followed by another *dang* blow by his son Abdullah who is absconding. On this Budha picked up a *lathi* from somewhere and hit Ahmad Din, the appellant, who slashed at Budha with a knife. At this stage some passers-by intervened and the knife was snatched from the hand of Ahmad Din.

The First Information Report was made soon after by Budha and it is a very significant fact that Budha does not mention the name of Sultan as one of his assailants who actually hit him a blow, and what is more important, he does not mention the fact of any injuries having been inflicted upon Ahmad Din in this fight by anybody. He just kept quiet about these injuries. There was delay in the production of the knife by the witness Muzaffar Din, and Budha himself and some other prosecution witnesses are not positive whether the knife (Ex. P-1) was the identical weapon used by Ahmad Din. The knife, a sketch of which is placed on the record, is a formidable weapon such as is used by butchers for dressing 'red' meat. It was not handed over promptly to the Police but was produced later on by Muzaffar Din witness at the Hospital. This delay is not accounted for and it cannot be said with certainty that this was the very knife used by Ahmad Din. The knife used by Ahmad Din, according to the story for the defence, was an ordinary pocket knife.

The story for the defence is that Budha was accompanied by Sultan, a trunk-maker, and two other persons named Maina and Chhappa. Sultan, the trunk-maker, according to the defence, bore ill-will towards Ahmad Din because, according to the defence, Ahmad Din was instrumental in getting a report made by his aunt, *Musammat* Jan Bibi, against two women one of whom was the wife of Sultan, the trunk-maker. As stated above, the difficulty which the case presents lies in the fact that none of the prosecution witnesses clearly states as to how Ahmad Din received no less than seven injuries. There can be no doubt that if Ahmad Din was attacked by Budha alone or by his companions, then Ahmad Din had a clear right to defend himself against his assailants. It should be remembered that in this fight Ahmad Din got a *lathi* blow on his head,

It might have been a grievous hurt: certainly Ahmad Din must have reasonably apprehended grievous hurt at least after this onslaught upon him by Budha, which resulted in profuse bleeding. In the excitement and confusion of the moment it would be too much to expect that Ahmad Din should ascertain the nature and extent of the injury to his head before defending himself in the best way he could against very serious injury. We have in the evidence that in this fight at a certain stage Ahmad Din was thrown down and Budha got on to the top of him. In such a state of things it is not to be expected that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though, of course, the counter-attack should not be out of all proportion to the force employed in the original attack. It is sometimes noticed that Magistrates with the very best of intentions and in their commendable zeal to suppress crimes of violence overlook the importance of the provisions of law as regards the right of private defence. The present case is an illustration. The accused have produced evidence in their defence, and it cannot be said that the evidence on behalf of the prosecution is decidedly superior to that put forward by the defence. The witnesses for the defence support the story put forward by the accused and say that the first blows were struck by Budha and that it was only afterwards that Ahmad Din whipped out his knife and slashed at his assailant Budha. In this connection a brief extract from the evidence of Muzaffar Din (P. W. No. 8) is not without interest. He says :

" Budha was grappling with Ahmad Din and he struck him first two or three fists and then two or three blows. He picked up a stick from somebody after he had received *dang* blows and he struck two or three blows to Ahmad Din before the latter stabbed him. I had stated before the Police that Ahmad Din and Budha had quarrelled and the latter had beaten him with fists."

This evidence, coming as it does from the mouth of one of the principal witnesses for the prosecution is not without significance and the appellant Ahmad Din is perfectly entitled to make full use of it in his defence. It should further be noted that the evidence of Dr. Lal Chand as regards the injuries found on the person of Ahmad Din is that they could not have been caused by a mere struggle with a person who was empty handed. Even Budha, the complainant, after making some confused statements in his examination-in-chief gives away his whole case when he says in his cross-examination "I had received only two *dang* blows when I struck a stick to Ahmad Din who was ahead of all the accused." Now, the prosecution witnesses are unanimous that Ahmad Din never struck a *dang* blow to Budha and that the *dang* blows were struck by Sultan and Abdullah. This shows that the first attack upon Ahmad Din was made by Abdullah alone.

On the whole I think that the case on behalf of the prosecution is, to say the least of it, a doubtful one, and, under all the circumstances of the case, I think that the injuries inflicted by Budha on the person of Ahmad Din were inflicted in the exercise of the right of private defence. Under the circumstances I accept the appeal of Ahmad Din, set aside his conviction and sentence and order that he may be released forthwith.

As regards Sultan he does not seem to have taken a prominent part, and in fact the First Information Report does not say that he hit any blow. I, therefore, give him the benefit of doubt as I do not think that on the evidence on the record his guilt has been satisfactorily established. I accept the appeal of Sultan also, set aside his conviction and sentence and order that he may be acquitted. He is on bail already and need not surrender.

R. L. *Appeal accepted.*

PRIVY COUNCIL.

APPEAL FROM THE LAHORE HIGH COURT.

November 11, 1926.

Present:—Viscount Haldane, Lord Sumner and Lord Sinha.

MADAT KHAN AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Cross cases—Evidence recorded separately—Judgment, common—Irregularity.

In the trial of cross cases arising out of the same occurrence the Court ought to keep the evidence in each case entirely distinct and to deliver separate judgments in each case. Where, however,

the evidence is separately recorded in each trial, the mere fact that both the cases are decided by one judgment would not vitiate the trial.

Appeal from the judgment of the High Court, Lahore.

Mr. *W. W. Wallach*, for the Appellants.

Messrs. *A. M. Dunne* and *Kenworthy Brown*, for the Crown.

JUDGMENT.

Viscount Haldane.—In this case their Lordships advised His Majesty that special leave to appeal should be granted because of the apprehension that it might turn out that evidence which was given in one trial had been improperly imported into a quite separate trial. Now that the case has been fully and fairly put by Mr. Wallach on its merits, it turns out that the apprehension was not well founded.

Two parties were charged for their attacks on each other in the same occurrence, and the charges were tried separately at two distinct trials. But, naturally, as the occurrences were common to both cases, the evidence given for the prosecution was similar to a substantial extent in each case. Each party, no doubt, was a witness against the other, but, on the other hand, there was also independent evidence. In a case of that kind it is almost impossible to keep the cases wholly separate. Although they were tried separately, the High Court gave one judgment, but treated the cases as two cases which had been separately tried. It is said that they imported considerations from one case into the other. When one looks at it, to some extent that was inevitable and to some extent it did so happen. There was, however, a body of separate evidence which was applicable to each case, and that in itself was enough for the conviction; so that, although technically it might have been better to keep the evidence entirely distinct, and to have delivered two separate judgments, no injustice has followed from what was done. There is no doubt that in substance the learned Judges had material on which to come to the conclusion to which they did come. They have come to a conclusion which in substance appears to their Lordships to be the right one, and it is only on technical grounds that that conclusion could be questioned.

In those circumstances their Lordships see no good reason for advising His Majesty to interfere in this case and the appeal should be dismissed.

Z. K. *Appeal dismissed.*

Solicitors for the Appellants:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Crown:—The Solicitor, India Office.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 898 OF 1926

January 14, 1927.

Present:—Sir Shadi Lal, KT., Chief Justice.

EMPEROR—PETITIONER

versus

KESHO RAM AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 439, 562—First offender—Release, order of—Discretion of Court—Revision—Interference by High Court.

Where a Magistrate makes an order of release under s. 562 of the Criminal Procedure Code in a case to which the provisions of that section are applicable after taking into consideration all the relevant circumstances of the case, the High Court will not interfere with the exercise of his discretion in revision, unless a strong case is made out justifying such interference. [p. 128, col. 1.]

Petition, under s. 563 (3) of the Criminal Procedure Code, for enhancement of the sentence passed upon the respondents by the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Lahore, dated the 5th March, 1926.

Mr. *Sundar Das*, for the Petitioner.

Mr. *Tek Chand*, for the Government Advocate, for the Respondents.

JUDGMENT.—The Trial Magistrate has convicted both the accused under s. 161 read with s. 116 of the Indian Penal Code; but, instead of sentencing them to any punishment he has directed, under s. 562 of the Criminal Procedure Code, their release on probation of good conduct. The learned Counsel for the Crown asks this Court to interfere in revision with the order of the Magistrate and to pass a sentence of imprisonment upon each of the convicts. Now, in order to give the Magistrate jurisdiction to release an offender under this section, it is necessary that two conditions must be

fulfilled: (1) the accused must be a first offender; (2) the offence must be one of those specified in section. It is conceded that both these requirements of the law have been satisfied; and the only question is whether the Magistrate was, in the circumstances of the case, justified in exercising the discretion vested in him by law.

Now, on perusing the judgment of the Magistrate I find that he has taken, to use his own phraseology, "everything into consideration," and that he has also paid due regard to the statement made by Mr. Byrne, Special Public Prosecutor, that he does not "ask for a sentence of imprisonment," but "that an order under s. 562, Criminal Procedure Code, would meet the ends of justice." The question for determination is whether in these circumstances I should exercise my extraordinary jurisdiction as a Court of Revision and interfere with the discretion exercised by the Magistrate. In this connection my attention has been invited by the learned Advocate for the respondents to a judgment of Mr. Justice Johnstone in *Abdul* v. *Emperor* (1) in which the learned Judge declined to interfere in revision with an order under s. 562 of the Criminal Procedure Code, although the order had been passed in a case to which the section was wholly inapplicable. Reliance is also placed on the judgment in *Emperor* v. *Partab Narain* (2) where it was pointed out that the terms of s. 562, sub-s. (1) are wide, and the Court of Revision refused to set aside an order passed under that section by a Magistrate in the exercise of his discretionary jurisdiction.

In the case before me the Magistrate has, as pointed out above, taken into consideration the relevent circumstances, and it is significant that even the Public Prosecutor asked him not to pass a sentence of imprisonment but to make an order of release under s. 562 of the Criminal Procedure Code. Upon these facts I am not prepared to hold that a strong case, such as would justify interference by a Court of Revision with the discretion of the trial Court, has been made out. Accordingly I dismiss the application.

Z. K. *Application dismissed.*

(1) 6 Ind. Cas. 639; 19 P. W. R. 1910 Cr.; 11 Cr. L. J. 389.

(2) 88 Ind. Cas. 1054; 2 O. W. N. 593; 26 Cr. L. J. 1278; A. I. R. 1925 Oudh. 673.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1126 OF 1926.

January 8, 1927.

Present:—Mr. Justice Dalip Singh.

IBRAHIM—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 376—Rape—Unchastity of girl—Sentence.

Where in a case of rape it is found that the girl is of unchaste character, a very severe sentence is not called for.

Criminal appeal from the order of the Additional District Magistrate, Shahpur at Sargodha, dated the 18th October, 1926.

Mr. *Niaz Muhammad*, for the Appellant.

Mr. *Abdul Rashid*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—The appellant in this case has been convicted by the learned Magistrate under s. 376, Indian Penal Code, and sentenced to rigorous imprisonment for seven years. The evidence of *Musammat* Sharif Khatun, the girl who was raped, corroborated by the evidence of Ali Muhammad, who is a disinterested witness, leaves no doubt that the girl was raped as she alleges, and I agree with the learned Magistrate in rejecting the defence evidence. At the same time the medical evidence shows that the girl was used to sexual intercourse and as she is unmarried it follows that she was unchaste. Her own story is that when the cattle of the accused trespassed on a grassy plot in which she was grazing her cattle she drove away the cattle and then went a distance of 60 or 70 *karms* to remonstrate with the accused. The accused thereupon seized her and proceeded to rape her. Her cries attracted the attention of Sultan (P. W. No. 2) and Ali Muhammad (P. W. No. 3) who rescued her. I do not reject this evidence, but at the same time taking into consideration the circumstances of the case I consider that the sentence is too severe and I reduce it to four years' rigorous imprisonment. The appeal is accepted to this extent only.

Z. K. *Sentence reduced.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1845 OF 1926.
January 3, 1927.
Present:—Mr. Justice Addison.

LABHU RAM—PLAINTIFF —APPELLANT
versus
SAZAWAR AND OTHERS—DEFENDANTS —RESPONDENTS.

Hindu Law—Minor—Mortgage, payment of—Guardian, natural, whether can grant valid discharge—Registration Act (XVI of 1908), s. 17—Endorsement of payment on back of mortgage-deed—Registration, whether necessary—Oral evidence of payment, whether admissible.

The *de facto* and natural guardian of a Hindu minor has full power to collect debts on behalf of the minor and to give a valid discharge in respect thereof. Therefore, in the absence of fraud or collusion a mortgagor who pays the mortgage-money to the *de facto* and natural guardian of the mortgagee, who is a Hindu minor, obtains a valid discharge of the mortgage-debt.

Where the fact of the payment of the mortgage-money is endorsed on the back of the mortgage-deed but a sentence is added that the mortgage has been extinguished, the endorsement, if unregistered, is not admissible in evidence but oral evidence is admissible in such a case to prove the payment of the mortgage-money.

Second appeal from the decree of the Additional District Judge, Amritsar, dated the 1st April, 1926, affirming that of the Additional Subordinate Judge, Fourth Class, Tarn Taran, District Amritsar, dated the 23rd December, 1925.

Mr. *Durga Das*, for the Appellant.

Messrs. *B. A. Cooper* and *Maya Das*, for the Respondents.

JUDGMENT.—Respondents mortgaged land to plaintiff's father by three different mortgage-deeds. Plaintiff's father then died and during the minority of the plaintiff his mother acted as his natural and *de facto* guardian. In 1914 the respondents paid to the plaintiff's mother the full amount due on the three mortgages and receipts for the different sums were endorsed on the mortgage-deeds. Unfortunately it was also added at the end of the endorsements that the mortgages were extinguished. The land was at the same time mutated back into the names of the original owners without mortgage. After the plaintiff became a major he instituted the present suit for possession of the mortgaged land on the ground that the money had not been paid to his mother, that she had no power to grant redemption of the land and that she did not spend the money for his benefit. The two Courts below have concurred in dismissing the plaintiff's suit and he has presented this second appeal.

The first point argued on his behalf was that as the endorsements on the mortgage-deeds were inadmissible in evidence on account of their want of registration no other evidence as to the redemption of the land or payment of the full amount of the mortgage-money could be given. I am unable to accept this contention. *Amir* v. *Diala Mal* (1) is a ruling on all fours with the present. There also the same mistake had been made of adding a sentence extinguishing the mortgage to the receipt proper and oral evidence was admitted in proof of the payment of the mortgage amount. There is ample evidence that the money was paid to the widow *bona fide* as guardian of her minor son and that the land was then mutated in favour of the original owners.

The only other point argued was that it was the duty of the mortgagors to see that the money paid to the mother of the minor was applied for his benefit. I entirely disagree. The *de facto* and natural guardian of a Hindu minor has full power to collect debts. There is no evidence in the present case that the mother misapplied the money. No fraud or collusion between the mortgagor and the widow has been established. In fact there is a clear finding that all along she had been doing all the necessary acts to look after the interests of her minor son. She instituted suits and obtained decrees. Throughout she had been realising rents and all this time she acted in good faith. She educated the plaintiff up to the F. A. standard and saw to all his interests and those of his sister. In my opinion the mere fact that there was a lien on land for the debt in question in the appeal before me cannot make any difference. The widow was entitled to collect that debt and the mortgagors were justified in paying the money to her in good faith in the ordinary course of business. There is no force in the appeal which I dismiss with costs.

Z. K. *Appeal dismissed.*

(1) 39 P. R. 1904; 91 P. L. R. 1904.

chase-money went to satisfy these debts the plaintiffs had no right to cancellation of the sale. This judgment was affirmed by the High Court, although the difference between the purchase-money and the debts which were found to create the legal necessity was much greater proportionally than in the present case or in the two cases on which reliance was placed above referred to. The ground of differentiation was that the property sold was a moiety share of a fixed-rate tenancy over which there also extended a mortgage, and that in such circumstances "it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding." These two considerations apply equally in the present case.

In their decision the learned Judges of the High Court rely on the authority of the case of *Girdharee Lal* v. *Kantoo Lal* (3) and especially on the head-note which contains this passage:—

"Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for, the fact that a small part is not accounted for will not invalidate the sale."

While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court Judges seem to have thought, that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question would in each case be a matter of arithmetical calculation, and opinions would necessarily vary as to what constituted the "bulk of the proceeds" or "a small part" of the same in each particular case. The learned Judges seem to have lost sight of the true question which falls to be answered in such cases, *viz.*, whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited at the Bar of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (4). The case related to a charge upon property by way of mortgage, and not to a sale, but the principles to be applied appears to their Lordships to be the same as in the case of a sale of property. The head-note states correctly the points actually decided so far as bearing on the present case :—

"The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is, by the Hindu Law, a limited and qualified power, which can only be exercised rightly by the manager in a case of need, or for the benefit of the estate..... The actual pressure on the estate, the danger to be averted, or the benefit to be conferred, in the particular instance, are the criteria to be regarded....

"A lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does inquire, and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money."

In delivering the judgment of the Board Lord Justice Knight Bruce, after stating the law substantially as laid down in the headnote, said :—

"The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." (page 424*).

This decision was followed in the case of a sale by a Hindu widow in the case of *Ram Gopal Ghose* v. *Bullodeb Bose* (5), where it was held by the High Court of Calcutta that:—

"Where there is no doubt as to the necessity for a sale by a Hindu widow and the vendee pays a fair price for the property sold and acts throughout *bona fide*, the mere fact of only two-thirds of the purchase-money having been paid to creditors, would not invalidate his conveyance, he not being bound to see to the application of his money."

(3) I. I. A. 321; 22 W. R. 56; 14 B. L. R. 187; 3 Sar. P. C. J. 380 (P. C.).

(4) 6 M. I. A. 393; 18 W. R. 81*u*; Sevestre 253*p*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552 19 E. R. 147.

(5) W. R. 1864, p. 385.

*Page of 6 M. I. A.—[*Ed.*]

A similar decision was pronounced by the same Court, *Baboo Luchmeedhur Singh* v. *Ekbal Ali* (6), where it was laid down that:—

"The rule that only so much of the property should be sold as will meet the necessity does not apply to cases where the excess is small, or where the money really required cannot otherwise be raised."

The case was a strong illustration of the principle laid down by Lord Justice Knight Bruce, because there was an admitted surplus of about Rs. 14,000 as to the mode of application of which there was no very distinct evidence, the total sale price having been Rs. 65,000. Nevertheless, the learned Judge, who delivered the opinion of the High Court, made this observation:—

"Looking at the transaction as a whole we consider it to be one in which it is proved that the purchaser acted with reasonable and sufficient care and caution and in which a sufficient necessity did exist. We, therefore, declare the sale to be good and valid against the plaintiff."

This case was followed by another in the same Court, *Lala Chatranarayan* v. *Uba Kunwari* (7) where a sale of a portion of an estate by a widow for Rs. 995 to pay off a debt of her father-in-law of Rs. 670 was not invalidated by the mere fact that she sold it for more than the amount of the debt when the purpose for which the sale was made, namely, the payment of the ancestral debt, was quite legal.

Similarly in *Kamikhaprasad Roy* v. *Srimati Jagadamba Dasi* (8) Mr. Justice Markby expressed the opinion thus paraphrased in the head-note, that:—

"In purchasing from a Hindu widow, the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required."

Reference may also be made to the case of *Felaram Roy* v. *Bagalanand Banerjee* (9) in which the Calcutta High Court held that:

"Where a Hindu widow *bona fide* executed a permanent lease upon taking a *selami* of Rs. 125 in order to pay off a debt of her husband's amounting to Rs. 100, this was not a case in which the reversioners should be allowed to recover possession upon payment of the amount actually needed to pay off the loan."

In the course of their judgment the learned Judges made this observation:—

"It would manifestly be impossible, and possibly prejudicial to the interest of the estate if the widow were to be held to be bound in every instance to sell property for payment of a debt due from her husband for exactly the sum due to the creditor."

More important than any of these is the decision of this Board in an appeal from Madras, *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan* (10). In that case the widow of a separated Mitakshara Hindu sold property belonging to her husband's estate in her possession as limited owner for Rs. 5,300, in order to pay off Rs. 4,588 due on two mortgages executed by her husband. The balance of Rs. 712 was appropriated by the widow to a purpose which did not constitute a legal necessity, but it was held that the sale was not invalid on this account, as the purchasers were not bound to see how the widow applied the purchase-money.

All these decisions are, in their Lordships' opinion, entirely inconsistent with the judgment appealed from, and with the Allahabad cases on which it was based. They are equally inconsistent with the decision in a recent case from the same Province, *Dwarka Ram* v. *Jhuali Pande* (11), and especially with the ground of judgment therein enunciated in the following absolute terms:—

"If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff, he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family."

In a still more recent case from the same

(6) 8 W. R. 75.
(7) 1 B. L. R. A. C. J. 201; 1 Ind. Dec. (N. S.) 252.
(8) 5 B. L. R. 508.
(9) 6 Ind. Cas. 207; 14 C. W. N 895.
(10) 74 Ind. Cas. 604; 27 C. W. N. 365; 16 L. W. 478; 4 U. P. L. R. P. C. 92; A. I. R. 1922 P. C. 307; (1922) M W. N. 801; 21 A. L. J. 282; 31 M. L. T. 149 (P. C.).
(11) 72 Ind. Cas. 134; 45 A. 429; A. I. R. 1923 All. 248; 9 O. & A. L. R. 494.

Province, *Daulat* v. *Sankatha Prasad* (12) the Judges of the High Court appear to have reverted to the principles upon which the judgment now under review is based, holding that "the criterion for deciding whether the sale should be upheld or set aside is whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account."

As the sum in question was only Rs. 105 out of a total consideration of Rs. 2,142-12-6, the Court upheld the sale transaction, but directed the defendants to re-pay to the plaintiff the sum of Rs. 105 which was found not to be covered by legal necessity. It is to be remarked that this is the only case of those cited to their Lordships in which an order for re-payment of a small sum was made although the sale itself was sustained, and is entirely opposed to the whole current of authority. It was not done in the recent case decided by this Board, *Masit-ullah* v. *Damodar Prasad* (13). There a sum of Rs. 2,000 out of a total consideration of Rs. 18,400 was not shown to have been applied in the discharge of ancestral debts, but, on the other hand, there was no evidence that it was used for immoral or unauthorised purposes. In setting aside the judgment of the High Court and dismissing the plaintiffs' suit their Lordships made no condition as to the re-payment of this balance of Rs. 2,000. It would rather appear that in any case where the sale has been held to be justified, but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that, where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make re-payment of such surplus to the members of the family challenging the sale.

Applying the principles laid down in the above series of cases by this Board, and consistently followed in other Courts in India, except in Allahabad, their Lordships have reached the conclusion that the judgment of the High Court cannot be sustained.

On the facts found by the District Judge it must be taken that the sale challenged was made after due enquiry as to the legal necessity by the vendee; that such necessity has been proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500; that the sale was for an adequate consideration, and that the mere fact that, after a long interval of time, the appellants have not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale.

They will, therefore, humbly advise His Majesty that the judgment and decree of the High Court should be set aside, and the plaintiffs' suit dismissed with costs in all the Courts, including the costs of the present appeal.

Z. K. *Appeal allowed.*

Solicitor for the Appellants:—Mr. *H. S. L. Polak.*

Solicitors for the Respondents:—Messrs. *Douglas, Grant* and *Dold.*

(12) 86 Ind. Cas. 91; 47 A. 355; 23 A. L. J. 55; L. R. 6 A. 167 Civ.; A. I. R. 1925 All. 324.

(13) 98 Ind. Cas. 1031; 53 I. A. 204; A. I. R. 1926 P. C. 105; 3 O. W. N. 721; (1926) M. W. N. 816; 24 L. W. 551; 48 A. 518; 44 C. L. J. 321; 51 M. L. J. 792; 28 Bom. L. R. 1402; 7 P. L. T. 815; 25 A. L. J. 1 (P. C.).

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1976 OF 1925.

January 3, 1926.

[*Present:*—Mr. Justice Addison.

FATEH MUHAMMAD—APPLICANT—APPELLANT

versus

MAYA DAS AND OTHERS—CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 27—Civil Procedure Code (Act V of 1908), s. 148—Insolvency—Discharge, application for—Extension of time—Power of Court.

An Insolvency Court has power to extend the time fixed by it within which an insolvent is directed to apply for his discharge and it is not a fatal defect in the application for extension of time that it is made after the expiry of the fixed period.

Miscellaneous First Appeal from an order of the District Judge, Jhang at Sargodha, dated the 28th April, 1925.

Mr. *Muhammad Din Jan,* for the Appellant.

JUDGMENT.—Fateh Muhammad was adjudicated an insolvent on the 1st March,

1923, and at the same time was directed to apply for his discharge within two years. The case came on for hearing in the ordinary course on the 28th April, 1925, when Fateh Muhammad applied for an extension of the time within which he should apply for his discharge. The learned District Judge refused to extend the time on the ground that he could not do so as the prescribed period had expired by a few days. He, therefore, annulled his adjudication. Against this decision Fateh Muhammad has appealed.

The appeal must be accepted on the authority of *Lakhi* v. *Molar* (1) where it was held that it is not a fatal defect that the application for extension was made after expiry of the fixed date. It was further held there that s. 148 of the Code of Civil Procedure established that principle and there was nothing repugnant to it in the provisions of the Insolvency Act, especially as provision for the extension of time was contemplated by s. 27 (2) of the Act. I accordingly accept the appeal *ex parte* and remand the case to the District Judge with a direction that he must apply his mind to the question as to whether an extension should be granted. The annulment of the adjudication is set aside. There will be no costs here as none of the creditors have appeared.

Z. K. *Appeal accepted.*

(1) 86 Ind. Cas. 115; A. I. R. 1925 Lah. 416; 26 P. L. R. 126.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 320 OF 1925.

September 27, 1926.

Present:—Mr. Justice Odgers and Mr. Justice Curgenven.

BALLA MALLAYYA—PLAINTIFF No. 2—APPELLANT

versus

PEDDI VEERAYYA AND OTHERS—DEFENDANTS AND PLAINTIFFS NOS. 1 AND 3—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XLI, rr. 23, 25, O. XLIII, r. 1 (a)—Order of remand—Fresh issues—Remand under inherent power—Appeal—Revision.

An Appellate Court has an inherent power of remand under s. 151, Civil Procedure Code, apart from O. XLI, r. 23, Civil Procedure Code, and no appeal lies against an order made in exercise of this power. [p. 136, col. 1.]

Athappa Chetty v. *Ramanathan Chetty* (1), *Muppavaraju Venkata Radhakrishna Rao* v. *Venthurumilli Venkatarao* (4), *Sheikh Muhammad Maracayar* v. *Rangasami Naidu* (3) and *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Ld.* (2), followed.

Where in an appeal the Appellate Court found that the appeal could not be satisfactorily disposed of in the absence of certain findings and, therefore, reversed the decision of the first Court, settled fresh issues and remanded the suit for fresh disposal by the trial Court:

Held, (1) that no appeal lay against the order of remand; [p. 136. col. 2.]

(2) that the Appellate Court acted within the limits of its jurisdiction and the order was not capable of being revised under s. 115, Civil Procedure Code. [*ibid.*]

Appeal against the order of the Court of the Additional Subordinate Judge, Bapatla, dated the 12th March, 1925, and passed in A. S. No. 32 of 1923 (A. S. No. 243 of 1924 on the file of the Sub-Court, Bapatla) preferred against that of the Court of the Additional District Munsif, Ongole, in O. S. No. 155 of 1924 (O. S. No. 645 of 1922 on the file of the District Munsif's Court, Bapatla).

Messrs. *P. Kameswara Rao* and *Ch. Raghava Rao*, for the Appellant.

Mr. *K. Kameswara Rao*, for the Respondents.

JUDGMENT.

Odgers, J.—This is an appeal against an order of remand by the lower Appellate Court and the preliminary point is taken that no appeal lies. The suit was for the restoration of a certain *bund* by the defendants, and the plaintiffs went to trial before the Munsif on the following issues:—

(1) Whether the plaintiffs are entitled to have the *bund*?

(2) Whether the defendants were justified in removing the *bund*?

(3) To what relief are the plaintiffs entitled?

The Munsif decreed the suit. On appeal to the Subordinate Judge, he found that the appeal could not be satisfactorily disposed of in the absence of certain findings. He, therefore, reversed the Munsif's decision, settled fresh issues and remanded the suit for fresh disposal by the Munsif's Court.

The appeal is brought under O. XLIII, r. 1, cl. (*a*) which allows an appeal from an order under O. XLI, r. 23. The latter is obviously inapplicable here and it is hardly contended that the suit was disposed of by the Munsif on a preliminary point. It is argued that the remand of the whole suit was incompetent and that the Sub-

ordinate Judge ought to have proceeded under O. XLI, r. 25 and called for findings while retaining the suit on his own file. It was held in *Athappa Chetty* v. *Ramanathan Chetty* (1) (a judgment to which I was a party) largely on the authority of *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Ltd.* (2) that an Appellate Court has an inherent power of remand under s. 151, Code of Civil Procedure, apart from O. XLI, r. 23 and that no appeal lies against an order made in exercise of this power. I adhered to this decision in *Sheikh Muhammad Maracayar* v. *Rangasami Naidu* (3) and am not prepared to re-consider the matter so far as I am concerned. I may add that my view is supported by *Muppavaraju Venkata Radhakrishna Rao* v. *Venthurumilli Venkatarao* (4). There is, therefore, no appeal in this case.

We are then asked to treat this as a revision petition under s. 115, Code of Civil Procedure. The same position arose in *Sheikh Muhammad Maracayar* v. *Rangasami Naidu* (3) where it was argued that the Subordinate Judge should have proceeded under O. XLI, r. 27. We held there that as in *Athappa Chetty* v. *Ramanathan Chetty* (1) there was, if anything, only an improper use of a power (*i. e.*, the inherent power) legally possessed, and that there was no question of jurisdiction. The same view appears to have prevailed with the Lahore High Court [*Wisahiu Ram* v. *Alwal* (5)] where the learned Judges held that the plaintiff could impugn the order of remand, if so advised, in second appeal. It is well established that the Court will not exercise its powers of revision, if another remedy is open to the petitioner. The case of *Venkatarama Aiyar* v. *Sundaram Aiyar* (6) is cited for the proposition that the Court had no jurisdiction to remand the entire case, but the Munsif ought to have been directed to take and submit further evidence. The learned Judges do not deal with the inherent power of the Court and none of the cases cited above seems to have been referred to, as far as appears from the judgment. The order of the Subordinate Judge there is said to be inconsistent; the whole case was remanded though only two issues were ordered to be re-tried on which the Subordinate Judge desired further evidence, though the trial Court had considered those issues on the evidence and recorded findings thereon. I think this case must be confined to its special facts. In the case before us, it appears to me obvious that no satisfactory result could be obtained from going to trial on the issues as framed by the Munsif. Under the circumstances I see no reason why the Subordinate Judge should be called upon to practically try the case *de novo* on appeal.

In my opinion the Subordinate Judge acted within his powers, and there is no question of jurisdiction. As stated it is clear that no appeal lies in a case of this sort. On both grounds, therefore, the preliminary objection must be upheld and the appeal dismissed with costs.

Curgenven, J.—The order of remand which is the subject of this appeal clearly was not made under O. XLI, r. 23, because the trial Court had not disposed of the suit upon a preliminary point. Accordingly O. XLIII, r. 1 (*a*) which allows an appeal against an order passed under O. XLI, r. 23, has no application. No other provision of law enabling an appeal having been shown, it must be held that no appeal lies.

Assuming that we shall be prepared to treat the appeal as a petition for revision under s. 115, Code of Civil Procedure, it must be shown that the Appellate Court, in remanding the suit for fresh disposal, exercised a jurisdiction not vested in it by law. In other words, is the power of the Court to remand a suit for disposal limited to the case provided for by O. XLI, r. 23, *viz.*, where the trial Court has disposed of it upon a preliminary point? This question was considered by a Full Bench of the Calcutta High Court consisting of five Judges, *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *Allahabad Bank, Ltd.* (2) and the conclusions they came to were briefly these: Section 107 of the Code which gives an Appellate Court a power of remand, gives it only "subject to such conditions and limitations as may be prescribed." "Prescribed" means, of course, prescribed by rules under the Code, and there was some difference of opinion as to whether, since r. 23 of O. XLI, provides

(1) 53 Ind. Cas. 417; 37 M. L. J. 536; 10 L. W. 359.
(2) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.
(3) 69 Ind. Cas. 826; 16 L. W. 515; 31 M. L. T. 182.
(4) 84 Ind. Cas. 965; 48 M. 713; 47 M. L. J. 552; 20 L. W. 711; 35 M. L. T. 135; (1924) M. W. N. 922; A. I. R. 1925 Mad. 229.
(5) 78 Ind. Cas. 408; 6 L. L. J. 153; A. I. R. 1924 Lah. 487.
(6) 92 Ind. Cas. 1045; (1926) M. W. N. 48.

for a remand in a particular set of circumstances, the section empowered a Court to remand in any other circumstances. Mookerjee, J., was inclined to hold that it did, but the preponderance of opinion favoured the view that it did not, and it appears to me, if I may respectfully say so, that Woodroffe, J., defines the position correctly in what he says upon this point. Accepting this view, it follows that the course adopted by the learned Subordinate Judge is a course not expressly authorised by the Code and can only be justified, as the Calcutta Full Bench justified it, as comprised among the Court's inherent powers. I must confess to some considerable hesitation in relying upon s. 151 for this purpose. Where the Code contains specific provisions in any department of procedure it is not ordinarily permissible to follow a procedure which might have been, but has not been, included in those provisions. Rule 25 of O. XLI does not provide for a case, like the present, where the issues have been defectively framed by the trial Court, and it requires that the original Court shall try the issues framed by the Appellate Court and shall return its finding upon them. It is an objection not very easy to meet that the learned Subordinate Judge should have dealt with the case according to this rule, and had no jurisdiction to deal with it otherwise. He should, it may be said, have called for findings upon his issues, and should not have remanded the suit for disposal upon them.

Apart, however, from the considerable body of authority in this as well as in other Courts, in favour of the opposite view, I think that there are cases, and that a case of the present kind is one, in which the ends of justice are usually better served by adopting the course now called in question. When a District Munsif has mishandled a case and the Appellate Court has had to lay down the lines upon which it should be dealt with, it is ordinarily in the interests of the parties that the case should be remitted to the lower Court for disposal rather than that the Appellate Court should undertake the lower Court's functions and pronounce judgment upon submitted findings. That has been my experience as a District Judge, and having myself had occasion to remand cases for further trial and disposal, and so to realise the usefulness of the power, I should hold with much regret that it was not a power which an Appellate Court could legally exercise. It occurs to me as a curious anomaly that although criminal procedure is in general less flexible than civil procedure, a Criminal Appellate Court should possess the power to order a re-trial which is not conceded in terms by the Civil Procedure Code. These observations apply where, as here, the whole case is re-opened by the remand order, not where one or more additional issues are framed and sent down for a finding. It was a case of the latter description that was dealt with in *Venkatarama Aiyar* v. *Sundaram Aiyar* (6). Accordingly I do not feel compelled to dissent from the view that a power inheres in the Court to make an order of the kind under consideration where it deems such an order necessary for the ends of justice. And if it has jurisdiction, it is not open to us to go into the merits and decide whether or not it was properly exercised.

I agree, therefore, that we should not treat the appeal as a revision petition and allow it, and that the appeal itself should be dismissed with costs.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1192 OF 1926.

January 12, 1927.

Present :—Mr. Justice Addison.

SHO IDAN LACHHMI NARAIN—CREDITOR—APPELLANT

versus

BAHADUR CHAND—SECOND PARTY—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 37, 43, 75—Discharge, failure to apply for—Annulment of adjudication—Procedure—Appeal, whether lies.

Under s. 75 (3) of the Provincial Insolvency Act no appeal lies from an order annulling an adjudication under the provisions of s. 43 of the Act, without the leave of the Court. [p. 138, col. 1.]

Where an insolvent fails to apply for an order of discharge within the time specified by the Court, the Court has no option but to annul the adjudication, but with a view to protect the creditors the Court should pass an order under s. 37 of the Provincial Insolvency Act vesting the property of the debtor in a person appointed by it. [*ibid.*]

An appeal lies from an order passed under s. 37 of the Provincial Insolvency Act. [p. 138, col. 2.]

Miscellaneous First Appeal from the order of the District Judge, Ferozepore, dated the 29th March, 1926.

Mr. *J. N. Bhandari*, for the Appellant.

Mr. *A. R. Khosla*, for the Respondent.

JUDGMENT.—Two brothers were separately adjudicated insolvent on the 15th July, 1922, at the instance of a creditor. A Receiver was appointed at the same time and each insolvent was directed to apply for his discharge within six months of the date of adjudication. Neither did so and on the 29th March, 1926, the District Judge annulled the adjudication under the provisions of s. 43 of the Insolvency Act. Against these orders the petitioning creditor has preferred two appeals.

It is objected that no appeal lies under s. 75 (2) of the Insolvency Act and that the appeals must be dismissed as no leave has been applied for under s. 75 (3) of the Act. It seems to be that this objection must be upheld. Leave to appeal was given during the hearing of the appeal in *Bansidhar* v. *Kharagjit* (1) but in that case the petition praying for leave to appeal had been presented with the petition of appeal whereas in the two appeals before me no petitions have been presented, praying for leave to appeal. These two appeals must, therefore, be dismissed as incompetent.

There is also a third appeal by the same petitioning creditor. After the District Judge had annulled the adjudications of the two brothers he then on the 10th of July, 1926, under the provisions of s. 37 of the Insolvency Act, ordered the property of Baghi Ram, which had vested in the Receiver, to be restored to him. It is prayed on appeal that there should only have been a conditional restoration and that the learned District Judge should have ordered under s. 37 that the property should vest in the old Receiver for the benefit of the creditors. In *Roop Narain* v. *Messrs. King King & Co.* (2) it was held that a Court has no option but to annul an adjudication where an insolvent fails to apply for an order of discharge within the time specified by the Court. But with a view to protect the creditors the Court should pass an order under s. 37 of the Provincial Insolvency Act vesting the property of the debtor in a person appointed by it. The present is undoubtedly a good case where this should be done in order to protect the petitioning creditor and other creditors. An appeal does lie from an order passed under s. 37 of the Act. I, therefore, accept the third appeal and, instead of the order passed by the District Judge, direct that the property of the debtor Baghi Ram shall vest in Seth Chanan Mal who was the Receiver in the insolvency proceedings. This order will continue for six months from to-day within which time the petitioning creditor or creditors shall have been able to take further steps to protect the property.

I make no order as to costs in these appeals.

Z. K. *Order accordingly.*

(1) 26 Ind. Cas. 926; 12 A. L. J. 1273; 37 A. 65.
(2) 94 Ind. Cas. 234; A. I. R. 1926 Lah. 370.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 257 OF 1925.
July 16, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Patkar.

SADASHIV ATMARAM INAMDAR—PLAINTIFF—APPELLANT

versus

ANNABHAT VENKANBHAT KAVATHEKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Pensions Act (XXIII of 1871), s. 4—Suit between private parties relating to grant of land revenue, whether maintainable—Certificate, whether necessary.

Section 4 of the Pensions Act is applicable to a suit between private parties to which the Government is not a party provided the suit relates to a grant of land-revenue. Therefore, a suit by a plaintiff to recover a share of the revenue of an *Inam* village from the defendant who has recovered the whole of such revenue, is not maintainable without a certificate from the Collector under s. 4 of the Pensions Act. [p. 139, col. 2.]

Second appeal from the decision of the Assistant Judge at Belgaum, in Appeal No. 287 of 1922, confirming the decree passed by the Subordinate Judge at Chikodi, in Civil Suit No. 448 of 1920.

Mr. *A. G. Desai*, for the Appellant.

Mr. *Nilkanth Atmaram*, for the Respondents.

JUDGMENT.

Patkar, J.—In this case the plaintiff sued to recover Rs. 139-8-0 at the rate of Rs. 46-8-0 per year out of the revenue of the *Inam* village of Kallol. The plaintiff

in the plaint stated that he was in possession of all the lands belonging to defendant No. 3, his adoptive father, except the revenue of the village of Kallol, which was payable to defendant No. 3. The suit, as framed by him, clearly relates to a grant of land-revenue. The defence was, that a certificate from the Collector under the Pensions Act was necessary as the suit amount included *mamul judi* and the amount collected from *kadim inamdar*.

The question, therefore, in this case is, whether a certificate is necessary under s. 4 of Act XXIII of 1871. Both the Courts have decided against the plaintiff and have held that a certificate under the Pensions Act is necessary. From the pleadings it clearly appears to be a suit relating to a grant of land-revenue. The learned Pleader for the appellant contends that he ought to be given an opportunity of proving that the grant related to the soil and was not merely a grant of land-revenue. The Subordinate Judge says in his judgment:—

"Plaintiff was given full opportunity to produce the *sanad* which is the only guide to ascertain the nature of the grant and whether the certificate is necessary. Defendant contends that a portion of the grant at least consists of sums recovered from *kadim inamdar*. Plaintiff has not denied or challenged that statement."

Ample opportunity was given to the plaintiff to prove that the grant was of the soil and was not a grant of land-revenue. It is clear that the suit relates to a grant of land-revenue, and the suit must fail because the plaintiff has not produced a certificate from the Collector. The plaintiff was given an opportunity to produce the certificate, the Subordinate Judge kept the case pending till the end of the month to enable the plaintiff to produce the necessary certificate and on failure to produce the certificate the suit was dismissed. He has not yet produced the certificate from the Collector. We, therefore, think that the suit must fail for want of a certificate under s. 4 of the Pensions Act.

It is contended on behalf of the appellant that this suit is not a suit against Government but is a suit between private parties, and, therefore, s. 4 of the Pensions Act does not apply, and reliance is placed on the case of *Govind Sitaram* v. *Bapuji Mahadeo* (1). That was a case in which the plaintiffs brought a suit for a declaration that they were entitled to officiate as *kulkarnis* and for a third share in the moiety of the *vatan* belonging to the parties. In the course of the judgment, the learned Chief Justice says (page 519*):—

"As the Vatandars Act itself precludes the suit being entertained except for the purpose of declaring the plaintiffs' status as *vatandars*, it cannot, we think, *in its restricted form* be regarded as a suit relating to a grant of money within the meaning of the above section."

The Court regarded the suit as being substantially a mere suit for a declaration of the plaintiffs' status as *vatandars* and it was held that, as the suit was of a restricted nature, it was not a suit, which related to a grant of money or land-revenue. As against this contention of the appellants there are several decisions of this Court. In *Damodar* v. *Satyabhamabai* (2) the plaintiff sued to recover a sum of money as the amount of her maintenance. She claimed under an agreement whereby the defendants agreed to pay her Rs. 52 every year for her maintenance out of a cash allowance, which was received by the latter from Government. It was held that the suit could not be taken cognizance of without a certificate under s. 4 of the Pensions Act. That was a suit between private parties and was not a suit against Government. It was held 'that the words [*relating to*] were wide enough to include any suit to enforce such a claim provided it related to a pension or grant of money or of land-revenue; it was immaterial whether the claim was based on an agreement between the parties or arose out of any other legal right or liability and whether it was a claim for a share by way of partition or maintenance or otherwise.' That case was followed in several cases, and I may refer to the cases of *Dwarkanath Amrit* v. *Mahadev Balkrishna* (3), *Balkrishna Sumbhaji* v. *Dattatraya Mahadev* (4) and *Girjabai Shivdeorao* v. *Naryanrao Ganpatrao* (5) where Sir Lallubhai Shah and Fawcett, J., have followed the case in *Damodar* v. *Satyabhamabai* (2). That was also a case between private parties and it was held that s. 4 of the Pensions Act applied.

(1) 18 B. 516; 9 Ind. Dec. (N. S.) 853.

(2) 31 B. 512; 9 Bom. L. R. 889.

(3) 17 Ind. Cas. 661; 14 Bom. L. R. 938; 37 B. 91.

(4) 45 Ind. Cas. 580; 20 Bom. L. R. 325; 42 B. 257.

(5) 88 Ind. Cas. 975; 26 Bom. L. R. 1165; A. I. R. 1925 Bom. 148.

*Page of 18 B.—[*Ed.*]

It was next contended that the suit is saved by s. 9 of the Pensions Act, but s. 9 of the Pensions Act applies where the claim of the plaintiff is admitted by Government. Here, in this case, the claim of the present plaintiff was never admitted by Government, and, therefore, s. 9 would not apply.

An attempt was made by Mr. Desai, the learned Pleader for the appellant, to argue that the Pensions Act was *ultra vires*. But that point was not taken in any of the lower Courts and was not taken in the memo. of appeal, and that contention was not upheld in the case of *Madhavrao* v. *Secretary of State for India* (6). It was there held that 'a suit against the Secretary of State for India in Council to recover a share in the *sardeshmukhi haq* could not lie in the absence of a certificate under s. 4 of the Pensions Act of 1871', and that 's. 4 of the Pensions Act, 1871, so far as it dealt with pensions and grants of land-revenue, was not *ultra vires*, since an action would not lie against the East India Company on a grant of land-revenue as the grant was in the exercise of their sovereign rights.' No doubt, that was a case against the Secretary of State and was not a suit between private parties.

The result, therefore, is that the suit must fail as the plaintiff has not produced the necessary certificate under the Pensions Act.

The plaintiff's remedy, if any, is to go to the Collector and apply that his name should be entered in the place of his deceased adoptive father, defendant No. 3 and that he has failed to do. We think, on the whole, that the view taken by both the Courts is correct and that this appeal must be dismissed with costs.

Marten, C. J.—I concur. I regard this suit on the facts—or rather on the pleadings of the plaintiff—as one in effect to establish the plaintiff's right to share this land-revenue jointly with his father. Consequently, as his father died pending the suit, his present claim is substantially one to establish his right to the whole amount of the land revenue. But, that, I take it, is a matter which *prima facie* is one for the Collector under the Land Revenue Code to decide, as it directly affects the persons by and to whom the land-revenue has to be paid. On that footing I do not think that Mr. Desai can maintain the suit without a certificate from the Collector. I say nothing as to what might be the case in a totally different class of suit, *e. g.*, a suit for the administration of the estate of a deceased man, in which some question relating to land-revenue might arise in working out the ordinary accounts and enquiries. But that is not the class of case we have to deal with. I can quite see that, if this case was decided in favour of the plaintiff, it might very largely prejudice the Collector in deciding what is *prima facie* his duty to determine, *viz.*, to whom the land-revenue should be paid by Government.

Z. K. *Appeal dismissed.*

(6) 59 Ind. Cas. 452; 22 Bom. L. R. 1176; 45 B. 196.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 306 OF 1925.
March 16, 1926.
Present :—Justice Sir William Ewart Greaves, KT., and Mr. Justice Mukerji.

Raja SHYAM LAL SINGH—DEFENDANT—APPELLANT

versus

Raj Kumar Thakur MADHUSUDAN SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1, O. XLIII, r. 1 (s)—Order appointing Receiver conditional on furnishing security—Appeal, whether lies.

An order appointing a particular person a Receiver on condition of his furnishing security does not become complete till the security is furnished and before the security is furnished the order is not appealable under O. XLIII, r. 1 (s) of the Civil Procedure Code. [p. 142, col. 2; p. 143, col 1.]

Appeal against the order of the Subordinate Judge, Burdwan at Assansole, dated the 15th of June, 1925.

Messrs. *H. D. Bose, D. N. Mitra, Bagram* and Babus *Bibhuti Bhusan Lahiri* and *Narendra Nath Mitra*, for the Appellant.

Babus *Trailakhya Nath Ghose, Asita Ranjan Ghose, Prosanta Bhusan Gupta* and *Monmatha Nath Roy*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal is directed against an order passed by the Subordinate Judge of Assansole on the 15th June, 1925. The order purports to grant the plaintiff's application for the appointment of a Receiver and states that the plaintiff is appointed Receiver of the disputed property during the pendency of the suit or until further order but states as a condition that he would have to give security to the

extent of Rs. 10,000 to the satisfaction of the Court within three weeks from the date of the order. It goes on to state that when appointed the Receiver will have to manage the properties under the direction of the Court and on certain terms. The defendant No. 1 has appealed to this Court.

A preliminary objection has been urged on behalf of the plaintiff-respondent as regards the competency of the appeal. It has been urged that the appointment of the plaintiff as Receiver was conditional on his furnishing security and that inasmuch as the security called for has not yet been furnished there was no complete order appointing the Receiver within the meaning of O. XL, r. 1, sub-r. (1), cl. (*a*) of the Code of Civil Procedure and that, therefore, the order to which I have referred is not an appealable one. In support of this preliminary objection reliance has been placed upon a number of decisions to which I shall presently refer, specially as there are certain decisions of this Court which I feel constrained to follow and as to the correctness of which I entertain considerable doubt.

It is necessary to state just a few further facts. The order to which I have referred was passed, as I have stated, on the 15th June, 1925. On the 7th July, 1925, the learned Subordinate Judge recorded an order to the effect that on the day before the plaintiff had applied for taking landed properties as security or in the alternative for granting him 15 days' time to furnish cash security and that on the day on which the said order was passed the plaintiff had offered certain landed properties as security. By this order the learned Subordinate Judge adjourned the matter to the 17th July, 1925, for hearing. Thereafter on the 9th July, 1925, defendant No. 1, who is the appellant before us, appears to have filed a petition for the stay of the appointment of the plaintiff as Receiver and afterwards on the application of both parties the case was adjourned *sine die* and no further order appears to have been passed in connection with the appointment of the Receiver.

The respondent relies upon certain decisions, the first one of which is the decision of this Court in the case of *Upendra Nath Nag Chowdhury* v. *Bhupendra Nath Nag Chowdhury* (1). That was a case in which the order had been passed by the Court below in these terms: "I think the whole of the property in suit will be better managed and the interest of all the parties will be better served if the property in suit be placed in the hands of a competent Receiver." It was against this order that an appeal was preferred to this Court and a preliminary objection as to the competency of this appeal was upheld, the learned Judges observing in their judgment that no final order had been passed appointing a Receiver in the case. The learned Judges went on to observe in their judgment that subsequent to the passing of the order from which an appeal had been preferred the office of the Receiver was offered to one Rash Behari Mandal who declined to accept the office, and thereafter the appointment of Rash Behari was cancelled and after that one Nakuleswar Bose was appointed Receiver. The learned Judges held that the order that was appealable was the order by which Nakuleswar was appointed Receiver but that no appeal had been preferred from that order. The case is clearly distinguishable from the present one inasmuch as the order that had been appealed against in that case was simply one in which the learned Judge of the Court below had merely made certain observations as to the propriety of a competent Receiver being appointed and did not in fact appoint any Receiver thereby. The next case relied on is that of the Bombay High Court in *Narbadashankar Mugatram Vyas* v. *Kevaldas Raghunath Das* (2). The order against which an appeal was preferred in that case ran in these words: "I hold that a proper person should be appointed Receiver. The parties will be further heard on the point as to who should be appointed a Receiver." It is quite clear that by this order no appointment of a Receiver had actually been made and the learned Judges of the Bombay High Court were of opinion that no appeal lay from that order. A decision of the Allahabad High Court has also been placed before us. That is the decision in the case of *Ramji* v. *Koman Das* (3). That was a case where an appeal was preferred from an order which stated that the Court allowed an application for the appointment of a Receiver provisionally and by which the Court called upon all the

(1) 9 Ind. Cas. 582; 13 C. L. J. 157.

(2) 29 Ind. Cas. 504; 17 Bom. L. R. 510.

(3) 27 Ind. Cas. 646; 13 A. L. J. 79.

parties to put in applications showing their claims regarding the person or the power of the Receiver and as to other matters. That again was not an order which can be treated as an order appointing a Receiver which comes within the purview of cl. (*a*), sub-r. (1), r. 1 of O. XL and it was held that no appeal lay from that order. These cases are authorities for the view that until a particular person has been appointed as Receiver, there is no effective order appointing a Receiver, and the mere expression of an opinion as to the propriety of an appointment of some person at a future date is not an order appointing a Receiver within the meaning of O. XL, r. 1, sub-r. (1), cl. (*a*) : or, to put in another way, that "the law gives a right of appeal only against an order appointing a Receiver and not against an expression of the Court below of its intention to appoint." This, however, is not the question for our consideration in the present case, for a particular person, namely, the plaintiff, has been appointed by the learned Judge in the present case. It may be observed that this view has been consistently maintained in the more recent decisions of this Court and in the Allahabad High Court [*vide Mohamed Askari* v. *Niskar Husain* (4)]. There is, as far as I am aware, no decision of the Bombay High Court to the contrary. The Madras High Court has adopted the contrary view in a Full Bench decision by a majority in *Palaniappa Chetty* v. *Palaniappa Chetty* (5) and the Patna High Court has adopted that view in the case of *Gobind Ram* v. *Ganesh Ram* (6) and this contrary view seems to have been adopted by the Lahore High Court as well.

The next decision to which our attention has been drawn is the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7). In this case a gentleman Mr. S. P. Sen Gupta was appointed Receiver to take possession of certain jewelleries, etc., and the order was that he was to furnish security for a certain amount. The Court after passing the said order passed another order directing the case to be put up for further order on a subsequent date. This Court in dealing with the question as to whether an appeal lay from the order appointing a Receiver with a direction to furnish security held that if the appointment is conditional on the furnishing of security, the giving of security is a condition precedent and that there is no effective appointment till the security has been given. The learned Judges were of opinion that so long as the security demanded was not furnished there was no appointment of the Receiver within the meaning of r. 1 of O. XL and that it was only then the appointment became an operative one by reason of the security demanded from the Receiver being furnished that an appeal would lie from the order which finally approved of his appointment. This decision appears to have been followed in later decision of this Court, namely, in Appeal from Original Order No. 327 of 1921, decided on the 2nd April 1924. Apart from authorities it seems to me plain upon the reading of the provisions of O. XL, r. 1 (1) (*a*) and r. 3 (*a*) of the Code that there are three stages in the matter of the appointment of a Receiver. The first is the stage at which the Court pronounces its opinion as to the propriety of making the appointment of a Receiver; the second is the stage at which the appointment is made; and the third is the final stage when the security, if any, ordered by the Court being furnished the person or persons appointed are put in possession of the property as Receiver or Receivers. Speaking for myself I am not prepared to hold that after an order has been made appointing a particular person as Receiver subject to his giving security, and during the time that the security is not furnished the order made by the Court, though it remains in abeyance in the sense that the Receiver is not clothed with his powers and duties as such, is anythe-less a judicial order open to appeal. With the greatest respect to the learned Judges who decided the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7), I am not prepared to assent to the view that in the case of an appeal from an order of this nature "no appeal would lie till an appointment has been made, which, but for the appeal is bound to be operative." I do not see that the Code,

(4) 54 Ind. Cas. 520; 42 A. 227; 18 A. L. J. 212; 2 U. P. L. R. (A.) 95.

(5) 40 Ind. Cas. 185; 40 M. 18; 32 M. L. J. 304; (1917) M. W. N. 393; 5 L. W. 776.

(6) 69 Ind. Cas. 929; (1922) Pat. 250; 4 U. P. L. R. (Pat.) 68; A. I. R. 1922 Pat. 577; 4 P. L. T. 210; 1 Pat. L. R. 161.

(7) 12 Ind. Cas. 745; 14 C. L. J. 489.

in providing for a right of appeal, contemplates any distinction of this character. The view I take receives support from a consideration of form 6 of Appendix E to the Code which, to my mind, shows that the judicial part of the order is over when such an order is passed and a right accrues to the person with the passing of the order which is embodied in the writ issued to him in that form. The authority of the decision in the case of *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7) in so far as this particular matter is concerned does not appear to have been followed in any of the other High Courts, and the learned Judge, who was in the minority in the case of *Palaniappa Chetty* v. *Palaniappa Chetty* (5) and who approved of this decision in other respects against the view of the majority, was also of opinion that the case had gone too far on this question as to the tentative character of an order of this nature.

The two cases of this Court, namely, *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (7) and the unreported decision of this Court to which I have referred, however, are not in any way distinguishable from the present case; and although personally I am not in agreement with the views taken in those cases I am not at present of opinion that it is necessary that there should be a reference to a Full Bench. I must, therefore, follow the decisions aforesaid and hold that in the present case no appeal lies from the order passed by the Subordinate Judge on the 15th June, 1925.

The appeal must be held to be premature and must, accordingly, be dismissed with costs. The hearing-fee is assessed at two gold *mohurs*.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 1 OF 1926
WITH CIVIL APPEALS NOS. 2 AND 3 OF 1926.
July 1, 1926.

Present:— Mr. Justice Fawcett and Mr. Justice Madgavkar.

JIVANGIRI GURU CHAMALGIRI AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

GAJANAN NARAYAN PETKAR AND ANOTHER—DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), O. XLV, r. 4—Appeal to Privy Council—Consolidation—'Same judgment,' meaning of.

A sale-deed was executed by four persons each of whom took a separate document from the vendee by which he was given an option of re-purchase. Plaintiff, who was one of the four vendors, brought a suit for specific performance of the agreement evidenced by the document passed in his favour. He also brought a separate suit as heir of one of the other vendors in whose favour a similar document had been passed. The trial Court dismissed the latter suit on the ground that the plaintiff had not proved his heirship but a decree was given in favour of the plaintiff in the former suit. One of the main questions raised in the suits was whether the document sued on was inadmissible in evidence for want of registration and the trial Court decided that it was admissible in evidence. On appeal to the High Court it was held that the document was inadmissible in evidence, being compulsorily registrable and the decree of the trial Court in plaintiff's favour was reversed and that against the plaintiff was confirmed. The High Court wrote its main judgment in one case and decided the other case by a reference to its judgment in the previous case. Plaintiff made an application for leave to appeal to the Privy Council but inasmuch as the value of each suit separately was below Rs. 10,000, he made an application to have the two suits consolidated for the purpose of the pecuniary valuation involved:

Held, that having regard to the fact that the only question which arose in the appeals to the Privy Council was the question of admissibility of the document sued upon under the Registration Act, the suits must be deemed to have been decided by the "same judgment" within the meaning of r. 4 of O. XLV of the Civil Procedure Code and should be consolidated [p. 144, col. 2.]

Applications made for leave to appeal to the Privy Council against the decision of the High Court in First Appeals Nos. 83 and 157 of 1924 and for consolidation of appeals.

Mr. *J. G. Rele*, for the Applicants.

Mr. *A. G. Desai*, for the Opponents.

JUDGMENT.—These are two applications for leave to appeal to the Privy Council and a third application to consolidate the two appeals. The litigation arose out of a sale-deed executed on March 2, 1897, by four persons, each of whom took a separate document by which he was given an option of re-purchase. The plaintiff was one of these four persons and he brought a suit for specific performance of the agreement evidenced by the document passed in his favour. He also brought a separate suit as heir of one of the other parties, in whose favour a similar document had been passed. The trial Judge held in the latter suit that he had not proved his heirship and, therefore, dismissed that suit. In the other suit a decree was passed in favour of the plaintiff for specific performance. One of the main questions in the suit was whether the document sued upon was inadmissible in evidence for want of re-

gistration. The Subordinate Judge held that it was admissible in evidence. On appeal to this Court, it was held that the document was inadmissible in evidence, being compulsorily registrable, and the decree of the lower Court was reversed.

In the corresponding appeal from the plaintiff's second suit, the Court did not go into the question of heirship and dismissed the appeal on the ground that the document sued on was inadmissible for want of registration. The plaintiff seeks to appeal to the Privy Council on the ground that, in both these appeals, this Court wrongly held the document inadmissible for want of registration; and that will be the sole point for determination, if leave is given to appeal. The valuation put on the claim in the trial Court and also in appeal was the sum of Rs. 7,219 odd, that being the amount for which an option was given to re-purchase. The applicant asks that, under O. XLV, r. 4, Civil Procedure Code, he should be allowed to have the two suits consolidated for the purpose of the pecuniary valuation involved. It is contended that both the suits involve substantially the same questions for determination and have been decided by the same judgment within the meaning of this rule. So far as the trial Court was concerned, the evidence in both suits was taken in the suit brought by the plaintiff in his own right, and the parties agreed to treat the evidence in that suit as evidence in the second suit where the plaintiff sued as an heir. The Subordinate Judge, in para. 3 of his judgment of October 23, 1923, in the second suit remarks that some of the issues in both suits are identical, and his findings on those issues and the reasons for them are the same as recorded in the judgment in Suit No. 493 of 1922; and that that judgment should be treated as part of this judgment. There was, however, necessarily a separate judgment on the question of heirship, which was raised, and on one or two other points. In the appeals to this Court, there was a main judgment given in Appeal No. 83 of 1924 [*Gajanan Narayan Patkar* v. *Jivangiri Chamelgiri* (1)] holding that the document was inadmissible for want of registration. In the linked Appeal No. 157 of 1924, the Court referred to the judgment in the other appeal as deciding that the document sued on required registration, and dismissed the appeal with costs on the ground that the document was inadmissible for want of registration. The Court also made some remarks about the question of heirship, but held that there was no necessity to go into that point in view of the decision on the question of the admissibility of the document. It is to be noted that both the judgments were delivered on the same day. Having regard to the circumstance that the only point that will arise in appeal to the Privy Council will be this question of admissibility of the documents sued on under the Registration Act, we are of opinion that the suits have been decided by the same judgment within the meaning of O. XLV, r. 4. We do not think that we should give a narrow interpretation to this rule, provided that its spirit is observed. So far as the question that will arise in the proposed appeal is concerned, it is quite clear that it was dealt with by each Court in one judgment, and that the judgment in the other suit and the corresponding appeal merely refers to that other judgment and, adopting the reasons there given, passes a decree accordingly. The mere fact that, owing to the question of heirship, the relief granted by this Court in one case differs from that given in the other case, does not, in our opinion, make the judgments separate ones, in view of that question not being involved in the proposed appeal to the Privy Council. Therefore, we allow the appeals to be consolidated for the purpose of pecuniary valuation, and in that view it is clear that the amount involved in the dispute both in the lower Court and this Court and on appeal to His Majesty is over Rs. 10,000. We direct a certificate to issue accordingly.

Supposing, however, that our view as to O. XLV, r. 4, is incorrect, we are of opinion that the question in dispute is one of general importance, which makes the case a fit one for appeal to His Majesty in Council. In this connection we would refer to the referring judgments in *Harkisandas Bhagwandas* v. *Bai Dhanu* (2) and the Full Bench decision on that reference. The execution of documents with an option of re-purchase is very common, and a con-

(1) 92 Ind. Cas. 527; 27 Bom. L. R. 1465; A. I. R. 1926 Bom. 131.

(2) 98 Ind. Cas. 434; 28 Bom. L. R. 954; 50 B. 566; A. I. R. 1926 Bom. 497 (F. B.).

siderable amount of litigation comes before the Courts in connection with them. The law on the question of necessity of registering such documents has not been clear in view of conflicting decisions; and even after the Full Bench judgments, having regard to the fact that the decision in these two cases (Appeal No. 83 of 1924, reported in *Gajanan Narayan Putkar* v. *Jivangiri Chamelgiri* (1) and the connected Appeal No. 157 of 1924, *Jeevangiri* v. *Vasant*, F. A No 157 of 1924, decided by Macleod, C. J., and Coyajee, J., on August 7, 1925 (unreported)) constitutes an exception to the general rule laid down by the Full Bench decision, it seems to us desirable that the matter should go before the Privy Council. We, therefore, also certify that the case is a fit one for appeal to His Majesty in Council; and as regards the fact that in Appeal No. 157 of 1924 the decree of this Court confirmed the decision of the Court immediately below it, we may add that the appeals involve a substantial question of law within the meaning of s. 110 of the Civil Procedure Code. The costs of the applications to be costs in the appeal.

As regards the question of security under r. 79 of the Appellate Side Rules, we think that security should be given for Rs. 8,000 as there are two separate respondents involved, but we allow the appellant to give security for Rs. 4,000 out of this amount by furnishing a bond in the sum of Rs. 4,000 with one fit surety in the same amount. The remaining Rs. 4,000 should be deposited in cash or Government securities for the same amount.

The Registrar is given a discretion to accept Rs. 2,000 for printing charges, if he is of opinion that that amount will be sufficient for the consolidated appeals.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1478 OF 1925.

January 4, 1927.

Present:—Mr. Justice Addison.

Musammat ALLAH JAWAI AND OTHERS —DEFENDANTS—APPELLANTS

versus

MUHAMMAD BAKSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession—Co-sharers—Assertion of exclusive right by one co-sharer—Limitation—Muhammadan Law—Inheritance—Heirs, whether joint tenants or tenants-in-common.

On the death of a Muhammadan his estate descends to his heirs not as a joint tenancy but as a tenancy-in-common, each of the heirs becomes entitled to claim his or her share at once and limitation begins to run against each under Art. 144 of Sch. I to the Limitation Act from the date of the death of the deceased.

Obiter.—Where one co-sharer definitely asserts his own right to certain joint property as against his other co-sharers; his possession from that moment becomes adverse to the other co-sharers.

Second appeal from the decree of the Senior Subordinate Judge, Jhang, dated the 27th March, 1925, reversing that of the Subordinate Judge, Fourth Class, Chiniot, District Jhang, dated the 28th November, 1924.

Mr. *Jiwan Lal Kapur*, for the Appellants.

Mr. *G S Salariya* for Bakhshi *Sain Das*, for the Respondents.

JUDGMENT.—The facts of this appeal are succinctly stated in the judgment of Mr. Justice Martineau, dated the 30th November, 1925. Later he set aside that judgment, which was delivered *ex parte*, on the ground that there was sufficient cause for the non-appearance of the opposite party. The appeal has now again been heard by me.

Musammat Jawai has been for a long time in possession of the property in question to the exclusion of the other heirs. The family is a Muhammadan one so that the estate of Raushan must be deemed to have descended to the heirs not as a joint tenancy but as a tenancy-in-common. For that reason alone on the authority of *Zainab* v. *Ghulam Rasul* (1) this suit is long time-barred. It was held there that on the death of a Muhammadan each of his heirs becomes entitled to claim his or her share at once and limitation begins to run against each under Art. 144 of Sch. I to the Limitation Act. In this connection I would also refer to *Mustafa Khan* v. *Dulari* (2) and *Basu* v. *Nanhi* (3).

Further, it has been held that *Musammat* Jawai in a criminal case denied the plaintiffs' claim to a share in this house. This was in 1911. The lower Appellate Court thought that this was not sufficient to start adverse possession. In my opinion the fact that she definitely asserted her own right to this house as against the plaintiffs and

(1) 73 Ind. Cas. 425; A. I. R. 1923 Lah. 519; 4 L. 402.

(2) 65 Ind. Cas. 75; 3 U. P. L. R. (A.) 5 A. I R. 1922 All. 433.

(3) 79 Ind. Cas. 951; A. I. R. 1924 All. 920; L. R. 5 A. 376 Civ.

all others in 1911 would certainly start adverse possession. Apart, however, from this finding the suit is obviously time-barred for the reasons given in the first portion of this judgment.

The appeal is accordingly accepted, the decree of the lower Appellate Court is set aside and that of the trial Court is restored.

The appellant will have her costs throughout.

Z. K. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 745 OF 1924.

November 17, 1926.

Present:—Mr. Justice Cammiade.

HARI CHARAN SIL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BIPIN BEHARI MUKHOPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 40—Commutation proceedings—Procedure—Non-appearance of guardian of minor—Absence of prejudice—Validity of proceedings—Civil Procedure Code (Act V of 1908), O. XXXII, r. 3, whether applies to commutation proceedings.

Proceedings under s. 40 of the Bengal Tenancy Act are miscellaneous proceedings by a Revenue Officer in regard to which there are no provisions as to procedure either in the Act itself or in the rules framed under the Act. The only matter for a Court to consider, where the legality of proceedings under the said section is impugned on the ground that the guardian of a minor who was a party to the proceedings had not appeared, is whether the minor has been prejudiced by the non-appearance of the guardian, and in the absence of such prejudice, a Civil Court cannot set aside the proceedings.

The provisions of O. XXXII, r. 3 of the Code of Civil Procedure do not apply to such proceedings.

Appeal against the decree of the Subordinate Judge, First Court, Bakarganj, dated the 4th of January, 1924, modifying that of the Munsif, Fourth, Court at Barisal, dated the 8th of March, 1923.

Mr. *Asita Ranjan Chatterjee*, Babu *Bhupendra Nath Das*, for the Appellants.

Mr. *Gunada Charan Sen*, Babus *Suresh Chandra Talukdar* and *Kiron Mohan Sarkar*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for rent. These defendants had originally held the land on condition of paying half the crop as rent. The rent in kind was commuted as a result of proceedings under s. 40 of the Bengal Tenancy Act. The plaintiffs who are the landlords, sued for arrears of rent in kind. The defendants pleaded commutation and offered to pay rent according to the order of the Revenue Officer. The plaintiffs took three objections to the order of the Revenue Officer to the commutation. All the three objections were overruled by the first Court which gave a decree for rent in accordance with the Revenue Officer's order. In appeal two of the objections taken before the lower Court were given up and the only objection that was pressed was that one of the plaintiffs was a minor whose natural guardian had been served with notice in the proceedings for commutation, and that that natural guardian had not appeared and contested the proceedings before the Revenue Officer. The learned Subordinate Judge who heard the appeal gave effect to this objection and held that the minor plaintiff had not been legally represented in the proceedings and the proceedings were, therefore, void. He accordingly gave a decree for rent in kind as prayed by the plaintiffs. This finding of law is clearly erroneous. Proceedings under s. 40 of the Bengal Tenancy Act are miscellaneous proceedings by a Revenue Officer in regard to which there are no provisions as to procedure either in the Act itself or in the rules framed under the Act. The provisions of r. 3, O. XXXII of the Code of Civil Procedure have no application. The only matter for a Court to consider in regard to the legality or otherwise of proceedings such as the present where a minor has been represented by a guardian who had not appeared is whether the minor was prejudiced by the non-appearance of his guardian. It is not alleged or suggested that the adult landlords' interests in any way conflicted with those of the minor, and there is no allegation that if the minor had been represented by a guardian who had appeared on his behalf such appearance would have produced a different result in the proceedings. That being so, failure of the guardian to appear is no ground for interference by a Civil Court with the orders passed by the Revenue Officer. There has been no illegality; and, except on the ground of illegality, there can be no interference by a Civil Court.

The appeal is accordingly allowed, the decree of the learned Subordinate Judge is set aside and that of the Munsif restored with costs in all Courts.

A. N. A. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 393 OF 1924.

June 29, 1925.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

BABANNA SANGAPPA AND OTHERS—DEFENDANTS—APPELLANTS

versus

PARAVA NINGBASAPPA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 148, O. IX, r. 5—Bombay High Court Appellate Side Rules, rr. 2, 40 Appeal—Notice to respondent, non-service of—Fresh notice, application for—Procedure—Delay—Order excusing delay, whether can be objected to—Hindu Law—Partition—Separation of one member, effect of—Self-acquired and ancestral property, blending of—Adoption by widow—Authority of husband—Consent of reversioners.

Order IX, r. 5 of the Civil Procedure Code has no application to appeals. [p. 147, col. 2.]

Where a notice issued to a respondent is returned unserved, r. 40 of the Appellate Side Rules of the Bombay High Court allows the appellant to make an application for fresh service within a month from the date on which the *Sheristedar* intimates to him the fact that the notice has failed to be served on the respondent. If he does not make such an application within the time allowed, then the Court can extend the time and excuse the delay under s. 148 of the Civil Procedure Code. Under heads II and VII of r. 2 of the Appellate Side Rules, this can be done by a Single Judge and it may be done by an *ex parte* order. Once such an order has been obtained, the opposite party cannot subsequently object to it. [p. 148, col. 1.]

One member of a joint Hindu family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remains after such a partition of the family property. [p. 151, col. 2.]

Where the head of a joint Hindu family treats certain self-acquired property in exactly the same way as the ancestral property of the family, and keeps no separate account of its income and expenditure, such conduct is sufficient to prove that the self-acquired property is blended with the ancestral property so as to alter it from self-acquisition into ancestral property. [p. 152, col. 2.]

Where a Hindu widow who has no express authority from her deceased husband to make an adoption to him, makes an adoption without the consent of his co-parceners, the adopted son obtains no rights in the joint family property. [*ibid.*]

First Appeal from the decision of the First Class Subordinate Judge at Bijapur, in Suit No. 53 of 1922.

Mr. *H. B. Gumaste*, for the Appellants.

Mr. *Nilkant Atmaram*, for the Respondents.

JUDGMENT.

Fawcett, J.—A preliminary point has been taken in this appeal that the notice issued to the respondents was returned unserved by the Subordinate Judge of Bagalkot under an endorsement, dated March 9, 1925, and that an application for the issue of a fresh notice to the respondents was not made until June 29, 1925. It is contended that this application was made after the period of three months prescribed by O. IX, r. 5, Civil Procedure Code, and that under the terms of that rule the Court must dismiss the appeal, in spite of the fact that Coyajee, J, on July 16, passed an order, excusing the delay and ordered the issue of fresh notice by substituted service upon the respondents.

In my opinion, however, O. IX, r. 5, does not apply to appeals. In terms it only applies to suits, and O. IX contains no provision such as appears in O. XXII, r. 1, that 'plaintiff' shall include an appellant, etc.

In fact it seems to me clear that the Legislature did not intend O. IX to apply to appeals, for O. XLI contains specific rules covering corresponding cases that arise in appeal, *e. g.*:—

Order IX,	rule 1 =	Order XLI,	rule 16.
,,	rule 2 =	,,	rule 18.
,,	rule 3 =	,,	rule 17 (1).
,,	rule 4 =	,,	rule 19.
,,	rule 5 =	,,	Nil.
,,	rule 6 =	,,	rule 17 (2).
,,	rule 7 =	,,	rule 21.
,,	rule 8 =	,,	rule 17 (1).
,,	rule 9 =	,,	rule 19.
,,	rules 10, 11, 12 =	,,	Nil.
,,	rule 13 =	,,	rule 21.
,,	rule 14 =	,,	Nil.

The correspondence between O. IX, r. 2, and O. XLI, r. 18, is in particular noticeable. If it was intended that O. IX should apply to appeals, it would be quite unnecessary to make the similar r. 18 of O. XLI.

Also, though provision is made for a failure by the plaintiff or appellant to deposit the costs of the summons or notice, the Legislature deliberately avoided making a rule corresponding to O. IX, r. 5, for the case of appeals under O. XLI.

The only decision on the point that I have been able to find is *Gopisetti Narayanasami Naidu Garu* v. *Namburi Bhadri Raza* (1) where a Madras Bench held that O. XLI, r. 14, makes O. IX applicable to proceedings in appeal, so that O. IX, r. 5,

(1) 21 Ind. Cas. 420; 25 M. L. J. 451.

would apply. It is to be noted that the respondents in that appeal were unrepresented, and so there was not a full argument. I entirely dissent from the decision for the reasons already given. Order XLI, r. 14, only says that notice shall be served "in the manner provided for the service... of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice." In my opinion, this was intended to make the relevant provisions of O. V applicable, and cannot cover O. IX, r. 5, which is a provision not about the service but about the consequence of non-appearance of a defendant on account of failure by plaintiff to make a certain application.

The case really falls under r. 40 of our Appellate Side Rules. This allows the appellant to make an application for fresh service within a month from the date on which the *sheristedar* intimates to him the fact that the notice has failed to be served on the respondents. If he does not make this application within the time allowed, then the Court can extend the time and excuse delay under s. 148, Civil Procedure Code. Under heads II and VII of r. 2 of the Appellate Side Rules, this can be done by a Single Judge. It is not a case falling under the Limitation Act, except so far as, under Art. 181, the period of limitation would be three years.

Accordingly, there is no provision under which the appeal should be dismissed because application was not made within either the period allowed by O. IX, r. 5, or that allowed by the Appellate Side r. 40. Nor is it a point affecting the admission of the appeal after the prescribed period of time, such as is dealt with by the Privy Council in *Krishnasami Panikondar* v. *Ramasami Chettiar* (2). It is not even a case like that of failure to file a *Vakilpatra* with an appeal, which, in *Mahomed Jafer* v. *Sheikh Ahmed* (3) is held to be immaterial. The order of Coyajee, J., was one which he had jurisdiction to make and which could properly be passed *ex parte*, and we cannot allow it to be questioned now, especially having regard to the principle underlying the proviso to O. XLI, r. 18. The appeal must, therefore, be heard on its merits.

Madgavkar, J.—On March 9, 1925, the return of the summons unserved was made from Bagalkot reaching this Court on March 11. On June 29, the appellant applied for substituted service, put in affidavits on July 8, and obtained an order as follows from Coyajee, J., on July 16:—

'Substituted service allowed. Delay excused."

On these facts a preliminary objection is taken for the respondents that O. IX, r. 5, sub-r. (1), as amended by India Act XXIV of 1920, applies to appeals, and the appellant having failed for more than three months to apply for the issue of fresh summons, the Court is bound to dismiss the appeal. The order of Coyajee, J., it is contended, was without jurisdiction and is a nullity.

The appellant relies on this order. Both sides have assumed that O. IX, r. 5, applies to appeals, and it was apparently so held in *Gopisetti Narayanasami Naidu Garu* v. *Namburi Bhadri Raza* (1) by a Bench of the Madras High Court, which referred to O. XLI, r. 14. That rule only provides that "all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice." These provisions, however, fall not under O. IX, but under O. V. Order IX is expressly headed "Appearance of parties and consequence of non-appearance." And, as pointed out by my learned brother, if the Legislature had intended *en bloc* to make the entire rules of O. IX in regard to non-appearance and the consequence thereof applicable to suits, O. XLI, rr. 16 to 20, would be superfluous. In my opinion, it is at least very doubtful whether, by reason of O. XLI, r. 14, O. IX including r. 5, as amended, applies to appeals.

The order of Coyajee, J., was made under r. 2 of the Appellate Side Rules. He had jurisdiction to make it. Even if our view above as to O. IX, r. 5, not applying to appeals, were wrong, the order of Coyajee, J., might be wrong, but it is with jurisdiction and cannot be treated as a nullity.

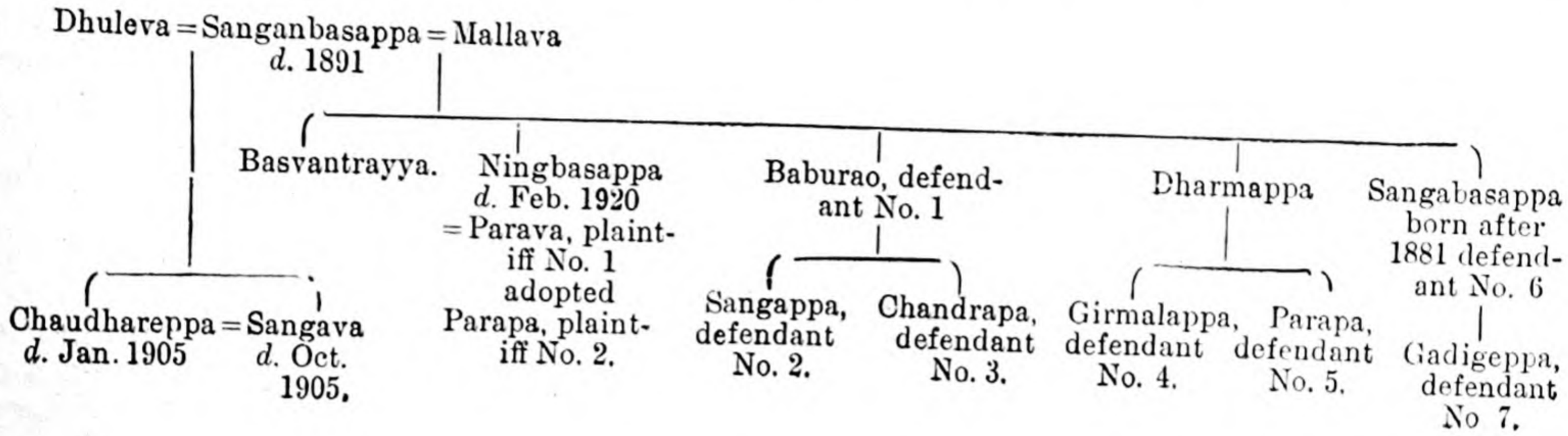
I agree, therefore, that the preliminary objection for the respondents fails and the appeal must proceed to hearing on the merits.

(2) 43 Ind. Cas. 493; 41 M. 412 at p. 416; 20 Bom. L. R. 541; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 7 L. W. 156; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481; 11 Bur. L. T. 121; (1918) M. W. N. 906; 45 I. A. 25 (P. C.).

(3) 95 Ind. Cas. 266; 28 Bom. L. R. 538; A. I. R. 1926 Bom. 336.

[On the merits their Lordships pronounced the following judgments:—]

Madgavkar, J.—The relationship between the parties is shown in the following pedigree:—]



Of the six sons of propositus Sanganbasappa, the eldest son Chaudhareppa, who was Sanganbasappa's son by his first wife, separated in December 1881 and was given a third share of the entire joint family property and was in enjoyment of the same till his death in January, 1905. The second son Basvantraya by Sanganbasappa's second wife also separated in 1886 under a deed, Ex. 112. Sanganbasappa, the propositus, died in 1891. The third son, Ningbasappa, died childless in February, 1920. On his death his widow. Parava, plaintiff No. 1, applied to the Revenue Authorities to transfer the lands to her name. In this suit she seeks to establish her right and possession in respect of two pieces of property, first, property A, being the one-third share, which had been taken away by the eldest son Chaudhareppa, in 1881, and the other property B, which had been left over after the separation of the second son, Basvantraya, in 1886.

In respect of property A, the claim was founded on a *malikpatra*, Ex. 225, passed on October 21, 1905, the date of her death, by Sangava, the widow of Chaudhareppa, in favour of plaintiff No 1's husband, Ningbasappa.

In respect of property B, the plaintiff No. 1 adopted plaintiff No. 2 Parapa, about two years after the date of the institution of the suit and claimed a one-fourth share, being the share of her deceased husband Ningbasappa.

The defendants-appellants resisted the entire claim. They resisted the claim to property A on the ground, firstly, that the *malikpatra* by Sangava, the widow of Chaudhareppa, in October 1905, though nominally in favour of Ningbasappa, was really in favour of the joint family consisting of Ningbasappa and his three younger brothers; and secondly, that Ningbasappa had in any case blended property A with property B, which was the joint family property of Ningbasappa and his three younger brothers.

The lower Court held that the *malikpatra* in regard to property A was really intended to be in favour not only of Ningbasappa, but likewise of the three younger brothers, and they constituted a joint Hindu family. With regard to property B, which was joint family property, it held that, by virtue of the adoption of plaintiff No. 2 by plaintiff No. 1, Parava, the plaintiffs were entitled to one-fourth of the joint family properties A and B on the ground that their Lordships of the Privy Council had laid down in *Yadao* v. *Namdeo* (4) that such an adoption, although the property had not vested in the adopting widow, gave the adopted son the share of the deceased adoptive father. Defendants Nos. 1, 2, 4, 5 and 6 appeal.

The respondents-plaintiffs have filed cross-objections. It is argued by Mr. Nilkant Atmaram for the plaintiffs-respondents in support of the cross-objections, firstly, that, on the date of the separation of Basvantraya in 1886, not only did Basvantraya separate, but that there was a complete dissolution, at least of the joint status of the entire joint family, including each of the younger brothers of Basvantraya.

(4) 64 Ind Cas. 536; 49 C. 1; 48 I. A. 513; 24 Bom. L. R. 609; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; A. I. R. 1922 P. C. 216 (P. C.).

Secondly, that the property A in the *malikpatra* by Sangava, widow of Chaudhareppa was given to Ningbasappa alone, and was a valid gift, being passed according to the oral wishes of her husband, as recited therein, and being in effect his nuncupative Will and that, in any case, inasmuch as the *malikpatra* was attested by Basvantraya and Baburao, defendant No. 1, and all the three younger brothers had consented to the grant of a Succession Certificate to the estate of the deceased Chaudhareppa in favour of Ningbasappa alone, it took effect as an alienation by the widow of Chaudhareppa, to which each of the reversioners had consented, or which they had ratified subsequently. Thirdly, that, in respect of property A, Ningbasappa had not blended it with the joint family property. The mere fact that he had allowed the benefit of the income to his younger brothers was not conclusive proof of that blending, in the absence of evidence of blending of the *corpus* itself.

For the appellants, it is contended that the *malikpatra*, even if valid, was in favour of the four brothers and not merely in favour of Ningbasappa, and that from 1905, the date of the *malikpatra*, up to the death of Ningbasappa in 1920, lands A and B had been treated on exactly the same footing by all the four brothers, namely, as joint family property, their income and expenditure being in nowise distinguished in the joint family accounts.

Accordingly, the questions which arise in this appeal are:—

1. Whether in 1886 when Basvantraya separated, the remaining brothers also separated in status, or whether they remained united ?

2. Whether the *malikpatra* by Sangava in 1905 was in favour of Ningbasappa alone or also in favour of his younger brother ?

3. Whether this *malikpatra* is valid in law ?

4. Whether Ningbasappa did or did not blend property A in this *malikpatra* with property B which remained with the father and other brothers after the separation of Basvantraya ?

5. Whether the plaintiff No. 2 on adoption obtained any interest in the properties ?

On the first point, reliance is placed for the respondents on the decision of their Lordships of the Privy Council in *Balabux Ladhuram* v. *Rukhmabai* (5) and it is argued that Basvantraya having admittedly separated, not only is there no presumption that the remaining brothers continued joint, but that it is admitted by defendant No. 1 and the others that the status of the family underwent no change after the separation. It is contended that, in law, separation of one means dissolution of the joint family, as was observed by Macleod, C. J., in *Ramchandra Avadhutrao Patil* v. *Tukaram Babaji Changula* (6).

But this was not the case set up in the lower Court. Although in the plaint the plaintiff vaguely stated "as there were two partitions in the family, plaintiff's husband and his brothers were practically divided," yet in her evidence, Ex. 67, she admitted as follows:—"My husband was manager of the family consisting of himself and his three brothers." Even in her application, Ex. 190, in 1920 to the Revenue Authorities, she was explicit that "the land mentioned in list 2B belonged to the joint (*Aekattar*) family and my husband was a senior member of the family." Under these circumstances, the learned Pleader for the plaintiffs-respondents was reduced to ask us to lay down as a proposition of law that the separation of one brother (Basvantraya) was in law the separation of each one of the other brothers as well. But the case of *Balabux Ladhuram* v. *Rukhmabai* (5) does not go this length, but merely enunciates that (pages 472-473*):—"There is no presumption, when one coparcener separates from the others, that the latter remain united.....An agreement amongst the remaining members of a joint family to remain united or to reunite must be proved like any other fact."

And the observations in *Ramchandra Avadhutrao Patil* v. *Babaji Changula* (6) at page 918† are taken from the older case *Anandibai* v. *Hari Suba Pai* (7) by a quotation which is not complete. For, in this last case Chandavarkar, J., observed as follows (page 296‡):—

"If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to the parties and pro-

(5) 5 Bom. L. R. 469; 30 I. A. 130; 30 C. 725; 7 C. W. N. 642; 8 Sar. P. C. J. 470 (P. C.).
(6) 61 Ind. Cas. 761; 45 B. 914; 23 Bom. L. R. 311.
(7) 10 Ind. Cas. 911; 35 B. 293; 13 Bom. L. R. 287.

*Pages of 5 Bom. L. R.—[*Ed.*]
†Page of 45 B.—[*Ed.*]
‡Page of 35 B.—[*Ed.*]

perty. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or, if the partition was intended to extend to the interest of all individually, there must be proof that some of them reunited. In the present case the former was alleged and has been found established by the evidence."

And in fact in this last case it was held that, out of six brothers, three separated and the other three remained united as before or had immediately reunited with each other after executing the deed of partition.

The learned Pleader for the plaintiffs-respondents asks us not to accept the view of the Allahabad High Court in *Parsotam Das* v. *Jagan Nath* (8) to which attention was drawn in argument by my learned brother.

Without going into the elaborate case-law on the point, we may take it as now established [see *Suraj Narain* v. *Iqbal Narain* (9) and *Girja Bai* v. *Sadashiv Dhundiraj* (10)] that an expression of an unequivocal intention to separate suffices to dissolve the joint status of a joint Hindu family. But it is not correct to say that because one brother has separated or has expressed such intention, therefore, the intention of the other brothers must be taken to be the same. For instance, in the present case, if this view of the law were correct, it would follow that the real dissolution of the joint family took place even earlier than 1886, namely, in 1881, when the eldest brother, Chaudhareppa, separated. But that this was not so, is clear from the fact that five years later Basvantraya thought it necessary formally to separate.

The case of *Balabux Ladhuram* v. *Rukhmabai* (5) has been referred to by their Lordships in *Jatti* v. *Banwari Lal* (11). It has been distinguished in *Hari Bakhsh* v. *Babu Lal* (12), the observations at page 102* being in point. The most recent case is *Palani Ammal* v. *Muthuvenkatachala Moniagar* (13). At page 257† their Lordships observe:—

"But the mere fact that the shares of the co-parceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the co-parceners on a separation would be. It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous co-parcener had separated from them."

These observations apply, in our opinion, to the facts of the present case. The deed of 1886 itself lends no countenance to the argument that the father and the younger brothers of Basvantraya also intended to separate, any more than the fact that Basvantraya on partition got one-fifth of the two-thirds which was left over after the one-third of that had been taken away by the eldest brother Chaudhareppa in 1881. It is undoubted that after 1886 the father and the four younger sons continued to live jointly as before. The accounts up to the death of Ningbasappa in 1920, are all one, no separation is made of the shares of the four younger sons or of their income and expenditure. Under

(8) 50 Ind. Cas. 357; 41 A. 361; 17 A. L. J. 347.

(9) 18 Ind. Cas. 30; 40 I. A. 40; 15 Bom. L. R. 456; 35 A. 80; 13 M. L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 16 O. C. 129 (P. C.).

(10) 37 Ind. Cas. 321; 43 I. A. 151; 18 Bom L. R. 621; 43 C. 1031; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455 (P. C.).

(11) 74 Ind. Cas. 462; 50 I. A. 192; 25 Bom. L. R. 1256; 4 L. 350; 21 A. L. J. 582; A. I. R. 1923 P. C. 136; 18 L. W. 273; 45 M. L. J. 355; (1923) M. W. N. 687; 28 C. W. N. 785; 33 M. L. T. 283 (P. C.).

(12) 83 Ind. Cas. 418; 5 L. 92; 51 I. A. 163; 26 Bom. L. R. 1108; 22 A. L. J. 254; 34 M. L. T. 70; A. I. R. 1924 P.C. 126; 28 C. W. N. 253; 20 L. W. 406; (1924) M. W. N. 650; 47 M. L. J. 938; 51 C. 163; 1 L. C. 437; L. R. 5 A. (P. C.) 113; 10 O. & A. L. R. 1171; 1 O. W. N. 536 (P. C.).

(13) 87 Ind. Cas. 333; 48 M. 254; 27 Bom. L. R. 735; A. I. R. 1925 P. C. 49; 48 M. L. J. 83; 6 P. L. T. 133; 21 L. W. 439; (1925) M. W. N. 330; 3 Pat. L. R. 126; 29 C. W. N. 846; 23 A. L. J. 746; L. R. 6 A. (P. C.) 143; 52 I. A. 83 (P. C.).

*Page of 5 L.—[*Ed.*]

†Page of 48 M.—[*Ed.*]

these circumstances, I am of opinion that both in fact and in law the argument for the plaintiffs on this point fails, and that in 1886 Basvantraya alone, like his elder brother, Chaudhareppa, separated, and the father, Sanganbasappa, and four younger sons including Ningbasappa continued to be members of a joint family both up to the death of the father in 1891, and the death of Ningbasappa in 1920.

On the second question, the *malikpatra* passed by Chaudhareppa's widow, Sangava, on the date of her death, October 21, 1905, is ostensibly in favour of Ningbasappa alone. There is nothing to show from the deed itself, nor is there any independent evidence *aliunde* that it was meant for the benefit of the three younger brothers of Ningbasappa. The recital therein that it was according to the wishes of her husband is doubtless not so disinterested, as in the case of *Hari Chintaman Dikshit* v. *Moro Lakshman* (14) where a widow, immediately after her husband's death passed a similar *varaspatra* which was sought to be challenged in a suit of 1881. At the same time the *malikpatra* in this case is attested both by Basvantraya and Baburao, the eldest of the defendants. It was not, therefore, a secret affair, and, under the peculiar circumstances, I cannot agree with the learned Subordinate Judge that Baburao and Basvantraya cannot be presumed to have known or consented to this deed in favour of Ningbasappa. It is also undeniable that when Ningbasappa in his own name applied for a Succession Certificate to Chaudhareppa, none of his brothers opposed the application. It is difficult, at this lapse of time, therefore, to hold that the *malikpatra* was in favour of any one else but Ningbasappa alone. Being attested by two brothers and subsequently ratified by the others, it is, in our opinion, a correct contention for the plaintiffs that it is good in law: *Basappa Dodfakirapa* v. *Fakirappa Shenkrappa* (15) following *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (16).

The last question is in regard to the blending of the joint family funds. It has been proved conclusively that Ningbasappa, who was the manager of the joint Hindu family of himself and his younger brothers and their sons in respect of property B, treated property A in exactly the same fashion as the joint family property B. In the first place, Ningbasappa had not kept any separate accounts of this land or of the land A or of their income. During all these years, A is treated in the joint family account exactly like B. Its income is lumped up in the *adhavas* along with the income of property B, and so is its expenditure. And, inasmuch as these were lands, it would be difficult to obtain further evidence of blending than this. It would appear that Ningbasappa throughout his life lived jointly and died jointly with his three brothers. He never had any children. Even when he took the deed from Sangava in his own name, the fees of registration and stamp for the deed were taken from the joint family. The matter was treated by one and all as making no difference to the younger brothers to whom in fact he acted in *loco parentis* until the time of his death. Such conduct suffices to prove blending in law with ancestral property so as to alter it from self-acquisition into ancestral: *Lal Bahadur* v. *Kanhaiya Lal* (17) and *RajanikantaPal* v. *Jagamohan Pal* (18). It follows, therefore, on these findings, that, on the date of the death of Ningbasappa, properties A and B were all joint family properties.

Plaintiff No. 1, Parava, the widow of Ningbasappa, has not set up express authority to adopt to her deceased husband. In fact, as already stated, her adoption of plaintiff No. 2 was *pendente lite* about two years after the institution of the suit. The consent of the co-parceners, the three younger brothers was not obtained. The view of the learned Subordinate Judge as to the effect of the ruling of *Yadao* v. *Namdeo* (4) must be held to be erroneous on the recent Full Bench decision of this Court in *Ishvar Dadu* v. *Gajabai Babaji* (19) where it was held that *Yadao* v. *Namdeo*

(14) 11 B. 89; 11 Ind. Jur. 145; 6 Ind. Dec. (N. S.) 58.

(15) 64 Ind. Cas. 214; 46 B. 292; 23 Bom. L. R. 1040; A. I. R. 1922 Bom. 102.

(16) 35 I. A. 1; 9 Bom. L. R. 1348; 12 C. W. N. 74; 17 M. L. J. 605; 6 C. L. J. 766; 30 A. 1; 5 A. L. J. 1; 3 M. L. T. 1; 11 O. C. 78 (P. C.).

(17) 34 I. A. 65; 9 Bom. L. R. 597; 11 C. W. N. 417; 4 A. L. J. 227; 29 I. A. 244 (P. C.).

(18) 73 Ind. Cas. 252; 50 I. A. 173; 25 Bom. L. R. 683; A. I. R. 1923 P. C. 57; 44 M. L. J. 561; 32 M. L. T. 149; 37 C. L. J. 515; (1923) M. W. N. 438; 50 C. 439; 18 L. W. 387; 27 C. W. N. 997; 9 O. & A. L. R. 805 (P. C.).

(19) 96 Ind. Cas. 712; 28 Bom. L. R. 782; 50 C. 468; A. I. R. 1926 Bom. 435 (F. B.).

(4) has not overruled *Ramji* v. *Ghamau* (20). On the Full Bench decision it follows that the adoption of plaintiff No. 2 by plaintiff No. 1 gave the latter no rights in the joint family property.

The appeal of defendants Nos. 1, 2, 4, 5, and 6, therefore, in my opinion, should be allowed, and the cross-objections of the plaintiffs dismissed with costs throughout against the plaintiffs.

Fawcett, J.—I agree. On the first point discussed by my learned brother in his judgment, I have only to add that their Lordships of the Privy Council in *Balabux Ladhuram* v. *Rukhmabai* (5) remarked at page 136* that it would be difficult to see how an agreement to reunite could have been made by or on behalf of a minor. The facts in that case were that there was a division by adult brothers, and the ruling as to an agreement must be taken to refer primarily to such a case.

In *Ramchandra Avadhutrao Patil* v. *Tukaram Babaji Changula* (6) to which I was a party, the judgment of the learned Chief Justice, no doubt, states as a general principle that, if it is proved that there has been a breach in the state of union amongst the members of a Hindu joint family, the law presumes that there has been a complete partition both as to parties and property. I am satisfied, on further consideration, that that states the rule of law too widely, and that there is no general legal presumption that can be made as applicable to every case arising of this kind. The remarks in the judgment of the Privy Council in the most recent case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* (13) make it quite clear that their Lordships do not take the authority of *Balabux Ladhuram* v. *Rukhmabai* (5) as covering a case like the present further than as there stated, *viz.*, that the question whether or not the remaining members of the family continued joint or separate has to be determined by evidence. In the present case, the circumstances are, I think, all in favour of the view that the remaining four minor brothers and the father continued to be joint. In view of the latest ruling of the Privy Council, we are not bound by the contrary statement of law in *Ramchandra Avadhutrao Patil* v. *Tukaram Babaji Changula* (6).

(20) 6 B. 498; 6 Ind. Jur. 587; 3 Ind. Dec. (N. S.) 787.

*Page of 30 I. A.—[*Ed.*]

On the question whether Ningbasappa blended the property in Schedule A with property in Schedule B, I think it is clear that there was such a blending. It may, no doubt, be open to question whether he did so with the intention of abandoning his separate interest, but I think that the probabilities point to there being such an intention, and that this is a case where his acts were not due to mere kindness or charity.

Therefore, I agree that the cross objections fail and that the appeal should succeed. I concur in the order proposed by my learned brother.

We are asked by the respondents' Pleader to make some provision for the maintenance of plaintiff No. 1. Prior to the date of the suit there was an offer on behalf of defendant No. 1 to give her two Survey Numbers or a cash payment of Rs. 250 a year as stated in Ex. 179, and defendants' written statement also mentions two rooms in house No. 1 in Schedule A as being suitable for her residence. For the appellants it is said that this offer is sufficient; for respondent No. 1 it is said at least Rs. 750 a year should be provided. The parties cannot agree. We, therefore, direct the lower Court to make the necessary inquiry and report to us as to what provision should be made for the maintenance of plaintiff No. 1 and also for her residence, if necessary. The report, with any further evidence taken, should be remitted to this Court within a period of three months from the receipt of papers by the lower Court. The further hearing of the appeal, so far as that point is concerned, is adjourned.

Z. K. *Appeal allowed: Cross-objections disallowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2123 OF 1926.
January 13, 1927.
Present:—Mr. Justice Addison.
HARI RAM—PLAINTIFF—APPELLANT
versus
SHEO KARN—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), ss. 17, 49—Partition deed, unregistered—Oral evidence of possession, whether admissible.

Where a document embodying the terms of a partition of immoveable property is not admitted in evi-

dence as being unstamped and unregistered, oral evidence to prove the details of the partition cannot be given as the terms of the partition are embodied in an inadmissible document. Nevertheless, however, the fact whether a party to the deed is in possession of certain property dealt with by the deed may be proved by oral evidence and the deed may be relied upon to determine the nature of such possession.

Second appeal under s. 41 of Act VI of 1918 against the judgment of the District Judge, Karnal, dated the 19th June, 1926, confirming the decree of the Fourth Class Subordinate Judge, Kaithal, dated the 17th December, 1924.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Behari Lal*, for the Respondent.

JUDGMENT.—In execution of a money-decree against Kalu Mal and two of his sons, Richha Ram and Joti Parshad, the decree-holder attached a house and a shop alleged by him to belong to the judgment-debtors. Hari Ram another son of Kalu Mal objected to the attachment and sale of the shop and part of the house on the ground that he was the owner in possession thereof. His objection failed and he instituted a regular suit. It was dismissed and his appeal was dismissed by the District Judge. The second appeal is now before me.

It was held in the suit, the decree of which was under execution, that Hari Ram appellant was separate from his father and other brothers. The property in dispute was originally joint family property. Hari Ram's case is that he received it on partition. The partition has been established but as the document, embodying the partition, was not admitted in evidence as being unstamped and unregistered the District Judge held that oral evidence to prove the details of the partition could not be given as those terms were embodied in an inadmissible deed. This proposition is correct but it has been held in *Sheo Karan* v. *Chiranji Lal* (1) which is concerned with still another son of Kalu Mal, that the fact whether the plaintiff was in possession of the property in suit or built any part of it could be proved by oral evidence and that the partition deed could be relied upon to determine the nature of that possession.

Now the question of possession by Hari Ram appellant was considered by the trial Court but rejected by the District Judge as he was of opinion that no other evidence to prove the details of the partition could be admitted. I, therefore, accept the appeal, and setting aside the order of the District Judge, remand the appeal to him to decide as to whether the plaintiff was in possession of the property in dispute or any part thereof or constructed any portion of it as this could be proved by oral evidence. When he has come to a finding on this point the partition deed could be relied upon to determine the nature of that possession. The remand is under O. XLI, r. 23 Civil Procedure Code. Parties will bear their own costs here.

Z. K. *Appeal accepted.*

(1) 98 Ind. Cas. 940.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 352 OF 1924.

July 12, 1926.

Present:—Mr. Justice Fawcett and Mr. Justice Madgavkar.

VALLABBHAI NARANJI—PLAINTIFF—APPLICANT

versus

CHHOTALAL PURSHOTTAMDAS & CO.—DEFENDANTS—OPPONENTS.

Civil Procedure Code (Act V of 1908), ss. 22, 23, 151—Suit instituted in one of two Courts having jurisdiction—Defendant desiring to obtain transfer of suit—Procedure—Inherent power of Court to direct transfer.

Where a suit is instituted in one of two Courts both of which would have jurisdiction to try the suit and the defendant desires to stop the trial of the suit in the Court in which it is instituted, the proper course for him is to make an application to the High Court under sub-s. (3) of s. 23 of the Civil Procedure Code for an order that the suit should be transferred to the other Court which has jurisdiction to try it. Where, however, this procedure is not availed of, there is no scope for passing an order under s. 151 of the Civil Procedure Code directing in the interests of justice, that the suit should be tried by the other Court which has jurisdiction to try it. [p. 155, col. 2.]

Application against the order passed by the Joint Subordinate Judge, Surat, in Civil Suit No. 276 of 1923.

Mr. *Dave* (with him Mr. *R. J. Thakor*), for the Applicant.

Mr. *K. V. Patel*, for the Opponents.

JUDGMENT.

Fawcett, J.—In this case a decree was passed at Calcutta against a firm in which it was alleged that the plaintiff was a partner. That decree was passed *ex parte* after an order had been made by the Court for effecting substituted service upon all the defendants in that suit, and the service was effected by posting the summons on the outer door of their last place of busi-

ness in Calcutta and duplicates on the Notice Board of the Court. The plaintiff alleges that he was not a partner of this firm and brings a suit for a declaration that the decree is inoperative, the same having been obtained by fraud, and for an injunction restraining defendant No. 1, the plaintiff in the Calcutta suit, from executing that decree.

There is no doubt that there was a cause of action for bringing this suit in the Court of the Subordinate Judge of Surat, inasmuch as the decree has been executed by that Court. According to the judgment of the Court below, the present plaintiff had paid up the amount in Court, and defendant No. 1 has received that amount after furnishing security in respect of it. Issues were raised whether the Court had jurisdiction to hear the suit, and whether (apart from the plea of jurisdiction) the plaintiff could and should be ordered to institute the suit as against defendant No. 1 in Calcutta for the reasons alleged in defendant No. 1's written statement. The first of these the Subordinate Judge answered in the affirmative. Upon the second issue, he has held that, in exercise of the powers conferred by s. 151 of the Code, it was necessary for the ends of justice that proceedings in the suit should be stayed, on the ground that justice was more likely to be done by the suit being instituted in Calcutta.

Against this order of stay, the present application has been made. There can be no doubt that, if there had been a section in the present Civil Procedure Code corresponding to s. 20 of the Code of 1882, there would be jurisdiction for the order. According to that section, where a suit that might be instituted in more than one Court was instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants did not reside or carry on business or personally work for gain, the defendants or any defendant might obtain an order staying proceedings on the ground that justice was more likely to be done by the suit being instituted in some other Court. That is a provision which would have enabled the Court to have passed the order that it has. But though the Bill No. 2 of 1907, which underlies the present Civil Procedure Code, contained a cl. 22 on the lines of this s. 20 (see *Gazette of India* for 1907, Part V, page 30), this clause was subsequently dropped by the Select Committee on the Bill as unnecessary, because they held that sufficient provision was made for transfer of such suits under the succeeding clause (see *Gazette of India*, 1908, Part V, page 36). This latter clause is now s. 22 of the present Code. And, under sub-s. (3) of s. 23, this Court has jurisdiction to order the transfer of a suit to another Court, even though that Court is outside the appellate jurisdiction of this Court [*cf. Venkatasa Barod* v. *Maksudan Das* (1)]. Section 22, with which s. 23 is connected, however, provides as follows:—

"Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed."

That being so, the proper course in this case for defendant No. 1 to take, if he wanted to stop the suit in the Surat Court, was to have applied to this Court under sub-s. (3) of s. 23 for an order that the suit should be transferred to the Calcutta High Court. That he should have done at the earliest possible opportunity, as mentioned in s. 22 of the Code. That opportunity not having been availed of, it is obvious that there is no substantial basis for holding, under s. 151 of the Civil Procedure Code, that it is necessary for the ends of justice that proceedings in the Surat Court should be stayed. The lower Court, no doubt, has followed a precedent of a suit on the Original Side of this Court, where a similar stay order was passed by Marten, J.: *Jethabhai Versey & Co.* v. *Amarchand Madhavji & Co.* (2). But that was a case where there were very much stronger reasons than exist in the present case for saying that the suit should have been brought in the other Court and not in a Bombay Court. And in any case the provisions of sub-s. (3) of s. 23 were not taken into consideration by the learned

(1) 35 C. 541.
(2) 82 Ind. Cas. 852; 25 Bom. L. R. 713; A. I. R. 1924 Bom. 90.

Judge Therefore, in my opinion, there is no proper scope for resorting to the exceptional provisions of s. 151, and the lower Court's order was made, in my opinion, without jurisdiction.

Accordingly, I would allow the application, set aside the order staying the suit, and direct the lower Court to take the suit up again on the current file and dispose of it according to law. As neither side brought this point of the possibility of transfer to the notice of either the Court below or this Court, we direct that costs of the application be costs in the cause.

Madgavkar, J.—I agree.

Z. K. *Order set aside.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 230 OF 1924.
January 8, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Broadway.

DILSUKH RAI AND OTHERS—APPELLANTS
versus
LACHHMAN DAS AND ANOTHER—RESPONDENTS.

Execution of decree—Duty of execution Court—Objection to terms of decree, whether can be entertained.

A Court executing a decree cannot go behind the terms of the decree and must execute it as it stands.

Where a decree declares the personal liability of a judgment-debtor, a Court executing the decree cannot entertain the objection that the judgment-debtor is not personally liable under the decree.

Appeal under s. 10 of the Letters Patent against the judgment of Mr. Justice Abdul Raoof, dated the 21st October, 1924, in Civil Appeal No. 1143 of 1923.

Lala *Mool Chand*, R. S., for the Appellants.

Messrs. *Parkash Chandra* and *Shamair Chand*. for the Respondents.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree obtained by Lachhman Das and Kanshi Ram for the recovery of a certain sum of money from the defendants Dilsukh Rai and others, and the question for determination is, whether the judgment-debtors are entitled to resist the execution of the decree on the ground that in pursuance of an agreement arrived at between the parties prior to the date of the decree, the judgment-debtors were not personally liable for the payment of the decretal amount. It appears that this was one of the pleas raised by the defendants in the suit brought by the decree-holders against them, but they did not substantiate that plea and absented themselves from the Court, with the result that an *ex parte* decree was passed against them making them personally liable for the debt due to the plaintiffs.

Now the principle of law is firmly established that a Court executing a decree cannot go behind the terms of the decree and must execute the decree as it stands. The learned Counsel for the judgment-debtors invites our attention to the judgment of the Madras High Court in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) in support of the contention that a Court executing a decree is competent to determine the question whether or not the parties had agreed prior to the date of the decree that the decree should not be executed against the judgment-debtor. This view has not been accepted by the Calcutta High Court, *vide Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (2) and *Hassan Ali* v. *Gauzi Ali Mir* (3), but it is unnecessary to pronounce any opinion as to which of the two views is correct, because the judgment in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) is inapplicable to the present case. Here the question is not whether the decree should or should not be executed but whether the Court should depart from the terms of the decree and decline to execute it personally against the judgment-debtors. This would amount to a variation of the terms of the decree and there can be no doubt that a Court executing the decree has no authority to alter the terms of the decree.

We accordingly accept the appeal and setting aside the judgment of the single Bench as well as that of the District Judge restore that of the Court of first instance. The respondents must pay the costs incurred by the appellants.

Z. K. *Appeal accepted.*

(1) 37 Ind. Cas. 836; 40 M. 233; 21 M. L. T. 24; 5 L. W. 132; (1917) M. W. N. 44; 32 M. L. J. 13.
(2) 29 C. 810; 6 C. W. N. 838.
(3) 31 C. 179.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 328 OF 1926.

November 17, 1926.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

PERIA KOIL KELVI APPAN GOVINDA RAMANUJA PEDDA JEEYANGARLAVARU—APPELLANT

versus

KADAMBI DHARMAPURI TIRUVENGADA KRISHNAMACHARLU AND OTHERS—RESPONDENTS.

Letters Patent (Madras), cl. 15—'Judgment'—Order of Single Judge of High Court, staying execution of decree pending appeal—Appeal, whether lies—Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution—Decree granting injunction, disobedience of—Application for stay of execution, pending appeal, whether maintainable.

An order of a Single Judge of the High Court staying execution of a decree of a *Mofussil* Court pending the disposal of an appeal therefrom to the High Court is a judgment within the meaning of cl. 15 of the Letters Patent and an appeal therefrom is maintainable under that clause. [p. 158 col. 2, p. 160, col. 1.]

(Case-law) considered.

Sonachalam Pillai v. *Kumaravelu Chettiar* (6), followed.

Sevak Jeranchod Bhogilal v. *Dakore Temple Committee* (1), distinguished.

Where a defendant has been disobeying a decree for injunction passed against him, he is not entitled, on application pending an appeal against the decree, to have the execution stayed. [p. 159, col. 1.]

Letters Patent Appeal against the judgment, dated the 7th October, 1926, of Mr. Justice Curgenven, in C. M. P. No. 3375 of 1926, in A. S. No. 119 of 1926, preferred to the High Court against that of the Court of the Subordinate Judge, Chittoor, in O. S No. 23 of 1919.

FACTS.—The plaintiff in O. S. No. 23 of 1919, in the Sub-Court, Chittoor, obtained a decree against the defendants declaring that he was the head or *ejaman* of the *goshti* or congregational worship in the temple at Tirupathi and entitled as such to lead in the worship or *seva* the assembled worshippers who were bound to follow his lead and recite the *thengalai patram* recited by the plaintiff, namely, *srisailasadayapatram* and restraining the defendants (some of whom were *Vadagalais*) from reciting the *vadagalai patram*, namely, *ramanjadaya patram*. The *Vadagalai* defendants filed an appeal, but continued to recite their own *vadagalai patram* at the time of worship in violation of the terms of the decree. The plaintiff at a late stage objected but on finding his attempts at obtaining orders under s. 144, Criminal Procedure Code, proving futile, he applied under O. XXI, r. 32, Civil Procedure Code, to the Court which passed the decree to commit the disobeying defendants for contempt. The defendant thereupon applied to the High Court to stay execution of the decree pending the appeal filed against the decree. The stay was granted by His Lordship Mr. Justice Curgenven in C. M. P. No. 3375 of 1925 mainly on the ground that the plaintiff had not taken steps for a long time against the disobeying defendants. The above Letters Patent Appeal was filed against the said order.

Messrs. *T. Rangachariar, V. N. Venkata Varadachari* and *R. Gopalachari*, for the Appellants.

Messrs. *C. S. Venkatachariar* and *D. Ramaswami Iyengar*, for the Respondents.

JUDGMENT.

Wallace, J.—This appeal is against an order of Curgenven, J., in C. M. P. No. 3375 of 1926 in which the learned Judge directed stay of execution of a decree by suspending the injunction which had been decreed by the Subordinate Judge of Chittoor in O. S No. 23 of 1919.

The respondent took a preliminary objection that no appeal lies, and we heard a good deal of argument on the matter into which I do not propose to go at length. It cannot be denied that the practice of this Court has been to allow a Letters Patent Appeal from an order of a Single Judge of this Court in matters of stay of execution pending the disposal of an appeal in the Court. Mr. Venkatachariar, however, for the respondent contended that the pronouncement of the Privy Council in a case reported as *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1) implies that the practice of this Court is not justified in law. In that case the Judicial Committee remarked at the end of their judgment, referring to the Letters Patent of the High Court of Bombay, that the term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense. The point actually before them was the meaning of the word 'judgment' in cl. 39 of the Letters Patent of Bombay. But the remark is general and is not confined to s. 39. As the language of the

(1) 87 Ind. Cas. 313; 49 M. L. J. 25; 23 A. L. J. 555; A. I. R. 1925 P. C. 155; L. R. 6 A. (P. C.) 117; (1925) M. W. N. 474; 2 O. W. N. 535; 41 C. L. J. 628; 22 L. W. 246; 27 Bom. L. R. 872; 30 C. W. N. 459 (P. C.).

Letters Patent of Bombay is the same as that in Madras, the remark would equally apply to this Court.

It is essential in order to understand the application and the necessity of the remark quoted above to state the point at issue in that case. Under a temple scheme prescribed by the Privy Council decree, the Temple Committee was given power to frame rules subject to the sanction of the local District Judge and subject to alterations and additions by the High Court. The District Judge sanctioned certain rules so drawn up and the so-called appeals were taken in the High Court, appellants also applying under the rules of the scheme for modifications by the High Court. The High Court did not entertain the latter but heard the so-called appeals and after the decision granted the appellants leave to appeal to the Privy Council. The Privy Council held that the orders of the High Court on the appeals were not 'judgments' within the meaning of s. 39 of the Letters Patent and that the High Court had no legal authority to deal with the matter at all except in so far as it was exercising the power conferred on it by the Privy Council decree scheme, a matter more in the nature of executive or administrative than on judicial activity. Hence, as the Privy Council held, no appeal lay from the District Judge to the High Court and, therefore, no appeal lay from the High Court to the Privy Council except on the sole ground that the judgment or decree was incompetent. Then the remark here relied upon follows.

I do not read the remark as meaning more than that all pronouncements in the form of judgements are not judgments within the meaning of the Letters Patent but only such pronouncements as are of the nature of decrees. What the Privy Council intends to import by the term 'decree', whether, for example, it is a decree as understood under the old Equity Law as equivalent to a judgment or whether it is the Civil Procedure Code definition of a decree, it does not say. There is, of course, no particular reason why we should interpret the Letters Patent by the Civil Procedure Code, nor to my mind is there any particular reason why we should interpret the word 'decree' in the old equity sense. If the remark made is, as suggested by Mr. Venkatachariar, a reference to the old distinction whereby final decisions in actions in equity cases were known as decrees while final decisions in actions in common law cases were known as judgments, then the dictum might just as easily have been reversed and it might have run that the term 'decree' in the Letters Patent means a judgment. That the words 'judgment' and 'decree' as used in the Letters Patent, whether mutually interchangeable or not, are not confined to final decisions in an action seems clear from the wording of cl. 40 which speaks of preliminary or interlocutory judgments, decrees, etc. Another Privy Council case has been referred to, *Tata Iron and Steel Co. Ltd.* v. *Chief Revenue Authority, Bombay* (2) but that does not carry us any further, as the Privy Council there held in effect that the duties of the High Court in the matter before it were merely advisory and not judicial and, therefore, their pronouncement was not a judgment. No such considerations arise in the present case. Until, therefore, the Privy Council has made more clear that it intended to overrule a long series of decisions not only in this Court but in the other High Courts, I am not prepared to hold that these have been overruled. There is no hint in the Privy Council decision that they were aware that they were overruling a long continued practice. Had they intended to do so, I think they would have said so in explicit terms. This is the view which has been adopted by another Bench of this Court in a recent decision in L. P. A. No. 240 of 1925 with which I respectfully agree. The balance of authority in this Court is that a Letters Patent Appeal does lie in a case like the present, and later decisions have usually been founded on the *obiter dicta* in the Full Bench case in *Tuljaram Row* v. *Alagappa Chettiar* (3) which have been regarded as laying down correct law. See *Srinivasa Iyengar* v. *Ramaswami Chettiar* (4), *Kulasekara Naicker* v. *Jagadambal Ammal* (5), *Sonachalam Pillai* v. *Kuma-*

(2) 74 Ind. Cas. 469; 47 B. 724; 45 M. L. J. 295; 21 A. L. J. 675; 25 Bom. L. R. 908; A. I. R. 1923 P. C. 148; (923) M. W. N. 603; 18 L. W. 372; 9 O. & A. L. R. 783; 33 M. L. T. 301; 28 C. W. N. 307; 39 C. L. J. 16; 50 I. A. 212 (P. C.).

(3) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J 1.

(4) 29 Ind. Cas. 846; 39 M. 235; 29 M. L. J. 12; 18 M. L. T. 46.

(5) 50 Ind. Cas. 14; 42 M. 352; 36 M. L. 351; 9 L. W 322; 25 M. L. T. 292 (F. B.).

ravelu Chettiar (6), *Babu Sah* v. *Purushothama Sah* (7), *Kanilal Bhoya* v. *Balaram Paramasukdoss* (8), *Krishna Reddy* v. *Thanickachala Mudali* (9), *Savan Durga Bai Ammal* v. *Ramanatha Row* (10), *Yusuf Saheb* v. *Subbhan Bibi* (11) and *Vellanki Venkatachinnayamma Rao* v. *Kotagiri Subbamma Rao* (12). The only cases to the contrary cited before us are *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13) and *Vairavan Chettiar* v. *Ramanathan Chettiar* (14) which, without any detailed discussion of the point at issue, follows *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13). The late Chief Justice Sir Arnold White who was a party to *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13) delivered the leading judgment in *Tuljaram Row* v. *Alagappa Chettiar* (3) and thus went back upon his views in that case. This deprives it of a considerable portion of its authority.

It is pointed out by the Hon. Mr. Rangachariar for the appellant that in spite of these repeated rulings here and in other High Courts to the same effect no restricted definition of the word 'judgment' was introduced into s. 15 of the Letters Patent when it was amended in 1919, and, what is perhaps more significant still, in the recent Letters Patent of the Lahore High Court the same language as in the older Letters Patents has been adopted—see *Gokal Chand* v. *Sanwal Das* (15) and *Ruldu Singh* v. *Sawal Singh* (16). I would, therefore, repel the technical objection taken.

(6) 79 Ind. Cas. 109; 47 M. 316; 46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 427; A. I. R. 1924 Mad. 597.

(7) 85 Ind. Cas. 201; 48 M. 700; 20 L. W. 845; 35 M. L. T. 136; 47 M. L. J. 932; A. I. R. 1925 Mad. 167.

(8) 68 Ind Cas. 921; 43 M. L. J. 480; 31 M. L. T. 284; 16 L. W. 603; A. I. R. 1923 Mad. 44.

(9) 73 Ind. Cas. 1054; 45 M. L. J. 153; (1923) M. W. N. 631; A. I. R. 1924 Mad. 90; 47 M. 136.

(10) 91 Ind. Cas. 566; 49 M. L. J. 632, (1925) M. W. N. 785; 22 L. W. 868; A. I. R. 1926 Mad. 64.

(11) 86 Ind. Cas. 909; 21 L. W. 308; (1925) M. W. N. 109; 48 M. L. J. 395; A. I. R. 1925 Mad. 443.

(12) 95 Ind. Cas. 956; 21 L. W. 310; A. I. R. 1925 Mad. 586.

(13) 24 M. 358.

(14) 95 Ind. Cas. 803; 14 L. W. 701.

(15) 55 Ind. Cas. 938; 1 L. 318; 12 P. W. R. 1920; 79 P. L. R. 1920; 2 L. L. J. 32.

(16) 67 Ind. Cas. 388; 3 L. 188; A. I. R. 1922 Lah. 380.

On the merits I think the appellant has a good case. The learned Judge has failed, in my opinion, to give adequate weight to the important fact that *prima facie* the defendants have been in a state of disobedience to the decree since ever it was passed. I do not wish to prejudge the proceedings which are now pending against them for contempt. But from their own affidavit paras. 8 and 11 it is clear *prima facie* that they have never attempted to obey the decree and that, even when the plaintiff objected, they nevertheless went on in their course of disobedience. Now it is obviously the duty of a party to a decree to obey the decree until he has had it stayed or set aside in proper proceedings, and I am not prepared to encourage parties to disobey decrees by granting to a *prima facie* disobedient party the very relief which he has been getting illicitly by his own disobedience. He disobeys as long as he dare and then when he finds the position getting awkward and that disobedience cannot succeed any longer he comes up for an injunction and expects to get it because he has been so successful up to date in not obeying the decree. The Court would be stultifying itself if it granted relief to parties guilty of such conduct.

This alone seems to me sufficient ground for a refusal to uphold the decision of the learned Judge. I would, therefore, reverse his decision and cancel the order passed upon the Civil Miscellaneous Petition and grant the appellant his costs both here and on the Civil Miscellaneous Petition.

Madhavan Nair, J.—This is an appeal against the order of a Single Judge of this Court staying the execution of the decree in O. S. No. 23 of 1919 on the file of the Subordinate Judge's Court at Chittoor pending the disposal of the appeal preferred against that decree.

A preliminary objection is taken that the order appealed against does not amount to a 'judgment' within the meaning of cl. 15 of the Letters Patent and that, therefore, an appeal does not lie. It is argued by the respondent that there is a conflict of decisions in this Court as regards what amounts to a 'judgment' under cl. 15 of the Letters Patent, that, therefore, the question should be referred to a Full Bench and that the decisions of this Court will have to be re-considered in the light of the recent pronouncement by the Privy

Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1).

The latest reported decision of this Court bearing on this point appears in *Sonachalam Pillai* v. *Kumaravelu Chettiar* (6). In that case following the decision in *Tuljaram Row* v. *Alagappa Chettiar* (3), it was held, after an examination of the case law on the subject, that an order of a Single Judge of the High Court refusing the stay of execution of a decree of a *moffusal* Court pending the disposal of the appeal therefrom to the High Court is a 'judgment' within the meaning of cl. 15 of the Letters Patent and that an appeal therefrom is maintainable under that clause. It is conceded that this decision would govern the present case. But what is argued is this, namely, that *Tuljaram Row* v. *Alagappa Chettiar* (3) is not a direct decision on this point and that at the time when *Sonachalam Pillai* v. *Kumaravelu Chettiar* (6) was decided there was a conflict of decisions on the question under consideration and that, therefore, the learned Judges in *Sonachalam Pillai* v *Kumaravelu Chettiar* (6) should have referred the question to a Full Bench; and they not having done so, we are now asked to make the reference.

The respondent relies upon two decisions of this Court, *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13) and *Vairavan Chettiar* v. *Ramanathan Chettiar* (14) in support of his argument that an order of a Single Judge of the High Court refusing stay of execution or allowing it does not amount to a 'judgment' within the meaning of cl. 15 of the Letters Patent. The decision in *Vairavan Chettiar* v. *Ramanathan Chettiar* (14) simply follows the decision in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13) and does not contain any discussion on the point at issue. The decision in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13) supports the respondent as it states that an order made by a Single Judge refusing stay of execution is not a 'judgment' within the meaning of cl. 15 and no appeal lies therefrom. But this decision was considered by the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (3). No doubt, the question referred to the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (3) was whether an order of a Single Judge on the Original Side refusing to frame an issue which is asked for by one of the parties is a judgment within the meaning of cl. 15 of the Letters Patent and is appealable; but the meaning of the term 'judgment' was elaborately considered in that case by the learned Chief Justice and Krishnaswami Iyer, J. Both of them held that in the particular case before them, there was no appeal. Ayling, J., contended himself by saying that he agreed that the answer to the question referred should be in the negative. I do not think it is necessary for the purposes of this case to refer to the discussion of the meaning of the term 'judgment' contained in that decision. I am prepared to accept the meaning put upon that term by the learned Chief Justice. In explaining its meaning the learned Chief Justice refers to various interlocutory orders which, in his opinion, would amount to judgments within the meaning of cl. 15 and one of such instances is an order refusing stay of execution. He states that he should be prepared to hold that an appeal lay from such an order. He notes that a contrary view on this question was taken in *Srimantu Raja Yarlagadda Durga Prasada Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayadu* (13) to which he himself was a party but he resiled from it in this decision. As the point for determination in *Tuljaram Row* v. *Alagappa Chettiar* (3) was whether an appeal lies from an order of a Judge of the Original Side declining to frame an issue which was asked for by one of the parties to the suit, the opinion on the question whether an appeal lies from an order refusing stay of execution is, no doubt, an *obiter dictum*; but in view of the elaborate discussion of the question, I think we should follow it.

It would be hardly right to confine *Tuljaram Row* v. *Alagappa Chettiar* (3) to the question therein decided. In fact, in this Court the decision in *Tuljaram Row* v. *Alagappa Chettiar* (3) has been generally considered as affording a general test as to what amounts to a "judgment" within the meaning of cl. 15 of the Letters Patent. Applying the test contained in it, the learned Judges in *Srinivasa Iyengar* v. *Ramaswami Chettiar* (4) held that the order of a Single Judge of the High Court rejecting a petition to send for the records

and to revise the judgment of the lower Court exercising small cause jurisdiction is judgment within the meaning of cl. 15 of the Letters Patent and is, therefore, appealable. Following the same decision it was held in *Kulasekara Naicker* v. *Jagadambal Ammal* (5) that an order as to costs passed by a Judge of the High Court in the exercise of his original jurisdiction is not the less a judgment within the meaning of cl. 15 of the Letters Patent because it relates to costs only. Two Full Bench decisions have thus treated the decision in *Tuljaram Row* v. *Alagappa Chettiar* (3) as binding on matters not directly dealt with by it. Various Benches of this Court have also applied the decision in *Tuljaram Row* v. *Alagappa Chettiar* (3) in determining the applicability of various interlocutory orders passed by Single Judges of this Court [see *Konalal Bhoya* v. *Balaram Paramasukdoss* (8), *Krishna Reddy* v. *Thanickachela Mudali* (9), *Yusaf Sahib* v. *Subhan Bibi* (11), *Vellanki Venkatachinnayamma Rao* v. *Kotagiri Subbamma Rao* (12) and *Babu Sah* v. *Purushothama Sah* (7)]. I have already referred to the decision in *Sonachalam Pillai* v. *Kumaravelu Chettiar* (6) which is a direct decision on the present question as it relates to the appealability of an order passed by a Single Judge of this Court refusing stay of execution. In view of this large volume of authority in this Court, I must hold that the decision in *Srimantu Raja Yarlagadda Durga Prasad Nayadu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasad Nayadu* (13) is no longer good law and that the decision in *Vairavan Chattiar* v. *Ramanathan Chettiar* (14) which simply follows it without discussing the question cannot be accepted as an authority. In the state of authorities, I do not think there is any necessity now to refer the question, before us to a Full Bench. So far as I can speak from experience, I may state that the practice in this Court ever since [*Tuljarama Row* v. *Alagappa Chettiar* (3)] has always been to allow appeals against orders like the one before us. It may also be mentioned that the decision in *Tuljaram Row* v. *Alagappa Chettiar* (3) has been followed in the Lahore High Court [See *Gokal Chand* v. *Sanwal Das* (15) and *Kuldu Singh* v. *Sawal Singh* (16)].

The next question for consideration is whether the meaning of the term "judgment" in cl. 15 of the Letters Patent as explained in *Tuljaram Row* v. *Alagappa Chettiar* (3) should be re-considered in view of the pronouncement of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1). The facts of this case are briefly these: the Privy Council sanctioned a scheme of management for a certain temple in Ahmedabad. The scheme empowered the Committee of the temple to frame rules for its management, etc., subject to the sanction of the District Judge of Ahmedabad and it was provided that the scheme may be altered or modified by the High Court of Bombay. The Temple Committee drew up certain rules which with some modifications were sanctioned by the District Judge. Appeals were preferred against the order of the District Judge to the High Court and applications were also concurrently made to the High Court for modification of the scheme. The High Court did not make any order on the applications but gave judgments on the appeals varying the order of the District Judge by amending the rules in certain respects. From the judgments of the High Court an appeal was filed to the Privy Council under cl. 39 of the Letters Patent of the Bombay High Court. After pointing out that appeals to the High Court did not lie and that the High Court had original powers under cl. 20 of the scheme for altering or modifying the rules which it did not exercise but which it might still exercise upon a proper application, their Lordships of the Privy Council state as follows:—"There was no right of appeal to His Majesty in Council from the judgments of the High Court of the 11th of April, 1919, and the 22nd September, 1919, or from any decrees which were drawn up, except on the sole ground that the judgments or decrees were incompetent. The term 'judgment' in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense." It is this last sentence that is relied upon by Mr. Venkatachariar in support of his argument that the opinion of the High Court in *Tuljaram Row* v. *Alagappa Chettiar* (3) should be revised. It is contended that if the judgment of the High Court in the case before the Privy Council interfering with the scheme does not come within the meaning of the term as used in the Letters Patent, then the order refusing stay of execution or allowing it cannot be considered to be a judgment because that does not amount to a decree. It may be

observed that though the opinion is generally stated, the appeal in that particular case was under cl. 39 of the Letters Patent and not under cl. 15. Their Lordships do not explain in what sense the term 'decree' is used in that sentence. Whether the term should be given the same meaning that is given to it by the Civil Procedure Code or whether it is used as understood in the old Equity Law according to which, as contended for by Mr. Venkatachariar, final decisions in equity cases were known as decrees is not at all clear. Section 40 of the Letters Patent shows that the words 'judgment' and "decree" are not limited to final decisions because it refers to preliminary or interlocutory judgments, etc., The decisions in *Tuljaram Row* v. *Alagappa Chettiar* (3) and other cases were in existence when the Letters Patent was amended in 1919 and still the Legislature did not interfere with the term 'judgment' by giving it a limited definition. In the recent Letters Patent of the Lahore High Court the same language as in the older Letters Patent appears. Another case referred to, *viz.*, *Tata Iron and Steel Co., Ltd.* v. *Chief Revenue Authority, Bombay* (2), does not give much help in deciding this matter. In that case it was held that the decision of the High Court upon a case stated and referred to it by the Chief Revenue Authority under s. 51 of the Income Tax Act was merely advisory and not judicial. In these circumstances, it is difficult to hold that by the pronouncement referred to their Lordships of the Privy Council have overruled the long current of authorities in this and in other Courts bearing on the question; at any rate, until the doubt is removed by a clearer pronouncement, the contention that the decisions referred to have been overruled cannot be accepted. A similar conclusion was reached by another Bench of this Court in L. P. A. No. 240 of 1925. For these reasons the preliminary objection raised by the respondent must be overruled.

On the merits, I agree with my learned brother that the decision of the learned Judge should be reversed with costs here and on the Civil Miscellaneous Petition.

V. N. V. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1314 OF 1926.

November 8, 1926.

Present :—Mr. Justice Martineau.

B. TELU RAM—APPLICANT—APPELLANT

versus

B. BADRI NATH AND OTHERS—RESPONDENTS.

Will—Disposing state of mind—Practice—Probate appeal—Necessary parties.

To prove that at the time of the execution of a Will the testator was in a disposing state of mind it is enough to show that his mental faculties were not impaired and that he knew what he was doing; it is not necessary to show that he was capable of appreciating the claims of those who were excluded by the Will from participation in the property where the Will is not an unnatural one. [p. 163, col. 2.]

Prag Devi v. *Nathu Mal* (1) and *Indar Narain* v. *Onkar Lal*(2), distinguished.

All the relations whose names are given in an application for Probate are not parties to the proceedings, as the law does not require notice to them and are not, therefore, necessary parties to a Probate appeal. [p. 162, col. 2.]

First Miscellaneous appeal, under s. 86 of Act V of 1881, from the order of the District Judge, Karnal, dated the 8th February, 1926.

Mr. *Mukand Lal Puri*, for the Appellant.

Mr. *Parkash Chandra*, for Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This is an appeal from an order of the District Judge of Karnal dismissing an application for Probate of a Will purporting to have been made by *Musammat* Bhagirthi, who was the sister of the appellant Telu Ram.

A preliminary objection is raised by the Counsel for the respondents that the appeal has not been properly framed on the ground that one of the respondents died before the institution of these proceedings and that two persons who were parties in the Court below have not been impleaded as respondents. There is, however, no force in this objection. Relations whose names are given in the application for Probate are not parties to the proceedings, as the law does not require notice to be given to them. The only necessary respondents in this appeal are the two caveators and they have been impleaded. The preliminary objection is, therefore, overruled.

The Will was written on the 20th October, 1923, six days before the death of Bhagirathi. It was written by a petition-writer, Sansar Chand, and he and four of the attesting witnesses (P. Ws. Nos. 2 to 5) have deposed that Bhagirathi executed the Will in their presence, her thumb-mark being taken on it, and that she was in

her proper senses and understood what she was doing. The Will also bears the attestation of Dr. Rahmat Ali, Assistant Surgeon of Karnal, who, although he was not present at the time of its execution, has stated that he visited *Musammat* Bhagirathi later in the day and that she answered his questions properly and understood what she was doing, and he wrote a certificate on the back of the Will as to her being of sound mind.

It does not appear to me that any serious objection can be taken to the attesting witnesses, whom the learned District Judge considered to be men either of no position or under the influence of the appellant. Plaintiff's witness No. 2 is a *pan* seller who appears to have no connection with the appellant. He was a next-door neighbour who would naturally have been called to witness the execution of the Will. Plaintiff's witnesses Nos. 3 and 4 are merchants and P. W. No. 5 is a *Mahajan*. The only objection urged with reference to them is that they supply articles to the District Board of which the appellant is the Secretary. This is hardly a sufficient reason for rejecting their evidence. The writer of the Will, Sansar Chand, P. W. No. 1, appears to be quite disinterested.

The evidence for the respondents is only that of three witnesses who say that they saw *Musammat* Bhagirathi unconscious or not in her proper senses five or six days before her death. Such evidence is of no value.

It is urged for the respondents, that if the Will had been duly executed by *Musammat* Bhagirathi, she would have signed it as she knew how to write. The reason given by the appellant for her thumbmark and not her signature being taken was that she was ill and her hand was shaky, while some of the witnesses stated that her hand did not shake and she was not asked to sign the Will. This discrepancy does appear to be important as it would not have been noticeable whether *Musammat* Bhagirathi had a shaky hand unless she actually tried to sign her name. Probably it was because her ordinary handwriting was shaky and she could sign her name only with difficulty that her thumbmark was taken instead of her signature.

The testatrix was, no doubt, as stated by the learned District Judge, in a poor state of health, but the evidence shows that her mental faculties were not impaired, and that she knew what she was doing. It is contended for the respondents that this is not enough and that it was necessary for the appellant to show that the testatrix was capable of appreciating the claims of those persons who were excluded by the Will from participation in the property. There might have been some force in the argument if the Will had been an unnatural one, but that is not the case. *Musammat* Bhagirathi had been living with her brother for many years since her husband's death so that it was perfectly natural for her to wish to leave her property to him. The caveators, on the other hand, had no claim on her. One of them namely, Badri Nath, was her husband's second cousin, and the other Jadu Sarup was her husband's brother's maternal grandson. Moreover, the testatrix did not ignore the existence of Jadu Sarup, as she made a suggestion in the Will that Telu Ram might give Rs. 500 on the occasion of the marriage of Jadu Sarup or his sister. *Prag Devi* v. *Nathu Mal* (1), which has been cited by the learned Counsel for the respondents, was a case of a Will made in favour of nephews to the exclusion of a daughter, who was the natural heir, and another case cited, namely, *Indar Narain* v. *Onkar Lal* (2) was one in which a lady had left all her property to a child whom she had adopted a few days before her death, and whom she had no reason to favour to the prejudice of the heirs. Those cases are clearly distinguishable from the present one.

In *Jagrani Koer* v. *Durga Parshad* (3) their Lordships of the Privy Council held that in the case of a Will, reasonable, natural and proper in its terms, it was not in accordance with sound rules of construction to apply to it those canons which demand rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural, unreasonable, or tinged with impropriety. The Will in the present case was a perfectly natural and proper one, and I find on the evidence that it is proved to have been duly executed by *Musammat* Bhagirathi.

(1) 92 Ind. Cas. 183; 7 L. L. J. 230

(2) 10 Ind. Cas. 130; 141 P. L. R. 1911; 20 P. R. 1912; 233 P. W. R. 1911.

(3) 22 Ind. Cas. 103; 36 A. 93; 16 O. C. 386; 12 A. L. J. 125; 26 M. L. T. 153; 15 M. L. T. 125; (1914) M. W. N. 137; 19 C. L. J. 165; 18 C. W. N. 521; 16 Bom. L. R. 141; 1 O. L. J. 57; 41 I. A. 76 (P. C.).

No executor was appointed by the Will, so that the appellant is entitled, not to Probate, but to Letters of Administration with a copy of the Will annexed.

I accept the appeal and reverse the order of the lower Court, grant to the appellant Letters of Administration, with a copy of the Will annexed. The respondents, Badri Nath and Jadu Sarup, will pay the appellant's costs in both Courts.

R. L. *Appeal accepted.*

A. N. A.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 1980 OF 1926.

December 22, 1926.

Present :—Mr. Justice Zafar Ali.

PAREM CHAND—JUDGMENT-DEBTOR—APPELLANT

versus

BUDHA—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Partition decree modified in partition proceedings—Limitation for execution, starting point of.

When a decree in a partition suit is modified in the course of subsequent proceedings, the limitation for its execution begins to run not from the date of the original decree but from the date on which the decree is modified.

Miscellaneous second appeal from the order of the Additional Judge, Gujranwala, at Sialkot, dated the 5th May, 1926, reversing that of the Subordinate Judge, Second Class, Gujrat, dated the 11th December, 1925.

Mr. *Jagan Nath Malhotra*, for the Appellant.

Mr. *Badar-ud-Din Qureshi*, for the Respondent.

JUDGMENT.—In this case the only question for determination is whether the decree-holder-respondent's application dated the 23rd October, 1925, for execution of the decree passed in his favour for possession of his half share in a house by partition was barred by limitation or not. It appears that a preliminary decree for partition was passed on the 7th July, 1921, and a commission was subsequently issued for dividing the property between the parties. They are joint owners of the house, and are brothers. In the course of the proceedings for partition the Court ordered on the 8th January, 1923, that the plaintiff should pay Rs. 100 to his brother as a condition precedent to his taking possession of his share of the house. It was further ordered that the plaintiff should deliver to defendant certain portions of the superstructure of the house. On the 23rd October, 1925, the plaintiff made a fresh application for execution and the trial Court held that it was barred by time. On appeal the learned District Judge came to the conclusion that the time began to run from the 8th of January, 1923, or from the 26th November, 1922, on which date the plaintiff had made an application during the execution proceedings. I am of opinion that the view taken by the lower Appellate Court is correct. The decree having been modified by order dated the 8th January, 1923, the application made for execution thereof on the 23rd October, 1925, was within time. Further, the parties being brothers and being in joint possession of the house neither can be precluded by lapse of time from taking possession of his share thereof.

I, therefore, dismiss the appeal with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 74 OF 1925.

January 4, 1927.

Present :—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Broadway.

MESSRS. TOHAR MAL-UTTAM CHAND THROUGH UTTAM CHAND—PLAINTIFFS—APPELLANTS

versus

JAMES FINLEY AND CO., LTD., AMRITSAR, THROUGH THE MANAGER OF THE COMPANY—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 20 (c)—Suit to set aside decree—Jurisdiction of Court within whose limits decree is attempted to be executed.

A Court has jurisdiction to entertain a suit to set aside a decree, if the decree is attempted to be put into execution within the territorial limits of the jurisdiction of such Court.

Letters Patent Appeal from the judgment of Mr. Justice Abdul Raoof, dated the 11th February, 1925, (passed in Civil Appeal No. 841 of 1924), affirming that of the Senior Subordinate Judge, Amritsar, dated the 6th March, 1924.

Lala *Badri Das*, R. B., for the Appellants.

Mr. *Tek Chand*, for the Respondents.

JUDGMENT.—The question of law raised in this appeal is concluded by the judgment of a Division Bench of this Court in *Jawahar Singh* v. *Sassoon and Co.* (1). It is laid down in that judgment that a Court has jurisdiction to entertain a suit to set aside a decree, if the decree is put into execution within the territorial limits of the jurisdiction of that Court. This requirement of the law has been satisfied in the present case and the Senior Subordinate Judge at Amritsar was consequently competent to hear and determine the suit. We accordingly accept the appeal and setting aside the judgment of the Single Judge as well as that of the Subordinate Judge we remit the case to the latter and direct him to determine it on the merits. We leave the parties to bear their own costs in the High Court.

Z. K. *Appeal accepted.*

(1) 94 Ind. Cas. 377; 7 L. 61; A. I. R. 1926 Lah. 277; 27 P. L. R. 517.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 789 OF 1923.

September 21, 1926.

Present:—Mr. Justice Jackson.

DORADLA SUBBAYYA SETTY AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

ALAPATI SYAMALADOSS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 152—Suit for money—Compromise providing for charge—Decree deliberately making no provision for charge—Change of law—Amendment of decree, so as to include provision as to charge, whether permissible.

In a suit for money filed in 1907, the parties entered into a compromise by which the defendant agreed to pay a certain sum of money to the plaintiff creating a charge therefor on certain immoveable properties. After deliberate and due consideration of the law as then understood, the Court, in drawing up the decree, omitted the provision creating a charge. In 1922, when the law on the subject had become solidified an application was made under s. 152, Civil Procedure Code, to amend the decree so as to include the provision for charge:

Held, that the application could not be granted.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the District Munsif, Ongole, dated the 9th January, 1923, in C. M. P. No. 266 of 1922, in O. S. No. 922 of 1907.

FACTS.—In O. S. No. 922 of 1907 on the file of the District Munsif, Ongole, which was a suit for money, the parties entered into a compromise by which the defendant agreed to pay certain sum of money to the defendant making it at the same time a charge upon certain immoveable properties belonging to him. A decree followed under s. 375 of the Civil Procedure Code of 1882 in terms of the compromise but no express provision was made therein creating a charge as grave doubts then existed as to whether such a provision could be included in a decree relating to a suit for money. An application was made nearly 15 years after the date of the decree to amend it so as to include a provision creating a charge. The District Munsif dismissed the application. A Civil Revision Petition was filed against the said order.

Mr. *N. Viswanatha Iyer*, for the Petitioners.

Mr. *Ch. Raghava Rao*, for the Respondents.

JUDGMENT.—The order of the District Munsif sought to be reversed is correct. When the decree was passed, it was not certain whether a compromise decree could extend beyond the subject-matter of the suit [*Muthu Vijaya Raghunath Udayana Tevar* v. *Thandavaraya Tamabiran* (1) and *Natesan Chetty* v. *Vengu Nachiar* (2)] and the decree in its present form was, no doubt, drawn up deliberately after due consideration of law. That opinion on the question has now solidified [*Ramaswami Nayadu* v. *Subbaraya Thevar* (3)] is no reason for amending the decree at this late date.

The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

(1) 22 M. 214; 8 Ind. Dec. (N. S.) 153.

(2) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(3) 88 Ind. Cas. 648; 49 M. L. J. 490; (1925) M. W. N. 525; A. I. R. 1925 Mad. 1101.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2324 OF 1926.

January 18, 1927.

Present:—Mr. Justice Addison.

GANGA RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM SUKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), ss. 77 (3) (d),

100 (3)—Suit for declaration of occupancy rights—High Court's power to order registration of a civil decree in a Revenue Court.

A suit for a declaration that the plaintiffs are occupancy tenants of a particular land is exclusively cognizable by a Revenue Court.

Where a suit exclusively cognizable by a Revenue Court has been decided by a Civil Court, if no prejudice has been caused thereby, it is competent to the High Court in second appeal to set aside the decree of the lower Appellate Court and to order that the decree of the Trial Judge be registered in a Revenue Court and that the memorandum of appeal in the lower Appellate Court be returned for presentation to a Revenue Court of competent jurisdiction.

Second appeal from the decree of the District Judge, Ferozepore, dated the 18th June, 1926, modifying that of the Sub-Judge, Fourth Class, Fazilka, District Ferozepore, dated the 1st December, 1925.

Mr. *Fakir Chand*, for the Appellants.

Mr. *D. C. Ralli*, for Messrs. *Manohar Lal* and *Duni Chand*, for the Respondents.

JUDGMENT.—This was a suit for a declaration that the plaintiffs were occupancy tenants of 40 *bighas*, 2 *biswas* of land. The suit was dismissed with costs by the Subordinate Judge, Fourth Class, Fazilka. On appeal the learned District Judge held that the plaintiffs were occupancy tenants of 11 *bighas* 6 *biswas* and granted them a declaration to that effect. Against the decision of the District Judge both sides have appealed to this Court.

It was admitted by Counsel on both sides that this was a suit by tenants to establish a claim to a right of occupancy, that it fell within s. 77 (3), Second Group, (*d*) of the Tenancy Act. It was cognizable by a Revenue Court only. In these circumstances, I accept the appeals holding that the suit was cognizable by a Revenue Court and setting aside the appellate order of the District Judge under s. 100 of the Punjab Tenancy Act, I order that the decree of the Subordinate Judge, Fourth Class, be registered in the Court of the Assistant Collector, First Grade, Ferozepore District, as, in my opinion, there has been no prejudice caused by his trying the suit. I further direct that the memorandum of appeal presented to the District Judge shall be returned to the appellants there in order to be presented to the Collector of the Ferozepore District who should entertain and hear the appeal. There will be no order as to costs in this Court or in the Court of the District Judge.

R. L. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2161 OF 1926.

January 5, 1927.

Present:—Mr. Justice Addison.

KALU AND OTHERS—DEFENDANTS—APPELLANTS

versus

SADHA SINGH—PLAINTIFF—RESPONDENT.

Suits Valuation Act (VII of 1887), s. 11—Undervaluation of suit—Appeal—Objection, absence of, effect of—Appeal, second—Objection to valuation, whether can be taken.

A suit for an injunction was valued at Rs. 100 for the purpose of jurisdiction. The suit was dismissed by the trial Court and the plaintiff presented an appeal in the Court of the Senior Sub-Judge. No objection was taken by the defendant to the valuation of the suit or the appeal and the Appellate Court decreed the plaintiff's suit. In second appeal the defendant objected that as the rules required that a suit for an injunction should be valued at more than Rs. 100, the Senior Sub-Judge had no jurisdiction to hear the appeal:

Held, that s. 11 of the Suits Valuation Act which governed all cases of erroneous valuation was applicable to the case and that the defendant having failed to object to the jurisdiction of the Senior Sub-Judge to hear the appeal, he could not be allowed to raise the objection in second appeal.

Second appeal from the decree of the Senior Sub-Judge, Ferozepore, dated the 6th July, 1926, reversing that of the Sub-Judge, Third Class, Ferozepore, dated the 17th February, 1926.

Mr. *L. C. Mehra*, for the Appellants.

Mr. *Vasdeo Kumaria* for Mr. *Fakir Chand*, for the Respondent.

JUDGMENT.—The plaintiff sued the defendants for an injunction restraining them from interfering with his building of a wall. The plaintiff valued his suit at Rs. 100 for purposes of jurisdiction. His suit was dismissed and the plaintiff then presented an appeal in the Court of the Senior Sub-Judge, the appeal was also valued at Rs. 100. The Senior Sub Judge heard the appeal without objection and accepted it granting the plaintiff a decree in certain terms. Against this decision this second appeal has been admitted.

The first ground of appeal is that according to the rules suits for injunctions should be valued at over Rs. 100 and, therefore, the appeal lay not in the Court of the Senior Sub-Judge but in the Court of the District Judge. There is no force, however, in this contention because as held in the case of *Sardar Khan* v. *Aisha Bibi* (1) s. 11 of the Suits Valuation Act

(1) 88 Ind. Cas. 72; 6 L. 105; A. I. R. 1925 Lah. 290 (F. B.).

governs all cases of erroneous valuation. This means that as the appellant before me did not object to the jurisdiction of the Senior Sub-Judge, he cannot now be allowed to raise it.

The rest of this second appeal is barred by clear finding of fact arrived at on evidence by the lower Appellate Court. Nothing has been said before me which would show that the lower Appellate Court erred in any way which would give rise to a second appeal.

The appeal is, therefore, dismissed with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1560 OF 1924.

November 22, 1926.

Present:—Mr. Justice Duval and Mr. Justice Mitter.

ADHAR CHANDRA DEY—DEFENDANT No. 3—APPELLANT

versus

BIPIN CHANDRA DEY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Homestead tenancy—Transfer, right of—Custom—Abandonment—Landlord's right to take possession.

A tenancy of homestead land created for the purpose of habitation which is in the nature of a village service tenure is not governed by the provisions of the Bengal Tenancy Act or of the Transfer of Property Act. Such a tenancy is not transferable except by usage or custom. [p. 168, col. 1.]

Where there has been an implied surrender of such tenancy and the former tenant has abandoned the land the landlord is entitled to take direct possession of it, [*ibid.*]

Appeal against the decree of the Subordinate Judge, Third Court, Tipperah, dated the 20th of March, 1924, affirming that of the Munsif, Second Court at Brahmanberi, dated the 29th of March, 1923.

Babu *Priya Nath Dutta*, for Babu *Birendra Kumar Dey*, for the Appellant.

Mr. *S. B. Dutta* and Babu *Sourindra Mohan Sen*, for the Respondents.

JUDGMENT.

Duval, J.—In this case the plaintiffs sued to recover possession of a certain piece of *bhiti* land. Their case was that they had purchased the *nishkar* right in the same and that one Behari and his father before him held the *bhiti* land in suit as a tenant-at-will under them. In 1918 Behari left the place and transferred his so-called interest in the land to the other defendants. The defendants at first denied the plaintiffs' title but that denial was subsequently given up. But his main case was that Behari never abandoned the tenancy but had only given it to the present appellants in usufructuary mortgage and so the plaintiffs cannot get *khas* possession. The Munsif, found that the so-called usufructuary mortgage was an out-and-out sale and that though, no doubt, Behari was not an agriculturist he held the land with no power of transfer and so decreed the suit. This judgment was confirmed by the learned Subordinate Judge.

Three points have been taken before us. Firstly, it is urged that as both the Courts have found that the land was not agricultural but homestead land the Bengal Tenancy Act cannot apply and no relief can be obtained on abandonment. Secondly, it is urged that if the Transfer of Property Act applies the plaintiff cannot challenge the transfer. Thirdly, it is urged that the deed is not a *kobala* or an out-and-out sale but only a usufructuary mortgage. As to the third point we may say at once that we have read the deed and considered the evidence of facts which have arisen and it is clear that Behari had abandoned the land and made it over to the present appellants. There is, therefore, in our opinion, no point in this contention.

The other two questions may be taken together. It is admitted that the land is homestead land only. Behari was a mason and there is nothing to show that his predecessors were agriculturists either. He was certainly not an agriculturist and he had gone to live elsewhere. The tenancy had been in existence, it would appear, long before the passing of the Transfer of Property Act or the Bengal Tenancy Act. There is no evidence to show that such holdings as these which were purely of the nature of village service tenures are transferable by custom. As to the application of the Bengal Tenancy Act it may be that it does not by itself apply. But as to the Transfer of Property Act it appears to us clear that it also does not apply. The proviso to s. 108 (*j*) expressly excludes non-transferable homestead and further this tenancy with its incidents came into existence before the passing of that Act. Reference must, therefore, be made to the authorities and in

this connection, I will refer, first to the case of *Hanuman Prasad Singh* v. *Deo Charan Singh* (1) where it was held that previous to the passing of the Transfer of Property Act tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage and that case further laid down that where there had been an implied surrender of the land and the former tenant had abandoned the land the landlord was entitled to take direct possession of it. The other case to which I am referred is the case of *Ananda Mohan Sah* v. *Gobinda Chandra Ray Choudhury* (2) which again says that such holdings as these are not transferable either absolutely or by way of sub-lease (and so by a usufructuary mortgage).

In this view I must hold that the appellant has no title to remain on the land and that the appeal must stand dismissed with costs.

Mitter, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 7 C. L. J. 309.
(2) 33 Ind. Cas. 565; 20 C. W. N. 322.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1779 OF 1926.
January 11, 1927.
Present :—Mr. Justice Addison.
FATTEH—DEFENDANT—APPELLANT
versus
NABI BAKHSH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 15—Sale by female—Agnate of husband, whether entitled to pre-empt—Plaintiff's failure to establish case set up in trial Court—Appeal—New case, whether can be made.

The Explanation to s. 15 of the Punjab Pre-emption Act applies only in the case of a sale by a female of land to which she has succeeded on a life-tenure through her husband, son, brother or father. [p. 169, col. 1.]

A female who was the absolute owner of certain land sold such land and an agnate of her husband instituted a suit to pre-empt the sale. The trial Court dismissed the suit on the ground that the only evidence produced by the plaintiff was that he was an agnate of the vendor's husband and that that did not prove that he was an heir of the vendor. On appeal the District Judge agreed with this finding of the trial Court but as it was contended before him, that the parties who were Muhammadan *Khojas* followed Hindu Law in matters of succession and that, therefore, the heirs of the vendor's husband were her heirs, he accepted the appeal and remanded the suit under O. XLI, r. 23 for re-decision on the merits after giving the plaintiff a further opportunity to establish the contention raised on his behalf in appeal:

Held, (1) that the plaintiff's suit had been rightly dismissed by the trial Court; [p. 169, col. 1.]

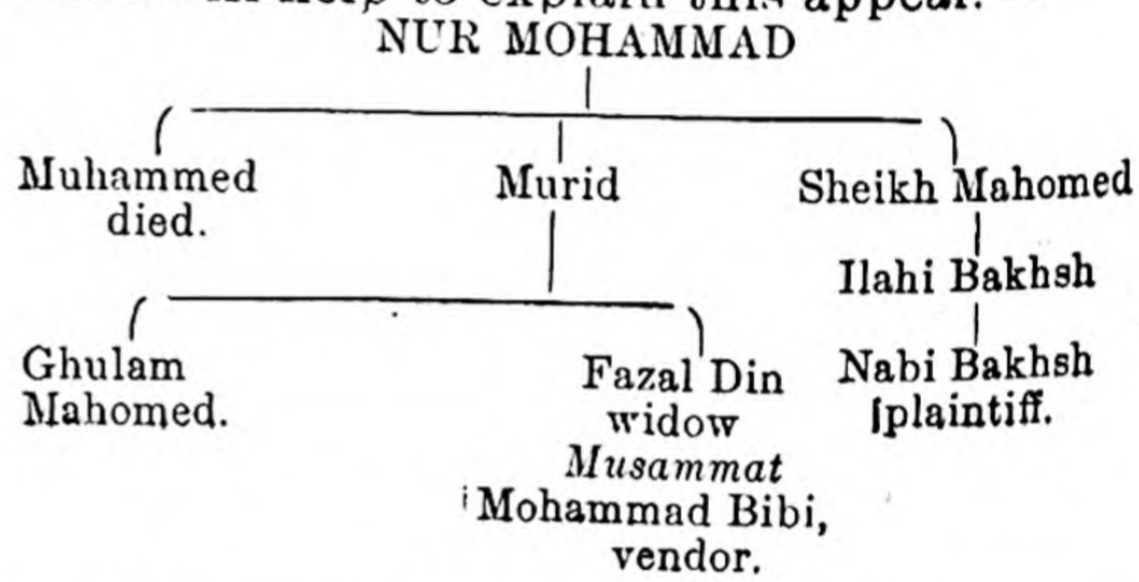
(2) that the contention that the parties followed Hindu Law in matters of succession having been raised for the first time in appeal, the District Judge should not have entertained it and that, therefore, his order of remand must be set aside and the suit must be dismissed. [*ibid.*]

Second appeal from the decree of the District Judge, Campbellpur, dated the 10th April, 1926, reversing that of the Senior Sub-Judge, Campbellpur, dated the 25th February, 1926.

Mr. *Shamair Chand*, for the Appellant.

Mr. *Nanak Chand*, for the Plaintiff-Respondent.

JUDGMENT.—The following pedigree-table will help to explain this appeal:—



Musammat Mohammad Bibi who appears to have minor daughters alive many years ago was given land in full ownership in lieu of her dower by her father-in-law, Murid. She sold this property to three different persons, and the plaintiff who is an agnate of her husband, instituted three suits for possession of the land sold by means of pre-emption. The trial Court dismissed all three suits on the ground that the only evidence produced by the plaintiff was that he was an agnate of the widow's husband and that that did not prove that he was an heir of the widow. On appeal it was admitted before the District Judge that the plaintiff was not an agnate of the vendor though he was of her deceased husband. The District Judge also stated in his judgment that no evidence was adduced by the plaintiff to prove that he was the heir of the vendor except that the pedigree-table given above was established. On that finding clearly the District Judge should have dismissed the appeals, but as Counsel for the appellant contended before him that *Khojas* followed Hindu Law in matters of succession and that, therefore, the heirs of the vendor's deceased husband were her heirs he accepted the appeals and remanded the suits under O. XLI, r. 23, Code of Civil Procedure, for re-decision on the merits after

giving the plaintiff a further opportunity to establish this. Against this decision, these three second appeals have been preferred here. The plaintiff stated in his plaint that he was an agnate and heir of the vendor and also a member of the *Khoja* tribe, whereas the vendees were not. It was on these grounds that he claimed pre-emption. The fact that he was an agnate and heir of the vendor was denied. The issue framed was whether the plaintiff had a superior right to pre-emption to that of the vendees. All that plaintiff did was to prove that he was an agnate of the widow's husband. As the widow held the land in her own right, *i.e.*, was its full owner, the fact that he was an agnate of her husband proved nothing. The Explanation to s. 15 of the Punjab Pre-emption Act applies only in the case of a sale by a female of land to which she has succeeded on a life-tenure through her husband, son, brother or father. It follows that the vendor's agnates must necessarily be the same as those of her brother or father, but the agnates of her husband are not her agnates, see page 47 of Ellis' Law of Pre-emption, 5th Edition. As the plaintiff knew what he had to prove and utterly failed to prove that he was either an agnate or an heir of the vendor the District Judge, undoubtedly, erred in accepting the appeals and sending them back so as to give the plaintiff a further opportunity to produce evidence which he had not tried in the first instance to produce. The argument put forward before the District Judge that *Khojas* followed Hindu Law in the matters of succession appears to be a mere afterthought as it is not even mentioned in the grounds of appeal before the District Judge. I have no hesitation in accepting these three appeals. I set aside the orders of the District Judge and restore the orders of the trial Court dismissing the suits with costs throughout.

Z. K. *Appeal accepted.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 315 OF 1926.

December 2, 1926.

Present:—Mr. Kinkhede, A. J. C.

Musammat KHURSHID BEGUM —DEFENDANT—APPELLANT

versus

ABDUL RASHID—PLAINTIFF—RESPONDENT.

Muhammadan Law—Husband and wife—Restitution of conjugal rights—Cruelty and ill-treatment—Suit not instituted bona fide, *effect of.*

In the case of Muhammadans a suit for restitution of conjugal rights is in the nature of a suit for specific performance, being founded on a contract of marriage, which the Muhammadan Law regards as a civil one. Even therefore, if the validity of the marriage is established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife. There must, however, be either violence of such a character as to endanger the personal health or safety of the wife or a reasonable apprehension of such violence. [p. 173, col. 2; p. 174, col. 1.]

Under the Muhammadan Law any reprehensible conduct on the part of the husband if properly proved affords good ground for refusing the assistance of the Court in a case of restitution of conjugal rights. For instance, if it is proved that the suit is not a genuine and *bona fide* one for restitution of conjugal rights but that the real object of the suit is to obtain possession of the wife's property, the suit must be dismissed. [p. 175, col. 1.]

Where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him. This principle applies equally to the case of a Hindu or a Muhammadan, whether the question arises under s. 488 of the Criminal Procedure Code or in a suit for restitution of conjugal rights. [p. 176, col. 2.]

Appeal against the decree of the District Judge, Nagpur, dated the 28th August 1926, in Civil Appeal No. 4 of 1924.

Messrs. *W. R. Puranik, S. R. Mangrulkar* and *S. T. Bhave*, for the Appellant.

Messrs. *M. B. Niyogi, A. V. Khare* and *W. B. Pendharkar*, for the Respondent.

JUDGMENT.—The facts of this case are given in sufficient detail in the first Court's judgment. The claim of the plaintiff-respondent Abdul Rashid, which was for restitution of conjugal rights against the appellant *Musammat* Khurshid Begum who is his wife, was decreed in the Courts below. The appellant, therefore, moved this Court for discharging the decree directing such restitution. This Court by its judgment, dated 8th December, 1925, remanded the case to the lower Appellate

Court for finding on the following issues :—

(1) If a decree for restitution of conjugal rights is granted to the plaintiff respondent, is there likely to be a danger to the life, health or safety of the defendant-appellant ?

(2) Is there any other reason why the Court should not exercise its discretion in favour of plaintiff?

After remand fresh pleadings were made and evidence adduced by both the parties. The learned District Judge decided both the issues in the negative and came to the conclusion that there were no good grounds for apprehending danger to the life, health or property of the appellant.

The correctness of this conclusion is challenged by the appellant in her memorandum of objections. The gist of those objections is that the lower Appellate Court misconceived the whole case and the evidence on record, allowed its mind to be influenced by extraneous irrelevant matters, and made wrong assumptions not warranted by legal evidence, and that as the lower Appellate Court has held that the respondent covets the appellant's valuable property, the only legal conclusion to be based upon the fact so found was that it would not be safe to grant him a decree for restitution of conjugal rights, as, such a decree, if granted, would not only deprive her of her valuable property, but was likely to endanger her life, health and personal safety for the rest of her life. It is also urged that as the lower Appellate Court failed to draw this legal conclusion the decree is not binding on this Court in second appeal. At the very outset I must say that the District Judge, Nagpur, who decided the case after remand has gone off his way and allowed his mind to be influenced by evidence and circumstances which had little or no bearing on the case, and belittled the importance of the plaintiff's conduct antecedent to the suit towards the appellant. He has failed to view the case in its right perspective, and consequently it has not received that attention at his hands with reference to the Muhammadan Law applicable to the parties, which it deserved: consequently his decision which is based more on conjecture than on legal evidence cannot stand. A careful study of the record shows that he has not grasped the interconnection between the present litigation and the previous one relating to the property in which the appellant succeeded in securing a decree against her husband as regards her valuable property. Not only this but he has failed to give full effect to the several directions and consider the various important matters to which the learned Officiating Judicial Commissioner had specially drawn the attention of the Court of first appeal in paras. 10 and 11 of his judgment. I am, therefore, constrained to ignore his finding as to the absence of reasonable apprehension and proceed to decide the case independently of such a finding.

It is necessary to give some history of the antecedent facts and of the previous litigation in the Revenue, Criminal and Civil Courts, as they have a great bearing on the present suit. The defendant-appellant is the granddaughter of a rich *malguzar* Nizamul Haq who owned three villages of considerable value. She was born at Nagpur on 5th March, 1902, (Ex. D-13). Her father predeceased her grandfather. Her mother Arras Begum and her grandfather were not on good terms and although the former was opposed to her marriage with plaintiff, her grandfather arranged to celebrate her marriage with plaintiff on 28th September, 1913, at Sindi, as the Kazi's Register, Ex. D-11, shows. She was then a minor 11 years old and plaintiff was 17. She was an heir-apparent to a big and valuable estate, and it is said that the plaintiff's father who was a friend and *mukhtiar* of Nizamul Haq and had an eye on the estate induced defendant's grandfather to marry her to his son the plaintiff. Nizamul Haq was a man of 80 when he died on 12th February, 1915, (Ex. P-9). The defendant-appellant through her mother as next friend thereafter on the 12th April, 1915, instituted Suit No. 55 of 1915 in the Court of Munsif, Wardha, for a declaration that her marriage, if any, was invalid. That suit was dismissed on 23rd November, 1917, (Ex. P 1). The appeal which the next friend preferred against the dismissal was dismissed by the District Judge, Wardha, on 28th February, 1918, (Ex. P-2). The marriage being thus declared to be valid and to have taken place as a fact, the second appeal filed against it was bound to fail. The order of Hallifax, A. J. C, passed on 28th September, 1920, (Ex. P-3) clearly shows that the application to withdraw the suit with liberty to bring

another was unconditionally abandoned. Thus the decision that the appellant was and is the married wife of the respondent became final and binding between the parties thereto.

Sometime after Nizamul Haq's death the defendant-appellant applied for mutation of her own name against her grandfather's village called Miahagaon in Hinganghat Tahsil. The plaintiff-respondent opposed her petition, alleging that the village and other estate was given to him by the deceased as per *kararnama* dated 13th January, 1914, and the award dated 14th January, 1914, and succeeded in getting it dismissed in 1916 (Exs. R-8 and A-1). The appellant, therefore, on 9th January, 1917, through her maternal uncle instituted Civil Suit No. 3 of 1917 against him for possession of the village and mesne profits and certain moveables (Ex. P-8). She succeeded in getting a decree for possession and for mesne profits Rs. 1,903-2-3 with a declaration that the agreement and the award were void and not binding on her (Ex. 1 D-16); that decree was affirmed by this Court in First Appeal No. 52 of 1919 on 19th January, 1922, (Ex. 1 D-17). When it was put into execution on 11th February, 1922, the execution petition was signed by the appellant as ordered by the Court. A warrant for possession and a notice of arrest was ordered to be issued against the plaintiff-respondent for the hearing dated 22nd April, 1922. The latter made an application on 16th February, 1922, challenging the decree-holder's signature on the execution application as a forgery and filed an affidavit to support it. This led to the suspension of the execution of the decree pending the enquiry into the genuineness of the signature. Ultimately the objection was overruled by an order dated 27th July, 1922, (Ex. 1 D-A-10). Exhibits A-3 to A-10 are certified copies of the execution proceedings which show what falsehoods and evasions respondent resorted to, to avoid arrest, and delay the delivery of possession of the villages, etc; the case dragged on till 6th October, 1923, when it had to be struck off as fully satisfied. While this litigation was going on, the plaintiff-respondent attempted to represent to the District Magistrate, Nagpur, that the appellant was anxious to proceed to his house (*i. e*, her husband's family), but was being unlawfully detained against her will, by her maternal uncle Gulam Ahmad and his associates, an drequested him to take action under s. 552, Criminal Procedure Code, against them all. That attempt, however, failed as the District Magistrate rejected his petition by an order dated 9th September, 1921, (Ex. 1 D-5). This gava rise to Criminal Revision No. 286 of 1921. In that Criminal Revision the appellant was examined by the Deputy Registrar under the orders of this Court on 4th March, 1922, (Ex. P-4-1-D-4) wherein she distinctly stated that she was not at all willing to go to the respondent and declared that in no case shall she go to him. The application for revision was then rejected by Hallifax, A. J. C., by an order dated 10th March, 1922, (Ex. 1-D-6).

The plaintiff filed his present suit on 7th April, 1922. In para. 6 of the plaint the cause of action is put down as having arisen on 4th March, 1922, 'when in her deposition the appellant definitely declared in answer to the questions put to her in her cross-examination by the respondent's Pleader that she would not go to plaintiff even if she were sued for restitution of conjugal rights.' It will thus be seen that there was great object in raising the false plea that the signature of the appellant on the execution application in Suit No. 3 of 1917 was a forged one. He succeeded thereby in inducing the Court to suspend, with immediate effect from 16th January, 1922, the execution of that decree, and the Court ordered the warrant to be re-called until the point was decided. The Court called evidence on this point fixing the case for 22nd April, 1922, (Ex. A-2). Having thus got the executing Court to suspend the execution of its decree, he utilised the opportunity to his best advantage by instituting this suit for restitution of conjugal rights on 7th April, 1922. This move on the part of the plaintiff respondent furnishes the real clue for the motive which actuated him to institute the present suit and throws great suspicion on the *bona fides* of this claim. The District Judge does not appear to have appreciated this aspect of the case, although this Court had clearly directed the consideration of the *bona fides* of the claim as the last sentence of para. 11 of the judgment clearly shows.

This was not enough. His conduct during the trial of this suit was, not only not straight-forward or *bona fide*, but positively unscrupulous and also such as to disclose utter disregard for truth or for consequences of perjury. He was prepared to swear any

false affidavits to suit his purpose whenever there was any prospect of his thereby scoring some point against his adversary and practising any tricks to hoodwink the Judge and his opponents. It betrayed, to speak in the mildest of terms, that he possesses a mentality peculiarly adopted to twisting facts to serve his own ends.

On the 10th of April, 1922, he swears an affidavit to support an application which he moved on 11th April, 1922, for attachment before judgment of the appellant's valuable villages said to be worth Rs. 50,000 on the ground that she was going to alienate them with a view to defeat his decree. But the Judge was shrewd enough to see through it, and ordered attachment of only 2 houses (*vide* order-sheet dated 11th April, 1922). Secondly, he described her in para. 5 of his plaint as major and aged 19 and in a position to give restitution of conjugal rights. In spite of the fact that she had actually authorised the late Mr. D. P. Tiwari, Pleader, to appear for her, and that gentleman had put in appearance for her on 15th July, 1922, and fearless of contradictions or of their dire consequences, he dexterously moved the Court by an application supported by an affidavit sworn on 27th July, 1922, to permit him to describe her as minor aged 16 and proposed his own mother's brother Abdul Jabbar son of Jamalluddin (P. W. No. 3) as her guardian *ad litem*. This Abdul Jabbar is described as being a distant relative of defendant No. 1. Though the age given in the plaint was consistent with his own assertion about her age in his petition dated 27th April, 1920, (Ex. D-12) to this Court, and the admission which his father made in his application to the Municipal Committee, Nagpur for a copy of birth Register (Ex. D-14), and the admission he himself made through his Pleader, Mr. Gokhale, on 28th June, 1921, in First Appeal No. 52 of 1919 (Ex. D-15) and got the name of her next friend Abdul Sattar removed from the memorandum of appeal, he had the audacity to swear an affidavit to the contrary and even go into the witness-box to support it as P. W. No. 7. A mere perusal of his deposition dated 9th June, 1923, would convince anybody that the certificate which the Judge who decided the question of age by his order dated 30th June, 1923, has given him of being an unreliable witness is fully justified. In all probability his dodge was to get his own mother's brother Abdul Jabbar appointed as guardian *ad litem* for her by tendering false evidence, and easily obtain a decree for restitution against her, and thus shut her out from contesting the suit. Thus the amendment of the plaint wherein he was allowed to describe her as minor for purposes of the enquiry into his allegation of minority, had to be deleted and the former description of her as major restored.

During this time and the subsequent months he as well as his father who stood surety for him in the execution case pending before the Wardha Court, evaded the several warrants for his arrest which were being issued against him and his surety; (Ex. A-8) which is a certified copy of order-sheets in the execution proceedings shows that on 17th February, 1923, they applied for extension of time till end of May and urged that he had filed the present suit for restitution of conjugal rights against her. The Court refused to grant extension and observed that the execution cannot be kept pending on this account. This clearly shows that the underlying idea of filing the present suit was to thwart the execution of the decree in Suit No. 3 of 1917 against the present plaintiff.

The defendant's objection to the jurisdiction of the Nagpur Court to try her case having been disallowed by the Court by an order dated 29th September, 1923, she was asked to file her written statement on the merits, which she did on 22nd October, 1923. Her defence was that she was not the married wife of plaintiff, that she was not bound by the adverse decision in Suit No. 55 of 1915, and that it did not operate as *res judicata* in this case. She further pleaded in para. 4 that plaintiff was a man of no property and was entirely dependent for his maintenance on his father, that plaintiff and his father and she herself were not on good terms, and that owing to the litigation it was impossible for the parties to live together as husband and wife. She asserted that she was not willing to accept the marriage even if it be held to have taken place. In reply to these allegations the plaintiff in para. 4 of his reply dated 29th October, 1923, denied the defendant's assertions and in spite of the defendant's point blank refusal dated 4th March, 1922, to go to live with him as his wife as per Ex. P-4-1 D-4, and evidently falsely misrepresenting facts he stated as follows:

"It is also denied that she, in fact, refuses to accept the marriage. She is personally quite willing to abide by and fulfil her marriage contract. It is only Abdul Sattar who is putting forth these pleas on her behalf." This allegation, however, remains unproved.

The issues framed in the case mainly referred to the question of the marriage and its binding character by reason of the former decision. No issues were framed with regard to the alternative questions raised in para. No. 4 of her written statement.

The first Court held that the previous decision operated as *res judicata* and thought that there was absolutely no case left for defendant No. 1 for resisting the plaintiff's claim or restitution of conjugal rights, and, therefore, decreed the claim. The District Judge, Nagpur, to whom she appealed for redress, upheld the decision as to *res judicata* and overruled the contention that the Court should have exercised its discretion in refusing to pass a decree for restitution of conjugal rights in the circumstances of the case, on the supposition that it had no foundation in the pleadings. The appellant, therefore, appealed to this Court on two grounds. The learned Officiating Judicial Commissioner held in his remanding judgment with reference to the first point that the decision in Suit No. 55 of 1915 operated as *res judicata* on the factum and validity of the marriage, between the parties, but with regard to the second point, thought the case was not properly tried, and, therefore, sent down the two issues set forth in para. No. 1 above.

The necessity for sending down these issues and giving the directions which the learned Officiating Judicial Commissioner gave, and the points to which the District Judge's special attention was directed, can be best understood when read in his own words:—

"(10) Although the appeal so far fails on the question of *res judicata*, it seems to me that both the lower Courts have wholly failed to give due consideration to another aspect of this case. It has been strongly urged before me that the relief claimed by the plaintiff-respondent was a discretionary one which it was open to the Court to refuse even though the validity of the marriage was established. The soundness of this proposition cannot be questioned. In the case of Muhammadans a suit for restitution of conjugal rights is in the nature of a suit for specific performance, being founded on a contract of marriage, which the Muhammadan Law regards as a civil one. Even, therefore, if the validity of the marriage be established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife: *cf.*, *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begum* (1). In *Hamid Husain* v. *Kubra Begam* (2) Piggot and Walsh, JJ., confirmed the dismissal of such a suit by the lower Court and, in arriving at this decision, one of the consideration taken into account was that the real reason for the bringing of the suit by the plaintiff was his desire to obtain possession of the defendant's property."

"(11) It has been suggested, however, on behalf of the respondent that no specific plea was taken on this issue by defendant No. 1. This is, however, incorrect. In para. 4 (*h*) of the defendant No. 1's written statement, dated 22nd October, 1923, the following passage occurs:—

'Plaintiff and plaintiff's father and defendant are not also on good terms. There was much litigation between plaintiff and defendant and one execution case of the defendant is even now pending against the plaintiff, and so even if the alleged marriage be held proved and binding on the defendant, still it is impossible for the parties, *i.e.*, plaintiff and defendant No. 1, to live together as husband and wife.'

"If this amounts to anything at all, it necessarily raised a matter which the lower Courts were bound fully to consider before granting the relief they did. As this matter will have to be the subject of enquiry by the Courts below, it seems to me undesirable to go into details at present, but I may say that there is ample matter on the record to show that the plaintiff has been on the worst of terms with the defendant and her relations for years back. There was a struggle for possession of the moveable property and valuable immoveable property, and apparently in execution proceedings even a warrant of arrest had issued against the plaintiff. All these

(1) 11 M. I. A. 551; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.
(2) 44 Ind. Das. 728; 40 A. 332; 16 A. L. J. 132.

matters required full consideration, before the Court in the exercise of its discretion, should have granted the decree it did. It will have to be carefully considered whether, if a decree for restitution of conjugal rights is granted, there will be danger to the health, life or sefety of the appellant, and the lower Appellate Court will also have to consider whether the suit has been brought for the *bona fide* purpose of obtaining the relief claimed therein, or whether the real object of the plaintiff is to obtain possession of the property, which has been the bone of contention between the parties for years past."

It will thus be seen that the District Judge was bound to approach the question whether to grant or refuse a decree for restitution of conjugal rights from the point of view of the suit being in the nature of a suit for specific performance of a civil contract of marriage, as pointed out by the learned Officiating Judicial Commissioner in para. 10 of his judgment with advertence to the remarks of their Lordships of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonissa Begam* (1): *cf. Asha Bibi* v. *Kadir Ibrahim Rowther* (3). On behalf of the appellant reliance is, however, placed before me on the following passage occurring in their Lordships' judgment at pages 611 and 612* :—

"The Muhammadan Law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following:—

'There must be actual violence of such a character as to endanger personal health or safety; or there must be a reasonable apprehension of it.' 'The Court,' as Lord Stowell said, in *Evans* v *Evans* (4) 'has never been driven off this ground'."

It is pointed out that "The marriage tie amongst Muhammadans is not so indissoluble as it is amongst Christians. The Muhammadan wife.....has rights which the christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights, and either refuse its assistance to the husband altogether, or grant it only upon terms.....". It will thus be seen that not only a defence of actual violence of such a character as to endanger the wife's health and safety or to render it unsafe for the wife to return to her husband's domain but also of "*a reasonable apprehension of it*" would among them constitute a valid defence to a suit for restitution of conjugal rights: *Abdul Kadir* v. *Salima* (5) and *Dular Koer* v. *Dwarka Nath Misser* (6).

In cases arising under s. 488, Criminal Procedure Code, cruelty falling short of physical violence but such as to jeopardise health or sanity would be sufficient cruelty to justify a refusal on the wife's part to live with her husband, and yet to get maintenance from him. A husband may by his misconduct disentitle himself to a decree for restitution of conjugal rights: *Husaini Begam* v. *Muhammad Rustam Ali Khan* (7). In *Khurshedi Begam* v. *Khurshed Ali* (8) which was a case of a husband who was an impecunious, selfish and unscrupulous young man who cared more for his wife's property than for her, the High Court set aside the decree for restitution of conjugal rights imposing conditions on the husband coming over to her father's house, as they thought that the wife's personal safety could not be safeguarded by such conditions. They did not think it at all safe to leave the young wife to the tender mercies of an ill-tempered, unscrupulous and unkind husband who had little or no regard for his wife. In *Hamid Husain* v. *Kubra Begam* (2) a decree for restitution of conjugal rights was refused to the plaintiff (husband) although it was found that there was no very satisfactory proof of actual physical cruelty, but the parties were on the worst possible terms and the reasonable presumption was that the suit was brought for the purpose of getting possession of the defendant's property rather than to have her to live with him. The Court was of opinion that by a return to her husband's custody the defendant's health and safety would be endangered. In *A* (Wife) v. *B* (Husband) (9) it was pointed out that "By marriage her husband acquires no interest whatever in his wife's property. In short, the husband and wife are in the eyes of the Mussulman Law

(3) 3 Ind. Cas. 730; 33 M. 22 at p. 25; 6 M. L. T. 295; 20 M. L. J. 1.

(4) (1790) 1 Hag. Con. 37 at p. 39; 161 E. R. 466.

* Pages of 11 M. I. A.—[*Ed.*]

(5) 8 A. 149; A. W. N. (1886) 53; 4 Ind. Dec. (N. S.) 1119.

(6) 34 C. 971.

(7) 29 A. 222; 4 A. L. J. 60; A. W. N. (1907) 27.

(8) 25 Ind. Cas. 213; 12 A. L. J. 1065.

(9) 21 B. 77 at p. 84; 11 Ind. Dec. (N. S.) 54.

perfectly distinct and independent—each being entitled to the protection of the law against the other—so far as his or her rights of property are concerned, as if they were perfect strangers." The result is that if a husband's real object in suing for restitution of conjugal rights is to covet his wife's property, is a Court of Justice to encourage a covetous husband by subjecting his wife's person to his full and absolute control and forcing her to go under his domain both physically and mentally? Any reprehensible conduct on the husband's part if properly proved affords good ground for refusing to him the assistance of the Court. There is, as shown above, and as found by the District Judge, ample material to justify the conclusion that here, the present suit is not a *bona fide* suit. The wife has not seen his face in her life and it is very doubtful whether he had occasion to see her face after her marriage during all these years. His unbecoming vanquishment in the matter of identification of his wife in the proceedings before the executing Court, and the unconditional withdrawal from the hearing at which the appellant was forced to come out of her seclusion to give evidence in support of the genuineness of her signature on the execution application so amply borne out by order dated 27th July, 1922, (Ex. A-10), clearly makes out the inner man and his innate tricky nature. It is not a genuine suit for the restitution of conjugal rights, but the real object is to obtain possession of the defendant's property and to molest her as soon as she goes under his control, and take revenge on her for her past refusal to associate with him. This must necessarily involve great danger to her life, health and safety and will surely affect her mentally also.

Apart from this aspect of the case, there is a very strong circumstance the significance of which does not seem to have been realised at all by anybody in the Courts below, although, the plaintiff himself had placed that material on record. One Dr. Abdul Rahman of Hinganghat was examined as R. W. No. 1 after remand to prove that he treated the appellant as she suffered from hysteria on 24th November, 1925. The object of this evidence was, in the words of the Doctor himself, to show that "A woman above puberty recovers from hysteria when she gets a husband." This was meant to convey the idea that the appellant's mental condition was affected because of her abstention from cohabitation with her husband. In the cross-examination the Doctor has admitted that he personally examined her and got information from the appellant direct. He also gave it as his opinion that 'A strong hatred against a particular man may cause hysteria.' Here who else but her husband would be the person towards whom she would entertain this strong hatred. Her deposition recorded by the late Khan Sahib Mohammad Hadi, Deputy Registrar (Ex. P-4) and its translation (Ex. A-D-4) clearly bears out the height of hatred, abhorrence or mental repugnance, which the appellant genuinely felt and feels towards him. In fact his attitude towards her has never been of a nature which would generate in her mind any feelings of love or affection towards him. On the contrary, everything had contributed towards widening the gulf of disaffection and positive dislike between them, and thus caused such an estrangement of feelings that it can safely be inferred that there could be no reasonable prospect, either in the near or remote future, of a reconciliation between them. The appellant's temperament has been so much affected by this that she has actually developed hysteria, and has thus disabled herself mentally from looking upon the plaintiff as a person who could give her any peace of mind or harmony of a marital life. To expect any conjugal bliss between such a married couple would be an absolute impossibility.

There is thus an invincible repugnance for the husband, not due to any obstinacy or caprice, resulting in a paralysis of the will, such as is consistent with and could reasonably he attributed only to the incompatibility of temperament of the couple, brought about by a long standing enmity, contempt and hatred which the plaintiff's own conduct and covetousness has bred in her mind, ever since he successfully defeated her claim for mutation of her name against her grandfather's valuable villages in 1915-16 (Exs. R-8 and A-1). If he had then possessed the heart of a kind and affectionate husband, and shown any kind and affectionate regard for her feelings (especially as she must then presumably have either attained or been nearing her age of puberty being then about 14 or 15 years old and, therefore, in a position to make her own intelligent preference), it would have been a very wise step on his part to

have at once attracted her heart and won over her affections, by abandoning all idea of setting up the alleged gift or agreement and the collusive and fraudulent award of interested persons like Abdul Jabbar (P. W. No. 3) and several others. That kind of attitude would have at once enlisted her sympathies, and the disastrous litigation in Suit No. 55 of 1915 and also Suit No. 3 of 1917 would not have been rendered necessary in order to unravel the grossest fraud practised on her grandfather, and it would not have even seen the light of day. Her invincible repugnance for her husband's society became so hardened by the plaintiff's subsequent unbending attitude that when she actually became major she thought that she had lawful grounds to withdraw herself from the society of her husband and refuse to have any concern with him, and thus determine for ever her own election to disavow the marriage tie, and affirm that she did not want to accept the *improper* marriage which she chose to characterise as having been 'fraudulently', 'wickedly' or even 'carelessly' contracted during her infancy by her grandfather to her 'manifest disadvantage': *cf.* Ameer Ali's Muhammadan Law, Vol. II, 4th Edition, pages 412-13. But unfortunately, she being caught in the clutches of the fiction of the law of *res judicata* is not allowed to prove in this suit that her grandfather made a sacrifice of her without any regard to her future welfare, to serve his own selfish purpose to which the plaintiff's father pandered by promising to get him married to some young wife in his extreme old age; a fact which she could establish in Suit No. 3 of 1917 as ably pointed out in this Court's decision in First Appeal No. 52 of 1919 (Ex. 1-D-17) as circumstance in proving the fraud practised in bringing about the award.

One has only to read the judgment of Suit No. 3 of 1917 and First Appeal No. 52 of 1919 to judge the full depth of delinquency to which plaintiff and his supporters had gone to deprive the appellant of her valuable estate which according to the plaintiff's own deposition as R. W. No. 7 is worth 3 or 4 lakhs. This covetousness ruled supreme and deadened all manner of finer sentiments of conjugal love and affection for this wife in the plaintiff's mind and naturally led him to neglect performance of the obligation which the marriage contract imposed upon him for the benefit of his wife under the Muhammadan Law. She must be deemed to have attained puberty in 1916 or at the most in March 1917. It was not till sometime towards the middle of 1921 when he made a false application under s. 552, Criminal Procedure Code to the Deputy Commissioner, Nagpur, or for the matter of that till 7th April, 1922, *i. e.* after 5 years' hard struggle to snatch away and swallow her estate, that he filed this suit and came forward with a show of affection for her and demanded the assistance of the Court for obtaining a decree for restitution of conjugal rights as against her. She is at present 25 years old as held by the District Judge.

In view of this long neglect on plaintiff's part she is legally entitled to refuse to go to him and is within her legal rights in denying the plaintiff's claim to restitution of conjugal rights as against her. The Lahore High Court in *Nawab Bibi* v. *Allah Ditta* (10) disallowed the husband's claim in second appeal on this ground. In a case reported in *Aishan* v. *Sher Muhammad* (11) of the same High Court the subsequent offer to take her back made by a husband who had turned out his wife was treated as not a *bona fide* offer for purposes of s. 448, Criminal Procedure Code.

Where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him: *cf.*, *Nihal Kaur* v. *Bhagwan Singh* (12). This principle ought to apply equally to the case of a Hindu or a Muhammadan whether the question arises under s. 488, Criminal Procedure Code, or in a suit for restitution of conjugal rights. In *Babu Ram* v. *Kokla* (13) the husband had turned his wife out of doors many years ago because he suspected her chastity. The wife went to live with her uncle who supported her. Later on she applied for and obtained an order

(10) 73 Ind. Cas. 896; 5 L. L. J. 505; A. I. R. 1924 Lah. 188.

(11) 59 Ind. Cas. 853; 22 Cr. L. J. 149.

(12) 24 Ind. Cas. 962; 26 P. W. R. 1914 Cr.; 170 P. L. R. 1914; 15 Cr. L. J. 554.

(13) 79 Ind. Cas. 634; 46 A. 210; 22 A. L. J. 68; 10 O. & A. L. R. 204; A. I. R. 1924 All. 291; L. R. 5 A. 43 Civ.

for maintenance under s. 488, Criminal Procedure Code, against her husband. During these proceedings, the husband still refused to take his wife back stating at the time that he suspected her chastity. When, however, the wife began to execute her decree for maintenance, the husband proceeded to file a suit for restitution of conjugal rights; it was held that in the above circumstance the inference was legitimate that the defendant would have a reasonable apprehension of bodily injury if she returned to her husband, and that the Court below was right in refusing the plaintiff a decree.

The plaintiff as R. W. No. 7 has said in his cross-examination that he did not produce the documentary evidence which he possessed in order to show the appellant's willingness to come to him. In re-examination he explained that "The documentary evidence are letters. They are not produced as they would endanger her life." This clearly shows that the plaintiff has in his possession and power means which will enable him to make her position as wife, to say the least, uncomfortable when she goes to his household, (unless he proves true to his words) and actually 'endanger her life.'

If under this state of the law and the state of extremely embittered feelings, the defendant were ordered to place herself in her husband's hands and go and live with him as husband and wife, there is every reasonable apprehension of her personal health and safety being jeopardized, and even her life being endangered by some ill-treatment or other attempts on plaintiff's part; even if those chances be considered totally eliminated in view of the apparent or superficial professions of good faith with which he seeks to press his present claim. There is no guarantee of the plaintiff's refraining from putting such undue pressure on her, in course of time, as would induce her to part with the property which she wrested away from his hands; to say the least, for aught we know, the very seclusion or the strange and new environments in which she would be placed in her husband's household, would, in all probability, hold out a very strong incentive to the appellant to bring about her own self effacement in order to escape the dire consequences of obeying life long the decree of the Civil Court for restitution of conjugal rights. There is, at any rate, a certainty of such a decree creating endless troubles and making the life of the appellant quite unbearable.

Under these circumstances I hold that the only legitimate conclusion which was deducible on the facts held proved by the Court of Appeal was that there is a great imminent danger to the health, life or safety of the appellant, besides the positive deprivation of her valuable estate of which she admittedly stood in constant dread, at the hands of the plaintiff-respondent. As the lower Appellate Court failed to draw this legitimate inference from plaintiff-respondent's conduct, I am not prepared to uphold the decree appealed against.

I, therefore, allow the appeal and setting aside the decree of the Courts below dismiss the plaintiff's suit. Costs of both parties in all the three Courts inclusive of the costs incurred after remand shall be borne by plaintiff. I fix Pleader's fee at Rs 50 for each Court.

Under the provisions of s. 35 (3), Civil Procedure Code, I direct that the defendant shall get interest at 6 per cent. per annum on the amount of her costs in three Courts from the date of the decision of each Court until satisfaction, and recover it as part of her costs from the plaintiff-respondent.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 66 OF 1925.

July 14, 1926.

Present:—Justice Sir William Ewart Greaves, KT., and Mr. Justice Mukerji.

RANMAYA GAORANGINI *alias* RASIDUNNISSA—PETITIONER—APPELLANT

versus

BETTY MAHBERT AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Succession Act (X of 1865), ss. 234, 250—Letters of Administration—Omission to cite necessary parties—Revocation—Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Minor defendant—Guardian ad litem, *appointment of—Order, absence of, effect of—Guardian appearing and acting on behalf of minor, effect of.*

Where a person who is named the guardian *ad litem* of a minor appears and takes part in the proceedings on behalf of the minor and properly looks after the interests of the minor, the minor must be held to have

been effectively represented in the proceedings by such guardian, despite the absence of a formal order appointing such person as the guardian *ad litem* of the minor. [p. 179, col 1.]

There is a distinction between cases of Wills and cases of intestacy in the matter of citations, for, in the former class of cases the proof of a Will in a majority of cases, if not in all, acts prejudicially to the legitimate rights of those who would inherit and be entitled to the properties in the absence of a Will, and omission to cite them is likely to affect such rights of theirs in their absence, while in the latter class of cases such omission only affects their preferential rights to administer the estate or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. Therefore, in the case of a grant of Letters of Administration, the Letters will not be necessarily revoked because there was an omission to issue citations to certain parties who were interested, particularly if these latter have not applied for revocation. [p. 180, cols. 1 & 2.]

Citations should always be issued to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased. [p. 180, col. 2.]

Appeal against the decree of the District Judge, Darjeeling, dated the 5th of January, 1925.

Mr. *Sambhu N. Banerji*, Babus *Bhupendra Nath Das* and *Shyama Das Bhattacharjee*, for the Appellant.

Mr. *C. C. Biswas*, Babus *Prafulla Chandra Chakravarti* and *Krishna Lal Banerji*, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal has been preferred from an order refusing to revoke a grant of Letters of Administration.

One Mrs. Benjamin, a native Christian, died leaving three sisters, three nieces by a predeceased sister, and two nephews and three nieces by a predeceased brother. Betty Mahbert who is one of the daughters of the predeceased sister obtained Letters of Administration from the District Judge on the 3rd January, 1924, and she is the principal respondent in this appeal. Ranmaya Gaorangini *alias* Koili *alias* Rasidunnissa who is a sister of the said Mrs. Banjamin, on the 23rd July, 1924, applied for revocation of the grant and her application being refused has preferred this appeal.

The application for revocation filed on the 23rd July, 1924, was based upon various grounds of which two only have been pressed in this appeal. The first of these grounds is to the effect that there were two minor sons of Rajman, the deceased brother of Mrs. Benjamin, named Dhan Bahadur and Harka Bahadur—living under the guardianship of their mother, Hiramaya, but no guardian *ad litem* had been appointed in respect of the said minors and the citation on Hiramaya that was issued by the Court was not sufficient as she was not a properly constituted guardian competent to represent the said minors. The second ground asserts that Betty Mahbert in her affidavit of assets had fraudulently undervalued them by omitting to mention a sum of Rs. 541 which stood to the credit of the deceased in the Forest Department and by not showing the valuation of a certain *jote* which belonged to the deceased. To these a third ground has been added, drawn from a petition filed on the 16th September, 1924, by the appellant when the revocation proceedings were pending in the Court below by which she amended or supplemented her original petition for revocation. This ground is to the effect that there were three daughters of Rajman, named Mankala, Kamalmaya and Sibay, and that the grant had been made without issuing any citation on them. A fourth ground has also been urged complaining of the propriety of the order passed by the District Judge by which he rejected the appellant's application for adjournment on the day that the case was heard and disposed of.

I shall deal with this ground first. The application for revocation came on for hearing on the 5th January, 1925. The appellant was absent on that day and on her behalf was filed a petition unsupported by any affidavit in which it was stated that a son of hers had died a few days before and she herself was ill. I am unable to say that the Judge was wrong in refusing to adjourn the case on a petition of this sort. Moreover, it is said here on behalf of the respondent Betty Mahbert that she had proved in some proceedings that were before this Court in connection with the case that the statements in the aforesaid petition were not true, the appellant's son having, in fact, died long before and that she herself was not ill as was alleged. This argument of the respondent has not been controverted in reply. This ground, therefore, has no substance.

As regards the first ground what appears upon the record is this. In a petition filed on behalf of Betty Mahbert on the 1st September, 1924, it was stated that the infants Dhan Bahadur and Harka Bahadur were away in Burma and their mother and next

friend Hiramaya Goarangini was living at Gayabari. The notices addressed to Hiramaya Garangini as mother and next friend of the said infants were sent to her. It is complained that only a postcard notice was sent, but it matters little that it was so, for, in fact, she appeared in the proceedings and as such guardian. She appears to have taken part in the proceedings and put in a petition stating the shares which her sons would, according to her, be entitled to. She does not appear to have done anything injurious to the interest of her sons and nothing has been shown to us which may suggest that their interest was not properly looked after. It must under the circumstances be held, despite the absence of a formal order appointing her guardian *ad litem* on behalf of the infants, that the infants were effectively represented by her in the proceedings. [*Walian* v. *Banke Behari Pershad Singh* (1)] This ground accordingly must fail.

As regards the second ground it is sufficient to state that it was completely traversed in the objection that was filed on behalf of Betty Mahbert on the 16th September, 1924, and there is nothing on the record to substantiate the appellant's assertion as to under-valuation.

The third ground now remains to be considered. So far as this ground is concerned it is the brevity of the learned Judge's order which has caused some difficulty. He has disposed of it in these words :—" Heard Pleader. The only reason which can be considered 'just cause' is the failure to issue citations to the alleged sisters of the two minors. That objection was taken in the case and it is not open to the same parties to raise the objection. If those persons have any grievance, it is for them to appear and ask the Court for revocation." The respondent seeks to support the order by contending that the appellants had taken this objection in the proceedings for the grant, but notwithstanding that no issue had been raised therein relating to this objection and that she cannot be heard in support of this objection again as a ground for revocation of the grant. I am not prepared to attach much importance to this argument of the respondent. The appellant, no doubt, had brought this matter to the notice of the Court, but if in spite of that the daughters were not cited and Letters were granted, there is no rule of *res judicata* nor any similar rule that I know of that would preclude the appellant from putting forward this omission as a ground for revoking the grant. The respondent next urges that the fact that no issue was raised on the point and there is no discussion of it in the order granting the Letters suggests that this objection was not seriously pressed. There again I must differ, for I do not find any materials on which it may be definitely said that the objection was taken otherwise than *bona fide*. The respondent further urges that the said daughters were made parties to the revocation proceedings and to the present appeal and they have not appeared till now and that this fact suggests that they are not interested in questioning the validity of the grant. That, undoubtedly, is so, but still the question has to be considered as to whether omission to cite necessary parties necessarily invalidates a grant and calls for its revocation. That the daughters of Rajman were necessary parties to whom citation ought to have issued is a position which cannot be disputed and indeed had not been disputed. For the broad proposition that such an omission of itself invalidates a grant reliance has been placed on behalf of the appellant on the decision in the case of *Akhileswari Dasi* v. *Hari Charan Mirdha* (2). On behalf of the respondents it has been urged that s. 250 of the Succession Act gives a discretion to the Judge in the matter of issuing citation, and the only case where such omission amounts to a just cause for revocation under s. 234 of the Act is a case of an omission to issue a citation such as is mentioned in s. 193 or s. 199 of the Act and is compulsory, and in support of this contention reliance has been placed upon the case of *Digambar Keshav Shrotri* v. *Narayan Vithal Ashtekar* (3). This last-mentioned case, which related to a Will and was under the Probate and Administration Act, it is true, lays down a distinction between compulsory citations and discretionary citations on reference to s. 16 and s. 69 of that Act; but I doubt very much whether the learned Judges intended to

(1) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

(2) 84 Ind. Cas. 639; 40 C. L. J. 297; A. I. R. 1925 Cal. 223.

(3) 9 Ind. Cas. 354; 13 Bom. L. R. 39.

lay it down that it is only compulsory citations which would come within Ill. (*b*) to s. 50 of the Act as has been contended for before us. The judgment in that case to my mind is not inconsistent with the view that they held that both classes of citations come within the illustration, but that the question whether the grant should be revoked or not would depend upon the circumstances, that is to say, in the case of compulsory citations nothing else need be considered, while in the case of discretionary citations other considerations have to be taken into account. This precise contention which the respondent has now put forward was urged in this Court in the case of *Rebells* v. *Rebells* (4) and was not accepted as well-founded (see the judgment of Banerjee, J., in that case) and I agree with what was said by the learned Judge in his judgment in that case.

In my opinion it must be held, in the words of Ill. (*b*) to s. 234 of the Succession Act, that the grant was made without citing parties who ought to have been cited. The question then arises whether if the case comes within the Ill. (*b*) the grant must necessarily be revoked or annulled. The appellant's contention is that it must be. The case of *Akhileswari Dasi* v. *Hari Charan Mirdha* (2) and the cases of *Dwijendra Nath* v. *Golok Nath Sarma* (5), *Rebells* v. *Rebells* (4) and *Shoroshibala Debi* v. *Anandamoyee Debi* (6) and the case of *Naba Gopal Goswami* v. *Sri Gopal* (7) upon which it proceeds are all cases of Wills, and omission to take steps for the proper representation of minors concerned therein. There is, in my opinion, a broad distinction between cases of Wills and cases of intestacy in the matter of citations, for in the former cases the proof of a Will in a majority of cases, if not in all, acts prejudicially to the legitimate rights of those who would inherit or be entitled to the properties in the absence of a Will, and omission to cite them is likely to affect such rights of theirs in their absence, while in the latter cases such omission only affects their preferential right to administer or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. These considerations lead to different results in different cases. In the present case in view of the fact that the daughters themselves have not yet complained of the proceedings having taken place in their absence, the omission to cite them does not, in my opinion, call for revocation of the grant. I wish to guard against suggesting in any way that the proceedings were not defective or that the District Judge exercised a sound judicial discretion in making the grant without issuing citations on the daughters. It has been repeatedly enjoined by this Court that citations should always issue to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased. This ground, however, as a ground of revocation fails in the circumstances of the case.

The appeal accordingly must be and is dismissed with costs as against the respondent No. 1, hearing-fee being assessed at 3 gold *mohurs*. The other respondents who have appeared and supported the appellant must bear their own costs.

Greaves, J.—I agree.

Z. K. *Appeal dismissed.*

(4) 2 C. W. N. 100.
(5) 28 Ind. Cas. 574; 19 C. W. N. 747; 21 C. L. J. 287.
(6) 12 C. W. N. 6.
(7) 33 Ind. Cas. 14; 23 C. L. J. 79.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 79 OF 1926.
January 5, 1927.

Present:—Sir Louis Stuart, KT., Chief Justice, and Mr. Justice Hasan.

Pandit GOKUL PRASAD PATHAK—PLAINTIFF—APPELLANT

versus

GOITRI PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Covenant to appropriate profits in lieu of interest on portion of mortgage-money and to charge interest on balance—Clog on equity of redemption—Interest, liability to pay after date fixed for redemption.

Certain property was put in the possession of a mortgagee and the mortgage-deed stated that the profits arising out of the property should be appropriated towards the payment of interest due on the mortgage-money. It was further provided by the deed that the mortgagor would pay interest at a certain rate on another sum of money which was due from him to the mortgagee and that on the expiry of a certain period the property would be redeemed

on payment of both the sums of money together with interest on the last-mentioned sum:

Held, (1) that the total of both the sums of money was to be treated as the mortgage-money and that, therefore, every part of it constituted a charge on the mortgaged property; [p. 181, col. 2.]

(2) that the agreement to pay the second sum of money together with interest thereon at the time of redemption did not amount to a clog on the equity of redemption; [*ibid.*]

(3) that interest would continue to run on the second sum of money even after the expiry of the period fixed for redemption up to the date of payment. [*ibid.*]

The general principle is that money borrowed on interest will carry interest till the date of re-payment of the principal unless the contract makes provision to the contrary. [*ibid.*]

Second appeal against the judgment and decree of the District Judge, Fyzabad, dated the 14th November, 1925, upholding that of the Subordinate Judge, Sultanpur, dated the 17th February, 1925.

Mr. *H. Husain*, for Mr. *Niamatullah*, for the Appellant.

Messrs. *Radha Krishna* and *M. Wasim*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the District Judge of Fyzabad, dated the 14th of November, 1925. The plaintiff-appellant brought the suit, out of which this appeal has arisen, for redemption of a mortgage dated the 27th of September, 1872. The deed of mortgage relating to that transaction was executed on that date by one Beni Bakhsh Singh in favour of one Janga Singh in respect of village Damanpur in the District of Sultanpur. The plaintiff is the successor-in-interest of the mortgagor, Beni Bakhsh Singh, and the defendants are the grandsons of the mortgagee, Janga Singh.

Three questions were urged at the hearing of this appeal by the learned Counsel for the appellant. They all turn on the construction of terms of the deed of mortgage of the 27th of September, 1872. It will, therefore, be convenient to state the terms of the mortgage on which the decision of the question urged in appeal depends. It appears that the mortgagor was indebted to the mortgagee in a sum of Rs. 2,300. This amount was split into two portions of Rs. 1,330 and Rs. 970. In lieu of the former amount the village of Domanpur was put into the possession of the mortgagee and the profits were to be appropriated towards the payment of interest due on that sum of money. As regards the latter amount of Rs. 970 the covenant was as follows:—970 *ki karar kin ki ek rupia saekra ke hisab se sud dei la kalam*—(As regards the sum of Rs. 970 I agree to pay interest for certain at the rate of Re. 1 per cent.). The redemption is fixed to take place at the end of 12 years on payment of both the sums of money and finally comes the covenant that in case of default the mortgage will automatically convert itself into a sale. On these terms of the mortgage the arguments in appeal are:—

(1) That the loan of the sum of Rs. 970 does not constitute a charge on the mortgaged property;

(2) that the payment of the same sum of money at the end of 12 years as a condition precedent to redemption amounts to a clog on the equity of redemption; and

(3) that the mortgagee is not entitled to interest after the expiry of 12 years.

We are of opinion, that none of the three arguments is sustainable. On the terms of the mortgage already quoted the entire sum of Rs. 2,300 becomes payable at the end of 12 years together with interest on the sum of Rs. 970 and it is in the event of default in payment of the whole of that amount that foreclosure is to follow. This being so, it follows that the entire sum of money was to be treated as mortgage-money and consequently every part of it constitutes a charge on the mortgaged property.

As regards the second argument, there is no substance in it whatsoever and indeed it was not seriously pressed. The sum of Rs. 970 was a portion of the consideration for which the mortgage was effected and the profits of the mortgaged property were not enough to cover interest accruing on that sum of money. It was, therefore, left to carry interest at the rate provided for in the document and we see no reason why the enforcement of a covenant of that nature would constitute any clog on the equity of redemption.

As regards the third argument, it would appear from the terms of the mortgage that the sum of Rs. 970 was to carry interest at the rate of 1 per cent. per mensem. We conceive that the general principle of construction is that money borrowed on interest will carry interest till the date of re-payment of the principal unless the contract makes provisions to the contrary. There is no such provision

in the mortgage under consideration. According to our interpretation of the deed of mortgage we find nothing in it which restricts the application of the general principle just now stated to the period fixed for redemption. The leading case on the subject is the decision of their Lordships of the Privy Council in the case of *Mathura Das* v. *Raja Narindar Bahadur* (1) and, though as laid down in that decision that every document must be interpreted according to its own terms, there is no doubt that the general principle is the same to which we have made reference just now. This is supported by a series of cases decided in the late Court of the Judicial Commissioner of Oudh and in the High Court at Allahabad: for instance we will refer to the case of *Najmun-nissa* v. *Raghunath* (2) and *Mahadeo Prasad* v. *Dhiraj Singh* (3).

The appeal, therefore, fails and is dismissed with costs. But we direct that in preparing the decree in the office of this Court the plaintiff will be allowed six months' time from the date of our decree to pay the money required of him for the purpose of redemption.

Z. K. *Appeal dismissed.*

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 26 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. s.) 25 (P. C.).

(2) 67 Ind. Cas. 963; 25 O. C. 36; A. I. R. 1922 Oudh 122.

(3) 77 Ind. Cas. 122; 44 A. 772; 20 A. L. J. 752; A. I. R. 1923 All. 7.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 1494 OF 1923.

June 29, 1926.

Present:—Mr. Justice Buckland.

DULICHAND SAMSUKH—PLAINTIFF

versus

DUNBAR MILLS CO., AND ANOTHER—DEFENDANTS.

Company—Articles of Association—Share certificate, loss of—Issue of new certificate—Indemnity—Discretion of Directors—Power of Court.

One of the Articles of Association of a Company provided that if any certificate of shares was worn out or was defaced, then, upon the production thereof to the Directors, they may order the same to be cancelled and may issue a new certificate in lieu thereof and if any certificate was lost or destroyed, then upon proof to the satisfaction of the Directors, or in default of proof, on such indemnity as the Directors deem adequate being given, a new certificate in lieu thereof should be given to the party entitled to such lost or destroyed certificate:

Held, that an absolute discretion was given to the Directors as to the indemnity to be furnished in the case of a lost or destroyed certificate and that the Court would not interfere with the exercise of such discretion where there was no question of the *mala fides* of the Directors. [p. 184, col. 1.]

Mr. *S. C. Chaudhary* (with him Mr. *R. C. Sen*), for the Plaintiff.

Mr. *W. W. K. Page* (with him Mr. *Ormond*), for the Defendant-Company.

Mr. *K. P. Khaitan*, for the Defendant Singhania.

JUDGMENT.—This suit has arisen out of the alleged loss of 25 shares in the Dunbar Mills, Ltd. The reliefs prayed for cannot be comprehensively stated, and I will proceed to narrate the facts.

The registered holder of the shares in question which were Nos. 2025 to 2949 inclusive, was the defendant Durga Prosad Singhania, whose name still stands on the books of the Company as the registered holder to this day. In the month of February 1920 they were sold by him to Messrs. Tezpal Makunlal. This transfer has not been proved with the exactitude with which the later transfers have been proved, but in the circumstances I do not think there can be any doubt that these shares were among those sold at or about that time by Singhania to Tezpal Makunlal according to the evidence of the witness Tezpal Jhoon Jhoonwalla.

Evidence has been called tracing the subsequent dealings in these shares. Tezpal Makunlal sold them to Jwalaprosad Shroff who in his turn sold them to Magniram Bungar. On the 28th May, 1920, the same shares came back into the hands of Jwalaprosad Shroff from Naraindas Khendenwalla, and on the same day Jwalaprosad Shroff sold them to Nemai Chand Boral. The witnesses Khasinath Chobey and Jabbermull have traced the subsequent dealings with the particular shares, and eventually on or about the 28th May, 1920, they came into the hands of the plaintiff.

This evidence which has hardly been subjected to cross examination, in my opinion, clearly establishes that the plaintiff bought the shares in question as alleged in the first paragraph of the plaint; and the question need not, therefore, be further considered, and that disposes o

the first issue submitted on behalf of the defendant Nor has it been challenged that the certificates were accompanied by a duly executed transfer deed, and, in my opinion, that also was the case and I hold accordingly.

The shares having come into the hands of the plaintiff according to his evidence, he found that the scrip was slightly damaged, and he gave orders to his man, Hetram, to take them to the sellers to have them changed for other certificates. Hetram proceeded on his way with the scrip, and since then according to the plaintiff, nothing more has been heard or seen of it. Hetram made a report to him but the report which he received from Hetram has not been admitted in evidence because Hetram is in his native village, and has not been called as a witness.

The plaintiff also says that he gave instructions for advertisements to issue as to the loss alleged, but as to this again no evidence of the advertisements has been adduced. I am at a loss to understand why no attempt has been made to produce the evidence of Hetram or the advertisements, but nevertheless such is the case.

The plaintiff thereupon approached Messrs. Kettlewell, Bullen & Co., the Managing Agents of the defendant Company, and what he desired and still desires, according to the plaint, is to have new certificates issued to him. A long story is stated in the plaint as to how the Managing Agents refused to issue to him new certificates, but this has not been proved.

The position taken up by the Company, however, is that they would be prepared to issue new certificates to the registered share-holder in accordance with Art. 16 of the Articles of Association. That could not be to the plaintiff because he is not the registered holder but it may be that the plaintiff would be entitled to have his name placed upon the register, in which case it would be for him to satisfy the defendant Company as regards the indemnity required for the purpose of obtaining new certificates.

No evidence of any facts has been given beyond the point where the shares are said to have been lost, but I am prepared to hold, on the evidence adduced, that the shares having been handed to a man in the employment of the plaintiff, and he having gone away with the shares, and the shares never having since been seen or heard of by the plaintiff, as regards the plaintiff, the certificates have been lost.

This disposes of the third issue submitted on behalf of the defendant Company, in the terms in which it is stated though having regard to the terms of Art. 16 to which I shall further refer I am not sure that it arises.

But in so holding I must not be taken to imply that the shares are irretrievably lost so that in all human probability there is no possibility whatever of any person coming forward with them and making a claim against the Company. It is necessary that I should say this as it might be contended upon Art. 16 of the Company's Articles of Association that my finding debarred the Directors from requiring the indemnity which that Article entitles them to demand in default of proof of loss to their satisfaction, and that by virtue of this judgment the plaintiff, once his name is registered, is entitled to new certificates without giving an indemnity. That would not be fair to the Company and my finding is not intended to go to that length.

It is not disputed on behalf of the Company that the plaintiff would be entitled to have his name placed upon the register once he has proved his title, and this brings me to the stage when the real matters in controversy, which have given rise to all the trouble, arise. They are embodied in the following issues submitted on behalf of the defendant Company:—

1. Was the defendant Company entitled to require from the registered holder the indemnity required in para. 8 of the written statement?

2. Is the plaintiff, upon adducing proof of loss, entitled to the issue to him of a duplicate certificate?

The last issue submitted is the usual one as to the relief to which the plaintiff is entitled.

So far as the plaintiff claims to have new certificates issued to him, he clearly, in my opinion, has no *locus standi* until he has had his name registered as the holder and, however much he might satisfy the Company as to the loss the answer to the second of the above issues must be in the negative.

The question really is as to the right of the registered holder, be it the plaintiff or be it Singhania, for the trouble has arisen as to the indemnity. What the requirements were and what the plaintiff

was prepared to do has not been proved, but I have been informed that the defendant Company required, among other guarantors, a European Bank, which the plaintiff could not or did not offer to furnish. Be that as it may, there is no need to discuss what actually was required for the whole question turns upon the point whether the Court will interfere with the discretion allowed to the Directors by Art. 16. This Article is as follows:—

16. If any certificate be worn out or defaced, then, upon production thereof to the Directors, they may order the same to be cancelled and may issue a new certificate in lieu thereof, and if any certificate be lost or destroyed, then upon proof to the satisfaction of the Directors, or in default of proof on such indemnity as the Directors deem adequate being given, a new certificate in lieu thereof shall be given to the party entitled to such lost or destroyed certificate.

The clause, in my opinion, gives an absolute discretion to the Directors as to the indemnity to be furnished with which the Court will not interfere, there being, as here, no question of *mala fides*. Various observations have been made to me as to the risk which the Company would incur on the one hand, and as to the need for a substantial guarantee on the other hand. In the view which I take I have nothing to do with such considerations. It is entirely a matter for the Directors who are given a discretion and may exact such indemnity as they deem adequate.

In this view there is no need to consider the ground upon which the various attempts to claim new certificates fell through, and indeed evidence of that would not have been relevant.

In my judgment the defendant Company is entitled to require from the registered holder such indemnity as the Directors may deem adequate.

In these circumstances it only remains to consider to what relief the plaintiff is entitled. I have already expressed my opinion on the questions of fact, and I declare that the plaintiff is the owner of ordinary shares Nos. 2025—2049 in the Dunbar Mills, Ltd., and solely and beneficially entitled thereto and to all the advantages and benefits thereof, and all dividends, privileges, bonuses, etc., declared since the day of purchase.

As regards dividends it appears that dividends which have accrued amount to Rs. 6,800 but by some arrangement or other which is not disputed this money was paid to Durga Prosad Singhania.

The plaintiff by his Counsel does not ask for any order against the Company as regards the sum already paid to Singhania.

I also hold that the plaintiff is entitled to have his name registered in the books of the Company as the holder of the said ordinary shares, and I direct rectification of the register of the Company accordingly.

The plaintiff is not entitled to an order that certificates be issued to him. Once his name has been placed on the register it will be for him to apply to the Company for new certificates which I have no doubt will be supplied if he furnishes an indemnity which the Directors deem adequate.

The question of costs required a certain amount of consideration for it would appear as though the plaintiff had obtained some measure of success in these proceedings, but I think upon analysis it is clear that he has entirely failed in regard to his real object in bringing the suit.

If one takes the first three issues as to purchase of the shares, delivery of the certificates with the deed of transfer and the loss, they are merely preliminary to the next point which is the rectification of the register.

The need for that has as far as I am aware been entirely ignored by the plaintiff throughout. His one object has been to get the new certificates. Assuming, however, that he was the proper person to apply for the new certificates, he has not according to the evidence, and there is nothing to show that he has made any effort to prove to the Directors the loss of the shares and to satisfy them. It may be that even so, had a sufficiently substantial indemnity been forthcoming the Directors would not have been too stringent in this respect. The new certificates and the indemnity, undoubtedly, have been the real question at issue throughout. As to that the plaintiff has entirely failed in this suit.

The questions of fact to which I have referred and the rectification of the register have been put in issue as the Company could hardly have been expected to admit them but at the same time it cannot be said that they have strenuously contested.

It was, however, necessary for the plaintiff to establish his case in regard to these matters before the question of the indemnity and the new certificates could be reached.

In the circumstances though he may, as I said just now, appear to have obtained some measure of success in these proceedings, nevertheless as to the real objects for which the suit was brought, he has entirely failed. In my judgment, he should pay the costs of the defendant Company.

Before I conclude I wish to refer to the brief of correspondence. A brief of correspondence was tendered in evidence, filed and marked. No letters have been referred to by either side. Learned Counsel for the defendant Company was willing that the brief of correspondence should be returned. Learned Counsel for the plaintiff was anxious that it should remain on the record. To this course no objection was taken on behalf of the defendant.

As I have directed the plaintiff to pay the costs of the defendant, there is no need to give any special directions as to this brief of correspondence, but had I ordered otherwise I should have directed that the costs of the brief of correspondence be borne by the plaintiff in any event.

Z. K. *Order accordingly.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 614 OF 1925.

June 28, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Percival

PUKHRAJ JESHRAJ MARWADI—DEFENDANT—APPELLANT

versus

JAMSETJI RUSTUM IRANI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 145, O. XXII, rr. 4, 9—Death of party—Abatement—Order setting aside abatement—Procedure—Decree passed against person not representing estate of deceased, whether binding on estate—Surety, whether liable.

Where an application is made to set aside an abatement and to bring on record the legal representatives of a deceased party to the suit, the Court, if it grants the application, should not merely make an order setting aside the abatement but should also make an express order directing that the legal representatives of the deceased party should be impleaded as parties to the suit. [p. 186, col. 1.]

Where a defendant dies and a person who is not his legal representative is brought on the record as such, a decree obtained against the latter cannot bind the estate of the deceased or the persons rightly entitled to that estate. Such a decree cannot, therefore, be enforced against a person who had stood surety for the satisfaction of any decree that might be passed against the original defendant in the suit. [p. 187, col. 1.]

It is essential that a person trying to make a surety liable should satisfy the conditions of the surety bond. [p. 186, col. 2, p. 187, col. 1.]

Where a defendant dies and his legal representative is brought on the record and a decree is passed against him the Court cannot direct that the decretal amount should be paid out of the estate of the deceased. The proper order in such a case is to pass a decree against the legal representative limiting his liability to the extent of the assets which have come to his hands as representing the estate of the deceased. [p. 186, col. 2.]

Second appeal from the decision of the Assistant Judge at Poona, in Appeal No. 206 of 1924, reversing the decree passed by the Subordinate Judge, Poona, in Civil Suit No. 250 of 1923.

Mr. *P. B. Shingne*, for the Appellant.

Mr *G. N. Thakor* (with him Mr. *K. V. Joshi*), for the Respondent.

JUDGMENT.

Marten, C. J.—The main trouble in this case has been caused by irregularities in the procedure adopted in the Small Causes Court, Poona. The point is whether the plaintiff can be held liable as surety under a bond which he entered into in the Small Causes Court to pay a certain claim up to Rs. 1,000, if the principal debtor, one Khodadad, did not pay, there having been an *ex parte* decree passed against Khodadad in favour of the Marwadi, who is the defendant-appellant in the present case. That *ex parte* decree was set aside on the terms *inter alia* that the surety should give security in the way I have mentioned.

In 1919 the defendant Khodadad died. He left a widow, two minor sons and a daughter, who in fact were all in Persia. Khodadad was a Parsi. The Marwadi allowed over six months to expire and the suit to be abated before he made an application to set aside the abatement and to bring the heirs on the record. But the persons, whom he asked to be brought on the record, were not the true heirs but one Tirandaj, the brother of the deceased. He did not specifically mention the relationship in his application to the Court, Ex. 26, but the matter came before the Judge on October 7, 1920, and, according to certain official notes on page 5 of the additional paper-book before us, he passed the following order :—

"The order of abatement is set aside on the terms given in the order in Miscellaneous Application No. 81 of 1920."

Now, the Miscellaneous Application No. 81 of 1920 was the application, Ex. 26, which I have just referred to, and the actual order made was:—

"The affidavit of petitioner shows that he could not trace the heirs of the deceased defendant within six months by his death. The order of abatement is set aside. Plaintiff to bear the costs of this application, and one-fourth of his costs in the suit are disallowed for failure to apply to join the heirs within six months."

I take it to be clear then that the terms referred to in Ex. 24 are these conditions as to costs which are set out in the actual order in Ex. 26. It will be seen, therefore, that neither in Ex. 24, nor in Ex. 26, is there any other order except that of abatement. There is no direction as was asked in the application that the name of the heir should be brought on the record, and that the plaint should be amended. It may be, if one looks at the rules, that it would be sufficient to set aside the order of abatement without more. Order XXII, r. 9, deals only with the setting aside of an order of abatement, and does not in itself provide for the heirs being added. The joinder of heirs comes under a different rule, *viz.*, O. XXII, r. 4, which provides that "the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit."

Then what happened was that apparently a notice was issued to the man Tirandaj named in the application, and it may be assumed that it was a notice to show cause why an order for setting aside abatement should not be made and why he should not be added as a party. That, of course, was given before the actual order setting aside the abatement was made. But as to whether any further notice was given to Tirandaj that he had been added and of the hearing of the suit, the record is silent. What is stated in Ex. 2 is: "The original defendant being dead his heir who is duly served is absent." Issues were framed and the order was: "Claim decreed with costs against the estate of the deceased Khodadad Behram." Then, in Ex. 23, there is a statement that "the suit having been mentioned for final decision in the presence of the plaintiff's Pleader and the defendant's Pleader, it is hereby ordered that the plaintiff's claim is decreed with all costs from out of the estate of the deceased Khodaded Behram." It will, however, appear from another part of the record that the original notice served on Tirandaj was lost. I refer to Ex. 26.

Now, stopping there for a moment, we think that it is not shown that the Court ever made an order, as it should have done, under O. XXII, r. 4, making the legal representatives of the deceased defendent a party to the suit. In neither of those two documents I have above referred to, is there any such express order, and though we are anxious to remedy mistakes, if mistakes have been made, still we do not feel we can spell out of the documents in the Small Causes Court an implied order to that effect. And when we get the actual decree that the Court passed, that, in the view I personally take, was in a wrong form. The Court was not administering the estate of the deceased. It had no right, in my view, to make an order that a certain sum was to be paid out of the estate of the deceased. The proper order ought to have been against a particular individual limiting his liability to the extent of the essets come to his hands as representing the estate.

So, it appears to us that we really have not got here, in the first place, an order "deciding this suit against the deceased applicant" within the meaning of the surety bond which the surety entered into. These are questions between principal and surety, and have to be decided strictly. We all know that little slips like giving time to a principal debtor without the leave of the surety will result in the surety being discharged. Even assuming the Court below was correct in thinking that the surety bond would apply to a decree against the applicant or his duly constituted representatives, we do not think it necessarily applies to a decree which is not binding on the applicant's estate. However, it has been pointed out to us that this point does not seem to have been urged in the Court below, and that, accordingly, it is not one which should prevail in an Appellate Court. Personally I do not take that view in a case like the present, because I think it is essential to see that the person trying

to make the surety liable satisfies the conditions of the bond.

But, even assuming a different view was taken of the above, and that there was a valid decree, and even assuming that this man Tirandaj was added as a party, and that the decree must be read as a judgment against him as representing the estate to pay the amount, a further serious point arises. Tirandaj was not the heir; the widow and children were, and although we, of course, accept the finding that the plaintiff acted *bona fide* in making him a party, and was unaware of the existence of the widow and children, still a point arises as to whether, under these circumstances, a decree obtained against a person, who is not the legal representative of the deceased, can be binding on the estate and on the persons rightly entitled to that estate.

In the circumstances of this particular case, we think the lower Appellate Court was right in holding that the decree is not binding, and that it cannot have the consequence of making the surety liable to pay what would be due from him under the surety bond in other circumstances. In the first place, the Code has been deliberately amended as regards the definition of a legal representative, and s. 2 (11) provides that " a legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased." Order XXII, r. 4, provides that the Court shall cause the legal representative of the deceased defendant to be made a party.

It is very material to observe that that wording has been altered from the old Code, which provides in effect that the Court was to cause a person who was alleged to be the legal representative to be made a party. That alteration in the Code explains the dictum in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (1) which was relied on by the learned Trial Judge, and which was cited by the appellant in the present case. I refer to page 234* where the Court stated :—

"In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate."

That decision on the then state of the Code I can quite follow the Court making. But now the wording of the Code has been altered. I think it is going too far to say that it is sufficient for an applicant to allege that a particular person is the legal representative to enable a decree to be made which should be valid against the true heir, although that heir is not a party to the suit.

The actual decision in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (1) can be supported on quite different grounds, *viz.*, that there was undoubtedly one true legal representative of the deceased on the record, and it was not necessary for the validity of the decree that all the heirs should be brought on the record. A decision of Sir Norman Macleod and Mr. Justice Shah in *Jehrabi Sadulla Khan Mokasi* v. *Bismillabi Sadruddin Kaji* (2) is very much to the same effect. But in *Mirkha Imamkha* v. *Bhagirathi Mahadev Abhyankar* (3) a decision of Mr. Justice Heaton and Mr. Justice Hayward it was considered that the main authorities which allowed one individual member of a family to represent the whole family, for instance, in some cases the manager of a joint Hindu family, did not apply to, or at any rate should not be extended to, the case of Muhammadans. Here we have to deal with the case of a Parsi. But whatever may be the true view, in that respect, we have not got here even one undoubted legal representative, and consequently the case is clearly distinguishable from those I have just stated.

Then there are two other cases which illustrate well the decisions on either side of the line. They are both decisions of the Privy Council, *viz.*, *Malkarjun* v. *Narhari* (4) and *Khiarajmal* v. *Daim* (5). In *Malkarjun* v. *Narhari* (4) the Court had not only allowed a notice to be served on a person as representing the estate,

(1) 26 M. 230; 12 M. L. J. 368.

*Page of 26 M.—[*Ed.*]

(2) 80 Ind. Cas. 758; 26 Bom. L. R. 375; A. I. R. 1924 Bom. 420.

(3) 51 Ind. Cas. 18; 21 Bom. L. R. 329; 43 B. 412.

(4) 27 I. A. 216; 2 Bom. L. R. 927; 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.)

(5) 32 I. A. 23; 32 C. 296; 1 C. L. J. 584; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).

but had definitely held after argument that he was the right representative. That decision, in fact, was erroneous. Subsequently in the suit certain property was sold, and later on, the question of the title of the purchaser came under consideration. There the Privy Council held that the Court had jurisdiction to decide whether the person added was the right person or not, and having come to a particular conclusion, whether right or wrong, which was not in fact appealed, that particular decision could not be afterwards challenged, so as to oust the title of the purchaser, because it would be almost impracticable for the purchaser to have to see whether the orders of the Court after argument were correct or not.

On the other hand, in *Khiarajmal* v. *Daim* (5) where similarly a wrong person was added as a legal representative, the Board held that the lower Court had never exercised a judicial discretion on the point, and that, accordingly, *Malkarjun* v. *Narhari* (4) was distinguishable, and the proceedings were not binding on the true heirs.

Although the present is a case of a money-decree, I think the important point of principle underlying it is more easily realised, if one considers sales by the Court of immoveable property. There, as was laid down in *Premraj Motiram* v. *Javarmal Gomaji* (6) it would be quite wrong as a general principle in a suit against *A* to sell the property of *B*, who is not a party to the suit. I appreciate, of course, that no sale at any rate at present is involved in this particular suit that we have to deal with, but I see no difference in principle between the present case, and a mortgage or other suit where wrong representatives are brought on the record.

In this particular I should like, merely by way of illustration of the general principles of law, to refer to two English authorities. There is a provision under s. 70 of the Conveyancing Act of 1881, which gives protection to purchasers under Court sales from any objection on the ground of want of jurisdiction, or want of concurrence, consent, notice or service. But, as was held in *Jones* v. *Barnett* (7) by the Court of Appeal, this section was not intended to enable the Court to sell *B*'s property, when it was intended only to sell *A*'s. Lord Lindley said at page 374*:—

"In making the order for sale the Court was dealing with property which it did not decide, but which it assumed, to belong to Isaac Jones. The order dealt with the property as being his It turns out that at that time it was not his at all, but that it belonged to Mary Jones."

Then at the end, after referring to the argument on s. 70, the Master of the Rolls said (page 375*):—

"They (the Legislature) could not have intended to enable the Court to sell the property of *B*, when it supposed it was selling the property of *A*, *B* not being a party to the proceedings."

Lord Justice Rigby said (page 375*):—

"In my opinion s. 70 was not intended to entrap the Court into dealing with property with which it had no idea that it was dealing."

On the other hand, in *Hewsen* v. *Shelley* (8) the Court of Appeal held that a sale of land by an administratrix was valid, notwithstanding that after the date of the sale the Will of the deceased was discovered, and then Probate was granted, and the Letters of Administration re-called. But there was a deliberate grant of Letters of Administration, and, as pointed out by the Court, nobody could safely deal with an administratrix, if the decision of Mr. Justice Astbury in the Court of first instance upsetting the sale by the administratrix was good law.

In our own Courts in *Baswantappa Shidapa* v. *Ranu* (9) we have a decision somewhat to the same effect as in *Jones* v. *Barnett* (7), *viz.*, where a man brings a suit to enforce a debt owing by the deceased, and makes the wrong persons defendants as representing that estate, any decree that he obtains will not be binding against the true representatives or heirs in the absence, of course, of fraud or anything of that sort. I should perhaps have stated that, as far as this Court is concerned, there is no question of fraud or anything of that sort.

Giving, then, my best attention to the arguments that have been addressed to us on this point, I think that, on the alterna-

(6) 18 Ind. Cas. 381; 15 Bom. L. R. 41.

(7) (1900) 1 Ch. 370; 69 L. J. Ch. 242; 48 W. R. 278; 82 L. T. 37; 16 T. L. R. 178.

(8) (1914) 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 51 S. J. 397; 30 T. L. R. 402.

(9) 9 B. 86; 5 Ind. Dec. (N. S.) 58.

*Pages of (1900) 1 Ch.—[*Ed.*]

tive ground relied upon by the lower Appellate Court, this decree was not binding on, and cannot be enforced against, the surety. I appreciate that, under s. 145 of the Civil Procedure Code, his liability in ordinary cases would be determined in execution proceedings under the decree. But there is authority to show that the plaintiff, in such a case, may bring a separate suit to enforce his rights against his surety. I think it was open to the surety here to take proceedings in a separate suit to negative his liability under this particular decree.

In saying this, I do not overlook the argument that the widow and children are out of time in disputing their liability, if any, under this decree. But that matter has not been gone into in sufficient detail to satisfy us whether that is correct even from the narrow point of limitation. In any event, and however, they may be circumstanced as regards laches, I do not think that necessarily the surety is barred by their conduct.

Accordingly, in the view I take, the lower Appellate Court arrived at the right conclusion, and, therefore, this appeal ought to be dismissed. But, as regards costs, there is one matter which has been brought to our attention, and that is what the lower Appellate Court states in para. 5 of the judgment as to the information on which the plaintiff acted. His evidence was that he was informed by the surety that the deceased had left a brother Tirandaj. The surety, on the other hand, deposed that he informed the defendant about the existence of the widow and children of Khodadad. The lower Appellate Court has expressly disbelieved that story of the surety, and as I read that judgment it has, in effect, found that the surety suppressed his knowledge of the existence of the widow and children, and told the plaintiff his brother was the heir. That being so, I think, at any rate, so far as this Court is concerned, the surety may be left to bear his own costs of this appeal.

Accordingly, the appeal will be dismissed without costs.

Percival, J.—I would merely add one remark, namely, that the Court of first instance has referred to Mr. Mulla's comments on O. XXII, r. 4, at the top of page 669 of the 7th Edition of his Civil Procedure Code. The learned author has there quoted the observation contained in the head-note of *Kadir Mohideen Marakkayar* v. *Muthakrishna Ayyar* (1) to the effect that, if there is no fraud or collusion, a person sufficiently represents the estate of the deceased for the purpose of a suit, if he is brought on the record by the plaintiff. In regard to that observation, two remarks may be made. In the first place, as has already been pointed out by the learned Chief Justice, that case was a case under the old Code before 1908, when the provisions were different from what they are now. But, besides this, even taking the case as it stands, the above words go rather beyond the decision in the case, because in that case one of the legal representatives was actually brought on the record. I make these remarks merely because the Trial Judge in this case appears to have been led astray by that observation, which is not quite correct in the present state of the law on the subject.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1063 OF 1924.
December 3, 1926.
Present:—Mr. Justice Pullan.
Lala JUGAL KISHORE—PLAINTIFF—APPELLANT
versus
MR. T. CAUL, CIVIL SURGEON—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment of liability—Letter reprimanding creditor for sending bills without deducting them from amount due to debtor—Construction—Denial of liability.

A letter sent by a debtor to his creditor ran as follows: "I do not understand why you persist in sending me bills when you yourself owe me Rs. 528. Please deduct your bill from the money you owe me and send the balance of Rs. 181-8 at your earliest...Don't send any more bills:"

Held, that the letter did not amount to an acknowledgment of liability within the meaning of s. 19 of the Limitation Act coupled with a claim of set-off, but was one denying liability. [p. 190, col. 1.]

Curlandar v. *Abdul Hamid* (1) and *Badri Das* v. *Manohar Das* (2), distinguished.

Second appeal against the decree of the District Judge, Jhansi, dated the 1st May, 1924.

Mr. *Haribans Sahai*, for the Appellant.
Mr. *M. N. Raina*, for the Respondent.

JUDGMENT.—The question raised in this second appeal is whether a letter sent by the defendant in the suit to the plaint-

iff on the 6th November, 1920, amounts to an acknowledgment to save limitation under s. 19 of the Limitation Act. It appears that the plaintiff supplied the defendant with motor accessories from time to time and the greater part of the account was settled in June, 1920. After that a dispute arose between the parties, the defendant who is a Doctor refusing to pay the balance of the bill until his professional fees were settled. This suit was not brought until the 6th November, 1923, and unless the letter is an acknowledgment the suit will be beyond time. The terms of the letter are as follows :—

"I do not understand why you persist in sending me bills when you yourself owe me Rs. 528. Please deduct your bill from the money you owe me and send the balance of Rs. 181-8 at your earliest. It will oblige. Don't send any more bills please."

Now an acknowledgment for the purposes of s. 19 of the Limitation Act must be an acknowledgment of liability and this letter expressly denies any liability. It may admit that the items of the bill are correct though it does not say so, but it certainly insists that no money is due from the defendant. The case is not strictly parallel to that cited on behalf of the appellant reported in *Curlendar* v. *Abdul Hamid* (1), because in that case the defendant admitted that a certain sum was due and paid that sum. It is true that the ruling reported in *Badri Das* v. *Manohar Das* (2) and relied upon by the lower Court is not strictly in point but I have been shown no case in which a complete denial that any sum is due has been held to be an acknowledgment of liability. I would, therefore, not hold that this is a case of an acknowledgment of liability coupled with a claim to a set-off which is the only ground on which the appellant could succeed.

Further, it is argued that the account should be held to be within time because of an item of Rs. 3 dated the 19th December, 1920. This item appears after a long interval and after the last payment made on the account by the defendant. It is also more than a month after the letter written by the defendant in which he has clearly answered the plaintiff's claim for settlement of the account. I do not consider that the plaintiff is entitled to tack on a small item of this nature which had no part in the account which had already been accepted by the defendant and included in his suit merely for the purpose of saving limitation. I find, therefore, that the appeal was rightly dismissed. I agree with the lower Appellate Court and dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

(1) 59 Ind. Cas. 941; 18 A. L. J, 1131; 2 U. P. L. R. (A.) 437; 43 A. 216.

(2) 20 Ind. Cas. 10; 11 A. L. J. 601.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 93 OF 1924.

November 9, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Panton.

SURESH CHANDRA BANERJI—CLAIMANT NO. 2—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Land Acquisition Act (I of 1894), s. 23—Market value, assessment of—Profits, prospective, loss of, whether can be taken into consideration.

In ascertaining the market value of land which is being compulsorily acquired the Court has to ascertain the market value not according to the present disposition of the land but the market value of the land as laid out in the most lucrative and advantageous manner in which the owner can dispose of it. But when once the market value has been assessed by taking every circumstance into consideration the person interested cannot in addition ask for damages on the ground that he might have made profits by engaging in a certain trade or business on the land in question. He is, however, entitled to claim damages for loss of earnings, if he carries on some business on the acquired land and by virtue of the acquisition he is deprived of his profits by reason of the fact that he cannot find any other place where he can carry on the business in which he was engaged on the acquired land. [p. 193, col. 1.]

Appeal against the decree of the Additional District Judge at Howrah, in Hooghly, dated the 11th of January, 1924.

Dr. *Dwarka Nath Mitter*, Babus *Bejoy Kumar Bhattacharjee*, *Shyama Prosad Mukherjee*, Senior, and *Benoyendra Nath Palit*, for the Appellant.

Mr. *Langford James*, Babus *Surendra Nath Guha*, *M. Nuruddin Ahmed* and *Ambicapada Chowdhury*, for the Respondents.

JUDGMENT.

Ghose, J.—This is an appeal from the decision of the Special Land Acquisition Judge on a reference made at the instance of the present appellant and

another who was described as claimant No. 1 named Mohini Mohan Banerji against an award made by the Collector. The land acquired was 21 *bighas* odd and was used as a brick-field. It was let out to two brothers named Bull from October 1910 for 10 years. The land was acquired under the Land Acquisition Act in 1914 when 5 years of the lease still remained to run. The rent payable by the Bull brothers to the two claimants was Rs. 1,800 per year. The interest of the claimants was that of *dar-mokarraridars*. The Collector awarded compensation on the basis of the rent reserved by the lease and allowed 20 years' purchase-money to the claimants. The total amount was Rs. 30,836. In their application for reference to the Judge the two claimants wanted compensation to the extent of Rs. 1,18,000 odd. The learned Judge upheld the Collector's award on certain grounds which it is not necessary now to deal with. Of the two claimants only the claimant No. 2 has appealed before us and he has valued his appeal at Rs. 15,000 in his one-half share, that is, he alleges that the compensation to be awarded to the two claimants ought to have been Rs. 60,000 odd.

It has been contended before us that the Special Judge ought to have allowed compensation to the claimants with reference to one calculation something above Rs. 88,000 and according to a different calculation Rs. 77,000 odd. The contention with regard to the valuation according to the first method is that the rent ought to have been taken at the rate of Rs. 110 per *bigha* and the Collector ought to have awarded 20 year's purchase value of that rent the amount being something over Rs. 46,000. To this it is contended that the value of the structures on the land should be added. The structures were a kiln and a building in which the office of the brick-makers was held. Rs. 3,000 is claimed for the kiln and Rs. 2,500 for the office building. The contention of the appellant further is that to this amount should be added damages for loss of earnings of the claimants as brick-makers and that is estimated at Rs. 37,000. This gives a total of Rs. 88,700 and if this calculation had any basis to support it the claimants might have claimed a sum of about Rs. 58,000 in addition to what has been awarded by the Collector. The appellant's share on this calculation would have been nearly Rs. 29,000. But he has abandoned about one-half of his legitimate claim on that basis according to the contention of his learned Vakil.

The second method in which compensation is claimed is that the valuation should have been made on the basis of the profits made by the business of brick-making. It is said that the profits according to the evidence would have been Rs. 3 per thousand bricks and as 15 lakhs of bricks would have been made every year the profits would have been Rs. 4,500. From this a deduction was made of 25 per cent. for risk in the manufacture and so forth. The actual profit is claimed at Rs. 3,385. To this is added the rent of Rs. 1,800 which the proprietor would not have to pay if he had himself prepared bricks on his own land. This gives a sum of Rs. 5,185 At 15 years' purchase on this basis the valuation is said to be something over Rs. 77,000.

We have to examine whether the appellant is entitled to a higher amount as compensation than what has been awarded by the Collector. The learned Judge below was of opinion that the Collector has actually awarded more than what the claimants were legitimately entitled to get as the market value of the property. It is not necessary for us as the appeal has been argued here to examine the evidence from that point of view of the learned Judge below. The only thing that I think we ought to see is whether the appellant before us has been able to prove by evidence that he is entitled to a higher sum than what has been awarded to him. In this case there is no evidence as to the selling value of lands in the vicinity for ascertaining the market value. The Collector took as the basis of his valuation the rent which was payable under the 10 years' lease to the Bull brothers. That lease was only for 10 years as I have already stated. The Collector apparently took that amount to be the rent realizable if a permanent lease were granted by the claimants. There is no evidence on the record as to what rent this land would fetch after the expiry of the lease to the Bull brothers. When the lease was granted to them there was virgin soil on the land and H. C. Bull who has been examined as the first witness for the claimants has deposed that when the land had virgin clay over it, it was more valuable than when working had to be made merely on silt, and when the land was

acquired as Bull says, he had almost worked out the virgin clay. From this evidence it is quite clear that the land had deteriorated in value by the use that had been made as a brick-field by the lessees when it was acquired. From this it is not very difficult to infer that after the expiry of this term of 10 years if the claimants proceeded to let out the land, it was not likely to fetch a higher rent or even the rent for which it was let out to the Bulls. After the virgin soil had been worked out the process of brick-making merely depended on the deposit of silt brought by the tidal water of the Bally *Khal* by the side of which this land is situated. This deposit of silt must in the nature of things be of an uncertain nature depending upon the quantity of soil carried in the tidal water at different times, and under those circumstances the letting value of the land would very likely be diminished. The contention on the side of the appellant is that the lease, Ex. 5, which is dated May, 1918, shows that an adjoining piece of land was let out to a person named Mohamad Ishaq Khan who has been examined in the case at a rate of rent of Rs. 110 per *bigha*. I do not think that that evidence can help us in coming to the conclusion that at the time of the acquisition of the land in question the rent of this land should have been taken as Rs. 110 per *bigha*. It may very well be that after the acquisition of this land for the purpose of the Railway the letting value of adjoining lands had increased for some reason or other. That was also a temporary lease for 11 years and I do not think that *that* lease which was taken 4 years after the acquisition can be taken as a guide to enable us to hold that the rental of the land in question can be taken as Rs. 110 per *bigha*.

The other piece of evidence on which the appellant relies is a lease dated July 1902 of a piece of land at some distance off from the land acquired and close to the Railway. The rent reserved under this lease was about Rs. 178 per *bigha*. The land was leased for the purpose of working a Bone Mill. Now if this lease had been any indication of the letting value of the lands in the vicinity there is no reason why the land in question was let out in 1910 at the rate reserved in the lease as already mentioned. In my opinion, therefore, there is no substance in the contention that the letting value of the land in question ought to have been taken at Rs. 110 per *bigha*.

With regard to the value of the kiln which has been claimed, I do not think that the claimants were entitled to value it separately. The land was let out at Rs. 1800 a year with the kiln and the annual value with the kiln on it was represented by the rent reserved. I, however, think that the claimants were entitled to ask for the market value of the office-building which was erected by the lessees after the lease was granted to them, which the lessors were entitled to take possession of after the expiry of the lease. But unfortunately for the claimants no evidence which can be acted upon has been given as to the market value of the building. The office was erected by Bull, but during his examination not a single question was asked as to what was spent in building the office or what its market value was at the time of the acquisition or as to the nature of the building. It was only the claimant No. 1 when he examined himself as a witness who said that the bungalow Mr. Bull erected worked to him to be worth Rs. 2,000 when new. Upon this flimsy evidence the appellant claims Rs. 2,500 as the value of the office-building. The claimant himself does not say anything as to how he guessed the value to be Rs. 2,000. This evidence, in my opinion, cannot at all be accepted in awarding any compensation for the building. It is contended that the building must have some value. It is, however, possible that the building was a thatched bungalow of no value to speak of. The argument, therefore, asking for adding the value of the structures to the value of the land must fail.

The next question put forward on behalf of the appellant is that of damage by reason of the acquisition injuriously affecting the earnings of the claimants. It is contended that in addition to the market value of the land as ascertained the claimants were entitled to damages for loss of any profits they might have made if they had engaged in the business of brick-making after the expiry of the lease in favour of the Bulls. In support of that contention the learned Vakil cites the case of *Ripley* v. *Great Northern Railway Company* (1). It seems to me that the

(1) (1875) 10 Ch. A. 435; 31 L. T. 869; 23 W. R. 685.

principle laid down in that case has no application to the circumstances of the present case. It is, no doubt, well settled that in ascertaining the market value of the land the Court has to ascertain what is the market value of the property not according to its present disposition, but laid out in the most lucrative and advantageous manner in which the owner can dispose of it. A familiar example is that of lands in or near a town which are agricultural but capable of being used as building sites. But when once you assess the market value of the land by taking every circumstance into consideration I do not think that the person interested may again ask for damages on the ground that he might have made profits by engaging in a certain trade or business on the land in question. It seems to me that a person is entitled to claim damages for loss of earnings if he carries on some business in the acquired premises and by virtue of the acquisition he is deprived of his profits by reason of the fact that he cannot find any other place where he can carry on the business in which he was engaged on the acquired premises; for example, in this case if the claimant had carried on the trade of brick making and if had proved that after the acquisition he was unable to find a suitable field for carrying on his business of brick making and by that reason would lose his customers or suffer damage in any other way, he might have made a claim for such damage. In this case there is ample evidence that if the claimants had wished to carry on their trade of brick making there were sufficient lands where they might have carried on the business if they chose to do so immediately after the acquisition or 5 years after the acquisition, that is after the lapse of the period when the lease granted by them was to expire. Moreover, as I shall state later on, there is no sufficient evidence to establish the amount of profits of the business. On these grounds I do not think that the appellant can claim anything as compensation for loss of his earnings.

With regard to the valuation that was suggested by the learned Vakil for the appellant on the basis of profits, I do not think that there is any sufficient evidence on which the profits with regard to the business can at all be calculated. In his evidence Bull, no doubt, states "I suppose my annual net profit would have been Rs. 7,000 per annum" but one cannot accept this to be a definite statement. His evidence whatever it is worth is not supported by his account books which were not produced. At page 65 in his evidence he gives certain details as to how a brick field should be valued; but with regard to his own business he does not state any facts as to the capital that he had invested and also the ordinary working expenses; and so no definite finding can be arrived at as to the earnings with respect to the property in question. The learned Vakil for the appellant relies strongly upon the evidence of Mr. Monk a witness for the opposite party who accept the estimate given by Bull that 15 lakhs of bricks might have been manufactured on the land in question after acquisition. But Bull qualifies his statement by saying that 15 lakhs of silt bricks from the field could be got after the field was improved as far as possible and he said further that very roughly it would cost Rs. 3,000 to Rs. 5,000 to remodel the field. Upon this evidence it is extremely difficult to find what the actual profit of the business was having regard to the capital invested, and no valuation can possibly be made on the basis of profits.

I do not think I should add anything further in order to dispose of the arguments advanced in the appeal. As a matter of fact, the appellant has not been able to satisfy us that the compensation that has been awarded was inadequate. The appeal must, therefore, be dismissed with costs.

The application was not pressed at the hearing. It is, therefore, rejected.

Panton, J.—I agree.

Z. K. *Application rejected.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 208 OF 1926.

December 22, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

AJODHYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHEO SHANKAR AND ANOTHER—PLAINTIFFS AND *Musammat Bibi* UMAL BANI—DEFENDANT—RESPONDENTS

Oudh Laws Act (XVIII of 1876), s. 10—Pre-

emption—Transfer not amounting to sale—Device to evade pre-emption, effect of.

Unless it is established that there has been a sale or the foreclosure of a mortgage no right of pre-emption arises under s. 10 of the Oudh Laws Act, and in each individual case the document of transfer is to be construed by the Court in order to determine whether there has been a sale or foreclosure of a mortgage. [p. 194, cols. 1 & 2.]

The law does not say that a right of pre-emption arises when a person transfers property after a manner which produces the same results as a sale without being a sale. The law says that the property must be transferred by sale. [p. 194, col. 2.]

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale but which may eventually have the same effect as a sale. [*ibid.*]

A transfer of a limited right in immoveable property, reserving to the transferor an annual payment of rent, does not amount to a sale so as to give rise to a right of pre-emption under s. 10 of the Oudh Laws Act, even if the amount of rent reserved is so small that the Court is able to find that the transfer is intended for all practical purposes to operate as a sale. [p. 194, col. 1.]

Second appeal against the decree of the learned District Judge, Fyzabad, dated the 23rd March, 1926, upholding that of the Additional Sub-Judge, Fyzabad, dated the 26th January, 1926.

Mr. *St. G. Jackson*, for the Appellants.

Mr. *Ali Zaheer*, for Mr. *H. Husain*, for the Respondents.

JUDGMENT.—*Musammat* Bibi Umal Bani executed a deed in favour of Ajudhia and Mahabir Tewari in consideration of the receipt of a sum stated to be Rs. 2,500. She transferred to them by what she called a *birt pater* certain revenue-free land reserving to herself Rs. 10 annual rent. The plaintiff-respondent Sheo Shankar instituted a suit to obtain possession of this land by exercise of a right of pre-emption. The Courts below have awarded him a decree against which the transferees Ajudhya and Mahabir appeal. The first question which we have to consider in this case is whether there is anything in s. 10 of Act XVIII of 1876 which justifies the exercise of a right of pre-emption to obtain property transferred by the transaction in question. Section 10 declares that a right of pre-emption shall arise, and shall arise only, when a person proposes to sell any property or when he forecloses a mortgage upon any property; and in order to ascertain in any particular case whether a right of pre-emption exists it is necessary first to see whether there has been a sale or the foreclosure of a mortgage. Unless it is established that there has been a sale or the foreclosure of a mortgage no right of pre-emption arises under s. 10. In each individual case the document has to be construed by the Court. There has been a practice in the past for certain Courts to endeavour to obtain assistance in construing a document from the construction of different documents arrived at by other Courts in previous cases. Their Lordships of the Judicial Committee referred many years ago to this practice as unprofitable. It does not appear to us to be a matter of moment how Single Judges or Benches of the Judicial Commissioner's Court construed particular documents. It is our concern to see whether this document, which is called a *birt pater* is or is not a sale. If it is a sale a right of pre-emption exists, and if it is not a sale a right of pre-emption does not exist. A sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. There was no transfer of ownership in this case but only a transfer of a limited right subject to an annual payment of rent. But it is argued before us that the annual payment of rent was so small that it was clearly the object of the transferor to effect the transfer in such manner, as to avoid the possibility of pre-emption, and obtain the same results as would be obtained by the execution of a deed of sale. This may well have been so, but it does not alter the fact. The law does not say that a right of pre-emption arises when a person transfers the property after a manner which produces the same results as a sale without being a sale. The law says that the property must be transferred by sale and, in our opinion, this transfer is not a sale and that concludes the appeal. We have further to note that a Bench of this Court on the 24th November, 1925, in *Shamshad Ali Khan* v. *Dharam Singh* (1) accepted the view taken previously in *Majida Bibi* v. *Malik Fazl Karim* (2) and *Lachhman Prosad* v. *Fida Husain* (3) which was as follows:—

"Nor is it forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale but which may eventually have the same effect as a sale."

We, therefore, allow this appeal. The plaintiff's suit will stand dismissed. The

(1) 95 Ind. Cas. 747; 29 O. C. 101.
(2) 19 Ind. Cas. 679; 16 O. C. 9
(3) 30 Ind. Cas. 232; 18 O. C. 109; 2 O. L. J. 220.

plaintiff will pay his own costs and those of Ajudhya and Mahabir in all Courts.

Z. K. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 366 OF 1926.

December 3, 1926.

Present:—Mr. Rupchand Bilaram, A. J. C.

THE PUNJAB NATIONAL BANK, LIMITED—PLAINTIFFS

versus

FIRM OF ADAMJI LOOKMANJI AND SONS —DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage, suit on—Person claiming adversely to mortgagor, whether necessary or proper party.

A person claiming a title paramount to that of the mortgagor and the mortgagee is not a necessary or a proper party in a suit brought by the mortgagee to enforce the mortgage and the question of such paramount title cannot be litigated in such a suit. [p. 196, col. 1.]

Jaggeswar Dutt v. *Bhuban Mohan Mitra* (1), *Gobardhan* v. *Munna Lal* (2), *Sataganda Appanna* v. *Satapa Dariganda* (3), *Maung San Myaing* v. *U Pon Gyaw* (4), *Viswanathan Chettyar* v. *Ma Aye* (5) and *Radha Kunwar* v. *Reoti Singh* (6), relied upon.

Mr. *Isardas Oodharam*, for the Plaintiffs.

Mr. *Fatehchand Assudamal*, for the Defendants.

Mr. *Hatim B. Tyebji*, for the Applicant.

ORDER.—This suit has been instituted for recovery of a sum of Rs. 12,873-10-3 against the Firm of Adamji Lookmanji & Sons. The amount is said to have been secured by an equitable mortgage of 4 properties belonging to Tayebally, Yusifally and Karimbhoy sons of Adamji Lookmanji and the usual mortgage-decree is claimed against them.

These three persons have been served as the ostensible partners of the Firm of Adamji Lookmanji under O. XXX, r. 3, Civil Procedure Code. Not only do the properties stand in the Record of Rights in the names of these three persons and these three persons only but the leases issued by the Karachi Municipality in respect of 3 out of 4 plots have been issued in their names only. The *sanad* of the 4th plot has likewise been endorsed on behalf of the Secretary of State in their favour.

In the written statement filed by them they do not state that the mortgaged properties belonged to their father or that he was otherwise interested in them. An application has, however, been made to me purporting to be an application under O. I, r. 10, Civil Procedure Code, unsupported by any affidavit, on behalf of certain female relatives of theirs praying that they be joined as parties to the suit. The ground urged is, that the properties belonged not to the three defendants served as partners but to their father Adamji Lookmanji who died in August, 1921, and as heirs of Adamji the applicants are as much co-owners of the properties as the three defendants and that it is, therefore, necessary that they should be made parties to the suit in order to decide all matters in controversy 'particularly those relating to the properties in suit.'

As I read the application it means nothing more than an application by certain persons who claim a title in a part of the mortgaged properties adversely to the mortgagors and, therefore, they are not only not necessary parties but persons who, in my opinion, should not as such be brought on the record in a suit between the mortgagee and the mortgagors. The applicants are not persons without whom no decree can be rendered so as to make them necessary parties to the suit, nor are they persons whose presence would render the decree more effectual so as to make them proper parties to the suit. A certain confusion had at one time arisen on account of the words used in s. 85 of the Transfer of Property Act which provided that all persons having an interest 'in the property' comprised in the mortgage should be made parties to a suit on the mortgage. This was differently interpreted by different High Courts. The question came up for decision before the Calcutta High Court in *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) and it was held that the term 'property' in s. 85 of the Act means not the physical object, but the interest therein, which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. In delivering the judgment of their Lordships, the late Sir Ashutosh Mookerji then Mr. Justice Mookerji, after reviewing the whole case-law on the subject observed at page 433* as follows :—

"The interpretation, which we put upon s. 85, leads necessarily to the conclusion that the proper scope of a mortgage suit

(1) 33 C. 425; 3 C. L. J. 205.

* Page of 33 C.—[*Ed.*]

is to cut off the equity of redemption and to bar the rights of the mortgagor and those claiming under him; the only proper parties to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage. It is not competent for the mortgagee to make as party defendant, one who claims adversely to the title of the mortgagor and mortgagee. He is a stranger to the mortgagee, has no connection with mortgage, and as his adverse claim of title cannot in any way be affected by the mortgage suit, in which he has no interest, he cannot be made a party for the purpose of litigating such claim of title."

In 1908 the Legislature set at rest the doubts raised by the use of the expression 'property' by substituting in O. XXXIV, r. 1 the words 'having an interest in the mortgage security or in the right of redemption.' And it is now well-settled law that in a suit brought by the mortgagee to enforce a mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary or proper party, and the question of the paramount title cannot be litigated in such a suit: *Gobardhan* v. *Manna Lal* (2), *Sataganda Appanna* v. *Satappa Dariganda* (3), *Maung San Myaing* v. *U Pon Gyaw* (4) and *Viswanathan Chettyar* v. *Ma Aye* (5). The cases which permit the joinder of Hindu co-parceners as defendants to a suit on a mortgage executed by the *de facto* or *de jure* manager of the family have no application whatsoever. In these cases the mortgagee is attempting to hold the interest of the co-parceners liable and their presence may, therefore, under certain conditions be proper. In the words used by their Lordships of the Privy Council in *Radha Kunwar* v. *Reoti Singh* (6) the joinder of the applicants as parties to the suit would not only be irregular but could only lead to confusion. It would convert an ordinary mortgage suit based on the contract between the plaintiffs and the 3 defendants into a suit *inter alia* for partition between the defendants and their female relatives requiring the determination of certain complicated questions which should, as far as possible, be avoided. The mortgagees can only sell the right, title and interest of their judgment-debtors in the mortgaged properties and any decision given in their favour or any sale held by them in execution of their decree cannot affect the rights, if any, of persons who are not made parties to the suit and are, therefore, not before the Court. In any suit which the female relatives may institute for partition of the properties, it would be open to the mortgagees or the auction-purchaser as the case may be to contend that even if the mortgaged properties belonged to Adamji Lookmanji, by permitting them to be entered in the names of his sons, and by permitting his sons to deal with them as their own he was estopped from contending that they were his properties and that his heirs were likewise estopped from disputing the mortgage and to plead that the female relatives should in any event get their share from properties of the deceased Adamji Lookmanji other than those which are the subject-matter of the mortgage.

The applicants do not claim to be interested in the mortgage security or in the right of redemption but in the mortgaged property itself so far as the case disclosed by them in their application goes and, therefore, their application, is in my opinion, entirely misconceived.

The learned Counsel has, however, urged that as the suit is not only against the sons of Adamji but also against the Firm of Adamji Lookmanji & Sons, as one of the partners or rather the proprietor of that firm was Adamji and as the transactions in suit are said to have been entered into during the lifetime of Adamji, the applicants are interested in the subject-matter of the suit as heirs of Adamji and should, therefore, be made parties to the suit.

This is altogether a new ground of which the plaintiffs had no notice and there is no allegation either by the sons of Adamji or affidavit by the applicants in support of this new plea. The learned Counsel on being pressed on this point clearly stated that the applicants do not claim any interest in the business carried on by the Firm of Adamji Lookmanji & Sons after the

(2) 46 Ind. Cas. 559; 40 A. 584; 16 A. L. J. 639.
(3) 57 Ind. Cas. 577; 44 B. 698; 22 Bom. L. R. 815.
(4) 80 Ind. Cas. 753; 2 R. 106; A. I. R. 1924 Rang. 240.
(5) 98 Ind. Cas. 11; 4 R. 214; A. I. R. 1926 Rang. 208.
(6) 35 Ind. Cas. 939; 43 I. A. 187; 14 A. L. J. 1002; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 303; 38 A. 488; 5 L. W. 456 (P. C.).

death of Adamji and that so far as the property is concerned, they only claim it as the heirs of Adamji Lookmanji and in no other capacity.

I cannot permit the applicants to take the plaintiffs by surprise by urging a point of which they had no notice, and I must decline to go into this new plea. If the plaintiffs wish to hold the estate of Adamji liable on the ground that he was a partner of the firm and subsequently fail to enforce it against the estate of his heirs other than the three defendants, it is their own concern.

I dismiss this application with costs.

P. B. A. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1633 OF 1924.

November 24, 1926.

Present:—Mr. Justice Duval and Mr. Justice Mitter.

Raja PRAMATHA NATH MALLIA—DEFENDANT No. 1—APPELLANT

versus

RADHA KISHORE MUKHERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession, suit for—Title, proof of—Presumption.

Where in a suit for possession title is found with the plaintiff and the evidence of possession is equally balanced on both sides, possession must be presumed to follow the title.

Appeal against the decree of the District Judge, Bankura, dated the 22nd of March, 1924, modifying that of the Munsif, Second Court at that place, dated the 16th of March, 1923.

Dr. *Radha Binode Pal*, Babus *Amullya Charan Sen* and *Syamadas Bhattacharjee*, the Appellant.

Babus *Mritynjoy Chatterjee* and *Nirmal Chandra Chakravarti*, for the Respondents.

JUDGMENT.

Mitter, J.—This appeal is on behalf of the defendant and arises out of a suit commenced by the plaintiffs for declaration of title and confirmation of possession in 15 *bighas* 8 *kattas* 9 *chataks* of land. There is also an alternative prayer for recovery of possession. There was also an allegation in the plaint that the plaintiffs had acquired title by adverse possession. But the defence of the defendant was that the plaintiffs had no title to the property as it did not form part of village Luchibad but it formed part of his *mouza* village Mukundapore.

The Court of first instance decided against the defendant on the question of title and dismissed the plaintiffs' suit holding that the plaintiffs were not in possession of the disputed parcels within 12 years before the suit.

On appeal by the plaintiffs to the lower Appellate Court it came to the conclusion that 10 *bighas* 12 *kattas* 15 *chataks* of the disputed land appertainad to Luchibad and the remaining 4 *bighas* appertained to Khiraijuri which belonged neither to the plaintiffs nor to the defendant. On the question of possession the Court held that the evidence of possession was equally strong on both sides and as plaintiffs had made out their title 10 *bighas* 8 *kattas* 12 *chataks* out of the disputed land the plaintiffs must be deemed to be in possession of the same. It is well-established that where title is found with the plaintiff and the evidence of possession is equally balanced, possession must be presumed to follow, that is what the Subordinate Judge really means although his finding on this point is not quite happily expressed.

It has been contended before us that a presumption on the question of possession should be raised in favour of the defendants on account of the entry in the Record of Rights as also by reason of an order made under the Survey Act of 1875 and the case of *Bisseswari Koer* v. *Ram Protab Singh* (1) has been cited in support of that contention. The case is obviously distinguishable for in the case of *Bisseswari Koer* v. *Ram Protab Singh* (1) there was no prayer in the alternative for recovery of possession.

In these circumstances we think that the findings of fact arrived at by the lower Court conclude this second appeal and this appeal is dismissed with costs.

There is a cross-objection which is not pressed. It is also dismissed.

Duval, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 4 Ind. Cas. 547; 14 C. W. N. 366.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1084 OF 1924.
December 10, 1926.
Present:—Mr. Justice Ashworth.
Syed KARRAR HUSAIN AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
Babu JAI NARAIN RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 9, O. XXXIV, r. 1—Mortgage-suit—Non-joinder of interested parties when fatal to suit—Dismissal by trial Court for non-joinder—Appellate Court when interferes—Impleading of parties in appeal.

The failure to join a person interested in a mortgage, whether that failure be in a suit by the mortgagor for redemption or in a suit by the mortgagee on the foot of the mortgage, will not be fatal to the suit if a decree can be passed that will not injuriously affect the absent party. But failure to implead a real defendant with an interest to oppose the suit is fatal to the suit.

Order XXXIV, r. 1 of the Civil Procedure Code must be read subject to O. I, r. 9.

Saeed-ud-din Khan v. *Hira Lal* (1), followed.

Parshadi Lal v. *Laiq Singh* (2) and *Shivubai Rajarm Shete* v. *Siddheswar Martand Hegde* (3), distinguished.

Second appeal against the decree of the District Judge, Ghazipur, dated the 24th of March, 1924.

Messrs. *Ajudhia Nath* and *Gadadhar Prasad*) for the Appellants.

Mr. *K. Verma*, for the Respondents.

JUDGMENT.—The only question that arises in this second appeal is whether the trial Court and the lower Appellate Court were correct in holding in this suit for redemption of a mortgage the failure of the plaintiffs to implead as defendants the transferees of some of the mortgagees interested and the grandson of one of the original mortgagees is fatal to the suit. The lower Courts relied upon a decision of a Judge of this Court reported in *Saeed ud-din Khan* v. *Hira Lal* (1) It was there held that a mortgagor must redeem the property in the hands of all the mortgagees or their representatives and that his failure to implead all such was fatal to the suit. The appellants rely upon another decision of a Single Judge of this Court reported in *Parshadi Lal* v. *Laiq Singh* (2). That case, however, is to be distinguished from the present one inasmuch as it was possible in that case to pass a decree for sale of part of the mortgaged property only in which the absent person had no interest. The proper view appears to be that O. XXXIV, r. 1 of the Civil Procedure Code is to be read subject to O. I, r. 9; that is to say, the failure to join a person interested in a mortgage whether that failure be in a suit by the mortgagor for redemption or in a suit by the mortgagee on the foot of the mortgage, will not be fatal to the suit if a decree can be passed that will not injuriously affect the absent party. It has been urged that, at any rate, the lower Court should have given the plaintiffs an opportunity to have the absent persons joined as mortgagees. It has not been brought to my notice that the plaintiffs ever asked the Court to do so and the question whether those persons were necessary parties formed the subject of an issue and arguments. In these circumstances, it does not appear to me that the decree of the lower Courts should be set aside and the trial Court ordered to issue notice now. There is a cogent reason against so doing. The suit as against these persons would be time-barred as the plaintiffs had brought their suit just before the expiration of 60 years from the date of the mortgage. Reliance has been placed by the appellants' Counsel in the case reported in *Shivubai Rajaram Shete* v. *Siddheswar Martand Hegde* (3). That case, however, was a case where a person seeking to redeem a mortgage failed to join another person interested as co-mortgagor in redemption, that is to say, the person absent was merely what is called a *pro forma* defendant. The considerations applicable to such a case are obviously different to a case like this where the absent person is a real defendant with an interset to oppose the suit.

For the above reasons I see no reason for interference with the decree of the lower Courts and dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

(1) 24 Ind. Cas. 25; 12 A. L. J. 619.
(2) 74 Ind. Cas. 943; 21 A. L. J. 701; A. I. R. 1924 All. 107.
(3) 61 Ind. Cas. 590; 45 B. 1009; 23 Bom. L. R. 435.

OUDH CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 45 OF 1926.

December 23, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Misra.

GAYADIN—DEFENDANT—APPELLANT

versus

LODHI—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 108 (10)—Jurisdiction of Civil and Revenue Courts—Suit by tenant to recover holding against landlord or person in illegal possession—Tenant not previously in actual possession—Suit, whether cognizable by Revenue Court—Person other than landlord taking illegal possession—Payment of rent to and acceptance by the landlord, whether proof of actual possession.

Where a tenant has never been in possession of his holding but merely tries to recover that holding whether from the landlord or from any other person whom he alleges to be in illegal possession thereof, the suit cannot be considered to be one cognizable by the Revenue Court. In order that a suit should be cognizable by the Revenue Court as falling within the provisions of s. 108 (10) of the Oudh Rent Act, it must be alleged and found that the plaintiff was at some time previous to the institution of the suit in actual possession of the land whether himself or through his sub-tenants and had subsequently been ejected by the landlord. If somebody else besides the landlord has illegally taken possession of the holding the remedy must be sought in the Civil Court and not in the Revenue Court. The mere fact that the plaintiff paid the rent and the landlord accepted it does not, in any way, show that the plaintiff actually had at any time obtained possession of the holding which had been let out to him by the landlord. [p. 201, cols. 1 & 2.]

In order to have a suit cognizable by the Revenue Court under s. 108 (10) of the Oudh Rent Act it must be one where the tenant must have been previously in possession and where his ejectment must have subsequently taken place owing to an act of the landlord. Unless these two elements are established a suit cannot be considered to fulfil the description of a suit covered by s. 108, cl. (10), Oudh Rent Act, which would be cognizable by the Revenue Court and Revenue Court alone. [p. 201, col. 2.]

The heading "suits by an under-proprietor or a tenant" in s. 108 of the Oudh Rent Act refers to suits brought either by an under-proprietor or a tenant against the superior proprietor or the landlord and if a suit has been brought by a person alleging himself to be a tenant against another person who has prevented him from taking possession of the holding, having himself taken possession of the same forcibly and illegally, the suit is not one contemplated to be cognizable by the Revenue Court under s. 108 of the Oudh Rent Act. [p. 200, cols. 1 & 2.]

The words "recovery of the occupancy" in s. 108, cl. (10), of the Oudh Rent Act indicate recovery of actual possession of the land as distinguished from merely constructive possession and the words "illegally ejected" in the said clause imply that the tenant was previously in possession and had subsequently been ejected. [p. 200, col. 2.]

Chandrika Bakhsh Singh v. *Raghunath Kunwar* (1), *Raghubar Dayal* v. *Chandan* (2), *Gaya Din Singh* v. *Chaubarja Pande* (3), *Ashiq Ali* v. *Ghulam Sarwar* (4) and *Kalap Nath* v. *Mata Din* (5), relied on.

Appeal against the order passed by the Subordinate Judge, Unao, dated the 1st September, 1926, reversing that of the Munsif, South Unao, dated the 30th April, 1926.

Mr. *Ali Uddin Ahmad*, for the Appellant.

Mr. *Mahabir Prasad Srivastava*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Subordinate Judge, Unao, setting aside the order of the Munsif, South Unao. The learned Munsif held that the suit was triable by the Revenue Court but the learned Subordinate Judge has taken a contrary view and remanded the case to the trial Court for decision on merits.

The sole point for decision in this case is whether the suit is triable by the Civil Court or by the Revenue Court. It would be proper to state the allegations on which the plaintiff came to Court in order to determine the question in issue. The plaintiff stated in his plaint that one Mathura Kurmi was originally the tenant of the plot in dispute holding under defendant No. 2 the landlord of the village. Mathura Kurmi is alleged to have died some 5 years ago; and after his death the said plot is stated to have been entered in the name of his widow, *Musammat* Rukmin, who died heirless. It was also stated in the plaint that defendant No. 2, the landlord, took possession of the land on her death and on the 19th May, 1923, executed a *patta* of the said land in favour of the plaintiff on an annual rent of Rs. 6 giving him permission to cultivate it from 1331 *Fasli*. It was further alleged in the plaint that defendant No. 1 forcibly cultivated the said plot of land in spite of a protest by defendant No. 2, the *zemindar*. It was also alleged that the landlord had realised from the plaintiff Rs. 12 on account of rents for 2 years, namely, 1331 and 1332 *Faslis* in spite of the fact that he was never in possession of the holding in dispute. The cause of action was stated in the plaint to have accrued on the 19th May, 1923, the date of execution of the *patta* in favour of the plaintiff and in July, 1923, the beginning of 1331 *Fasli* when he ought to have got possession but could not obtain it owing to defendant No. 1 having forcibly cultivated the land. The suit was brought on the 26th January, 1926.

It would thus be clear from the allegations set forth above that the plaintiff never obtained possession of the land

granted to him by defendant No. 2, under the *patta*, dated the 19th May, 1923; that it was not defendant No. 2, the landlord, who prevented him from entering into possession of his holding but it was really defendant No. 1 who had forcibly cultivated the said land without the consent of the landlord; and that the actual possession of the holding was claimed by the plaintiff from defendant No. 1, who, as stated above, was illegally in possession thereof. The suit is not, therefore, one for recovery of actual possession of the holding by the plaintiff in respect of the land from which he had illegally been ejected by the landlord but is one for recovery of possession of the said holding from defendant No 1 who, according to the allegations of the plaintiff, was merely a trespasser. The question which we have, therefore, to decide is whether such a suit is cognizable or not by the Civil Court.

After hearing the arguments in this case and after having perused the orders of the Courts below we have no hesitation in holding that the suit as brought was clearly cognizable by the Civil Court and not by the Revenue Court.

Section 108, cl. (10) is alleged to bar the present suit. It finds its place under Ch. VIII of the Oudh Rent Act (XXII of 1886), the heading of which is "Jurisdiction of the Courts."

There are four classes of suits stated in s. 108.

They are as follows:—

(*a*) Suits by a landlord.

(*b*) Suits by an under-proprietor or a tenant.

(*c*) Suits regarding the division or appraisement of produce.

(*d*) Suits by, and against, *Lambardars*, co sharers and *Muafidars*.

Clause (10) finds its place under heading (*b*) stated above. To our minds the said heading refers to suits brought either by an under-proprietor or a tenant against the superior proprietor or the landlord. The frame of the entire section justifies this inference. If, therefore, a suit has been brought by a person alleging himself to be a tenant against another person who has prevented him from taking possession of the holding, having himself taken possession of the same forcibly and illegally, the suit, in our opinion, is not one contemplated to be cognizable by the Revenue Court under s. 108 of the Oudh Rent Act. Section 108, cl. (10) runs as follows:—

"Suit for *recovery* of the *occupancy* of any land which has been treated by a landlord as abandoned or from which an under-proprietor or tenant has been *illegally ejected* by the landlord or for possession by a person in whose favour an ex-proprietary tenancy arises under s. 7-A."

We have purposely underlined the words "recovery", "occupancy" and "illegally ejected" which find place in the said clause in order to bring out clearly the meaning of the clause as it stands. In our opinion the words "recovery of the occupancy" indicate recovery of actual possession of the land as distinguished from merely constructive possession. It also appears to us to be clear that the words "illegally ejected" imply that the tenant was previously in possession and had subsequently been ejected. In the case of *Chandrika Bakhsh Singh* v. *Raghunath Kunwar* (1), Pandit Kanhaiya Lal, A. J. C. while interpreting s. 108, cl. (10) held that the word "occupancy" indicated physical possession for there could be no ejectment of a person who had himself not been in possession, and that it should be distinguished from the word "possession" which connoted and included both actual as well as constructive possession. The learned Judge observed that "s. 108, cl. (10) of the Oudh Rent Act would not apply, if the claimant was not in actual possession of the said land but was merely seeking to obtain actual possession on the strength of his alleged title as against the landlord and the person in actual possession. The title of a person in actual occupation or cultivatory possession of a plot of land is capable of being easily determined by a summary adjudication in the Revenue Court, but where that person is not in actual occupation, the question of the title might involve an elaborate inquiry into its origin and devolution. The application of s. 108, cl. (10), of the Act is, therefore, confined to cases in which the previous occupancy of the under-proprietor is alleged or acknowledged. The occupancy must, however, be physical for there can be no ejectment of a person, who has himself not been in occupation."

In the case of *Raghubar Dayal* v. *Chandan* (2) decided in 1906 a Bench of the late

(1) 18 Ind. Cas. 284; 16 O. C. 105.
(2) 10 O. C. 73.

Court of the Judicial Commissioner of Oudh, consisting of Mr. Chamier (now Sir Edward Chamier), A. J. C., and Mr. Evans, A. J. C., took the same view. On page 26* Mr. Chamier observed as follows:—

"Nor do I think that it is a 'suit for the recovery of the occupancy of any land from which a tenant has been illegally ejected.' These words seem to imply that the plaintiff must have been in possession and had been ejected by the landlord. The plaintiffs do not suggest that they have ever been in possession. The plaint shows that the question for decision is whether the plaintiffs are entitled to succeed to a right already declared to exist by competent authority. This is not a question which is reserved for the Revenue Courts."

On page 28* Mr. Evans observed:—

"It is not alleged that plaintiffs ever obtained actual possession. They were, therefore, never ejected. As pointed out by my learned colleague the wording of s. 108, cl. (10) of the Oudh Rent Act implies that the particular kind of suit to which this section refers is a suit in which there has been an actual ejectment of the plaintiff. In this case there has been no such ejectment and what plaintiffs practically ask for is possession of this land as against defendant, whose predecessor they assert took possession as heir of the deceased Pancham."

The same view was taken by Mr. Daniels, A. J. C., in the case of *Gaya Din Singh* v. *Chauharja Pande* (3) and by Mr. Dalal, A. J. C., in the case of *Ashiq Ali* v. *Ghulam Sarwar* (4). In *Kalap Nath* v. *Mata Din* (5), Pandit Kanhaiya Lal, A. J. C., held that s. 108, cl. (10) of the Oudh Rent Act had no application where the contest was between rival tenants claiming to cultivate the same land.

We are, therefore, clearly of opinion that where a tenant has never been in possession of his holding but merely tries to recover that holding whether from the landlord or from any other person whom he alleges to be in illegal possession thereof, the suit cannot be considered to be one cognizable by the Revenue Court. In order that a suit should be cognizable by the Revenue Court, it must be alleged and found that the plaintiff was at some time previous to the institution of the suit in actual possession of the land whether himself or through his sub-tenants and had subsequently been ejected by the landlord. If somebody else besides the landlord has illegally taken possession of the holding the remedy must be sought in the Civil Court and not in the Revenue Court. This, so far as we know, has been the law consistently followed in the Province of Oudh, and we have thought it proper to make it clear so as to avoid unnecessary litigation.

It was contended before us that because the rent had been realized by the landlord from the plaintiff in respect of 1331 and 1332 *Faslis*, it must be deemed that the plaintiff had been put into possession of the holding. We regret we are unable to accept that view. The mere fact that the plaintiff paid the rent and the landlord accepted it, does not, in any way, show that the plaintiff actually had at any time obtained possession of the holding which had been let out to him by the landlord.

It was also contended that because the landlord was a defendant in the case the suit must be treated as one between a tenant and a landlord and thus cognizable only by the Revenue Court. This contention also, in our opinion, has no substance. According to the allegations of the plaintiff himself the landlord did not at any time dispossess him; rather it was alleged in the plaint that defendant No. 1 had forcibly cultivated the land in spite of a protest from the landlord. The mere fact that the landlord was impleaded cannot, in our opinion, convert this suit into a suit of the class contemplated by the Legislature to be one cognizable by the Revenue Court, under s. 108, cl. (10). In order to have a suit so cognizable it must be one where the tenant must have been previously in possession and where his ejectment must have subsequently taken place owing to an act of the landlord. Unless these two elements are established a suit cannot be considered to fulfil the description of a suit covered by s. 108, cl. 10, which would be cognizable by the Revenue Court and Revenue Court alone.

We are, therefore, of opinion that the view taken by the learned Subordinate Judge is correct and the suit must be tried in the Civil Court.

We, therefore, uphold the order of remand and dismiss this appeal. The costs

(3) 73 Ind. Cas. 238; 10 O. L. J. 178; 9 O. & A. L. R. 87; A. L. R. 1924 Oudh 14.

(4) 74 Ind. Cas. 553; 11 O. L. J. 18; 9 O. & A. L. R. 521; A. J. R. 1924 Oudh 175; L. R. 5 A. (O.) 7.

(5) 28 Ind. Cas. 859; 18 O. C. 48.

*Pages of 10 O. C.—[*Ed.*]

of this appeal and of the lower Appellat Court will abide the result.

G. H. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 822 OF 1923.

August 3, 1926.

Present:—Mr. Justice Ramesam.

NAGUR PICHAI ROWTHER BY HIS POWER AGENT SUBRAMANIA PILLAI—DEFENDANT No. 4—APPELLANT

versus

RAKKAPPA AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 TO 3—RESPONDENTS.

Hindu Law—Joint family—Alienation by co-parcener—Suit to set aside alienation and for partition—Equities in favour of alienee—Allotment of property alienated to alienor's share—Mortgage with possession by manager without necessity—No suit to set aside mortgage by junior member for over 12 years—Mortgage, binding nature of—Suit for partial partition—Objection as to maintainability of suit, whether can be first raised in second appeal.

In a suit by a Hindu co-parcener to set aside an alienation by the other two co-parceners and for partition of the properties alienated, it was found that the alienee had spent some money for improvements, that he was entitled to ⅔rds of the items purchased by him in any event, and as to the remaining ⅓rd he had the right to be in possession as *othidar* and that the plaintiff could not recover without paying the *othi* amount and compensation for improvements:

Held, that in effecting the partition, the items alienated should, in equity, be allotted to the share of the alienors and the alienee must be allowed to retain them if possible. [p. 203, col. 2.]

An objection to the maintainability of a suit as being bad for partial partition cannot be allowed to be taken for the first time in second appeal when no issue thereupon has been raised in the Courts below. [p. 202, col. 2.]

A usufructuary mortgage executed by a manager of a joint family without necessity is binding upon a junior member thereof who has not sued to set aside it for over 12 years from the date of the mortgage. [p. 203, col. 1.]

Second appeal against the decree of the Court of the Second Additional Subordinate Judge, Madura, in A. S. No. 5 of 1922 (A S. No. 126 of 1921, District Court, Madura), preferred against that of the Court of the District Munsif, Melur, in O. S. No. 442 of 1919.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Rajah Ayyar*, for the Respondents.

JUDGMENT.—In this second appeal 4th defendant is the appellant. It arises out of a suit for partition. Plaintiff's father, 1st defendant, and the 3rd defendant's father were brothers. The 2nd defendant is the son of the 1st defendant. The 4th defendant is an alienee of two of the items in the plaint schedule, he having purchased the property under Ex. I, dated 28th February, 1908, for Rs. 1,900. The Munsif dismissed the suit as one for partial partition. On appeal the Subordinate Judge decreed the plaintiff's suit. The 4th defendant, therefore, appeals.

The first point argued before me is whether the suit is bad for partial partition. The Subordinate Judge held that it is not open to an alienee to raise such a point. It is true that where a member of the family sues for partition and recovery of his share of an alienated item alone, such a point is not open to the alienee. But I doubt if there is any general rule that an objection on the ground that the suit is one for partial partition can never be taken by a stranger. However this may be, I do not think this case is one in which such an objection ought to be allowed to be taken as a bar to the maintainability of the suit. Though the 4th defendant raised the point in his written statement he never took an issue specifically raising the point. The third issue "What are the joint family properties," is too general to cover a plea as to the maintainability of the suit. It seems to me, therefore, that this point should not be allowed to be raised for the purpose of getting plaintiff's suit dismissed. It may be that it may have to be inquired into for the purpose of the point to be next discussed.

The next question is whether the alienation in favour of 4th defendant should be upheld as binding on the family and whether in any event, as a matter of equity, the alienated item should not be allotted to defendants Nos. 1 to 3 so as to uphold the alienation in favour of 4th defendant if possible. The sale itself was effected by 1st defendant and 3rd defendant's father who alleged in the deed that plaintiff was adopted into another family. The consideration of Rs. 1,900 was made up among others of three items:—

(1) Rs. 43 3-0 for *kist* for *Fasli* 1317.

(2) An *othi* (Ex. II) dated 10th October, 1891, for Rs. 200.

(3) Another *othi* (Ex. II-D) dated 28th April, 1907, also for Rs. 200.

It is unnecessary to refer to the other items of consideration, for the Subordinate Judge has found them to be not binding on the family, and I agree with him. As to

the three items mentioned above the Subordinate Judge found the first to be binding on the family but not the second and third as to which I think they are binding on the plaintiff by reason of adverse possession because they were effected more than 12 years prior to the filing of the suit, so that it is unnecessary to go into the question whether the money was actually spent for the benefit of the family. Incidentally I may observe that in the case of one of them Ex. II it purports to be "for the benefit and expense of the family and for contract works." It is attested by the plaintiff who must have been 20 or 21 at the time. His answers to the questions about Ex. II (*d*) are not very straight though the cross-examination might have been pushed further. It seems to me that this is a case in which one can infer from the circumstances that the plaintiff was aware of the contents of the document and on this ground also one may hold that Ex. II (*d*) is binding on the whole family including the plaintiff. But anyhow, on the ground of lapse of 12 years from the dates of Exs. II and II (*d*) I think they are binding on the plaintiff. If so, the plaintiff cannot recover possession of his third share of the items sold under Ex. III without paying also his third share of the *othi* amounts; that is, he has to pay ⅓rd of Rs. 443-3-0. One-third of Rs. 250 (improvements allowed by the Sub-Judge), *i. e*, ⅓rd of Rs. 693-3-0 or Rs. 231-1-0.

This leads me to the main question about the alienee's equity, namely, whether these items should not be allotted to the share of the vendors of 4th defendant, which I think, if possible, may be done. He raised the question in his written statement. The 2nd part of the 6th issue runs:—

"Whether he (4th defendant) is entitled to any equity."

I do not see why this should not be construed as including the point raised. In the view taken by the District Munsif on the binding nature of the sale-deed it was unnecessary for him to discuss this point. The Subordinate Judge has not discussed this question either, but the defendant cannot be blamed for it as he was respondent before him. I do not see any peculiar feature in this case or any conduct on the part of the 4th defendant specially *mala fide* to disentitle him to such equity. Seeing that he has spent some money for improvements, that he is entitled to ⅔rds of the items purchased by him in any event and that as to the remaining third he has got the possession as *othidar* and the plaintiff cannot recover it without paying the *othi* amount and some amount for improvements, I think this is a case in which the 4th defendant's right to equity is stronger than in many other cases. I, therefore, direct that in effecting the partition the purchased items should be allotted, if possible, to the share of the 1st and 3rd defendants so that 4th defendant may continue to be in possession. For this purpose if the other items in the plaint schedule are enough to constitute the plaintiff's third share or more than that share, well and good. If they are not, the Courts below may take into consideration the question how far three of the items mentioned in para. 24 of the Munsif's judgment, namely, the 5 acres in Thattankulam, the house at Madura re-conveyed by Ramasamy Kone by Ex. F-3 and the house mortgaged to D. W. No. 5 under Ex. 5 are joint family properties. The plaintiff should be given an opportunity of adducing evidence on this matter, that is, that they are not family properties. If the Court, find that some or all of them are family properties, they may be used for the purpose of allotting to the plaintiff his ⅓rd share so as not to trench on the alienated items.

There is a third point argued before me, the question of mesne profits. The Sub-Judge has given a decree for three years' profit prior to the suit. There is no dispute before me as to the rate of mesne profits before the suit but the appellant says that he is not liable for the profits prior to the suit. The suit was brought 11 years and 7 months after the sale and the plaintiff never sent any kind of notice to the 4th defendant questioning it. I, therefore, do not think he is entitled to profits prior to suit [see *Ramaswamy Iyer* v. *Venkatarama Iyer* (1)]. This question of profits does not really arise if the Courts below succeed in allotting the alienated items to the share of defendants Nos. 1 and 3 and through them to the 4th as I expect they will. The case will go back for passing a final decree with reference to these observations.

As between the plaintiff and the 4th defendant each party will bear his own costs throughout.

V. N. V. *Case remanded.*

(1) 75 Ind. Cas. 406; 46 M. 815; 45 M. L. J. 203; 18 L. W. 183; (1923) M. W. N. 786; A. I. R. 1924 Mad. 81.

SIND JUDICIAL COMMISSIONER'S COURT. FULL BENCH.

CIVIL REVISION APPLICATION No. 98 OF 1924.
October 8, 1926.
Present:—Mr. Kincaid, J. C.
Mr. Rupchand Bilaram, A. J. C.,
Mr. Tyabji, A. J. C., Mr. Lobo, A. J. C.,
and Mr. Barlee, A. J. C.
FIRM OF GOKALDAS KHATAOO
—APPLICANTS
versus
LACHMANDAS—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 50, O. XXX, rr. 1, 2, 3—Decree against firm—Partner, death of, before institution of suit—Legal representatives, whether liable in execution.

Held, by the majority (*Rupchand and Lobo, A. J. Cs.*, dissenting):—Where a suit is brought against a firm and a decree is obtained in such suit, the legal representatives of a person who was a partner in the firm at the time when the cause of action accrued but who was dead at the time when the suit was instituted, are liable to be proceeded against in execution of the decree under O. XXI, r. 50 (2) of the Civil Procedure Code. [p. 213, cols. 1 & 2; p. 216, cols. 1 & 2.]

[Case-law reviewed and discussed.]

Application to revise the judgment, dated the 30th June, 1924, of Mr. Rupchand Bilaram, Additional Judicial Commissioner, and reported as 87 Ind. Cas. 992.

JUDGMENT OF THE DIVISION BENCH.

Kincaid, J. C.—*(December 2, 1925).*—The facts of this interesting appeal are as follows:—

The Firm of Visumal-Wadhumal was started by Visumal some years ago. He was then Manager of a joint family numbering two persons, himself and his brother Goumal, six or seven years old. Unfortunately at the time of the boom Visumal entered into forward contracts in *bajri* for the *Mangh* 1974 *Vaida*. They were disastrous to the firm and in October, 1918 Visumal died leaving a minor son Lachmandas. After Visumal's death the creditors of the firm filed a number of suits against it, which Goumal, the surviving brother, defended pleading that the contracts had been wagering contracts. His pleas were overruled and the creditors were granted decrees by Raymond, A. J. C.

On the 14th November, 1920, Goumal and Lachmandas, represented by his mother Tejibai separated and such disputes as arose were referred by them to arbitration On the 12th January, 1921, the arbitrators passed an award dividing the property. By this award the joint family business with its debts was allotted to Goumal. A quantity of cash, however, was allotted to the minor and deposited in certain Banks in the names of three persons as Managers for Lachmandas. Goumal objected to the award and it was set aside by Aston, A. J. C., but against the learned Judge's order a revision application has been filed by the minor's guardian. In the meantime, however, the judgment-creditors, the firm of Gokaldas Khatao, learnt of the deposit of the minor's cash and obtained an attachment order in respect of a sum of Rs. 21,118 in the Central Bank of India and another sum of Rs. 26,630 in the Mercantile Bank of India. These sums had been deposited in the names of Jethanand, Pribhdas and Ghanshamdas. Jethanand applied to the Court of the Judicial Commissioner under O. XXI, r. 58, Civil Procedure Code, to raise the attachment. He contended that the money in the two Banks did not belong to the Firm of Visumal-Wadhumal but was the private property of the minor Lachmandas. The judgment-creditors retaliated by applying that they should be given leave under O. XXI, r. 50, Civil Procedure Code, to execute the decree against Lachmandas as the legal representative of Visumal, a partner of the firm. After exhaustively examining the law on the subject, Rupchand, A. J. C., on the 30th June, 1924, held that as Lachmandas had not been joined in the suit as Visumal's legal representative, the decree could not be executed against Lachmandas' estate. He raised the order of attachment and dismissed the execution application with costs and also dismissed an application under O. XXI, r. 50, Civil Procedure Code, but made no separate order as to costs.

Against this order the Firm of Gokaldas Khatao, the judgment-creditors, have filed the present appeal.

Mr. Tahilram argued the case for the appellants. Mr. Kimatrai appeared for the respondents.

The appeal is one in which the learned Pleaders have displayed great industry and much forensic ability and the question involved is one of considerable difficulty. The learned Judge of the lower Court differed from the case of *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1) and pre-

(1) 68 Ind. Cas. 627; 24 Bom. L. R. 1037; A. I. R. 1923 Bom. 66.

ferred to follow the ruling of Romer, L. J. in *Ellis* v. *Wadeson* (2). The learned Lord Justice therein held that where a partner died before action brought or between service of writ and judgment, judgment could only be obtained against the surviving partners, and be enforced against them and the partnership assets, unles the legal personal representatives of the deceased partner were added as parties. Where all the partners died after service but before judgment, judgment could not be entered at all. Mr. Tahilram was at great pains to show why the law in England should be different from that in India; but for my part, I think, that it is not always profitable, especially in partnership suits, to take English cases for our guidance. The conditions of English business are so different from those of Indian business. The amazing ingenuity with which the firm property suddenly becomes separate property; the skill with which joint members disappear from the co-parcenary taking the family property with them; the thousand and one devices by which the Indian judgment-debtor renders the decree against him void are unknown in England. There a partner's property is always his own separate property. There are no joint family members, there is no such thing as a joint family business. If a partner dies there is no difficulty in locating his property or in ascertaining who his legal representatives are. Such a case as the present, for instance, could not arise there. In fact, although I am not concerned with this aspect of the case, it seems likely that the elaborate partition, arbitration proceedings and revision application that have been transacted and made are all intended to safeguard the property of Visumal and Goumal and that their alleged disputes are mock disputes. In these circumstances, therefore, it is idle, as it seems to me, to talk of the equities of the case as in favour of the minor. We must turn aside from the equities of the case and the pronouncements of English Judges and turn to the law as it is in India and as it has been interpreted by high judicial authority.

Order XXX, r. 4 (1) runs as follows:—

"Notwithstanding anything contained in s. 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit."

The learned Pleader for the appellant has interpreted this clause to mean that the suit shall not be bad because the legal representative of the deceased has not been joined but the decree cannot be executed against him. I think, however, that had the Legislature meant so to restrict the meaning of this clause, it would have expressed itself in less ambiguous terms. As I read the section it means that not only will the suit not be bad for non-joinder of the legal representative of the deceased but that it will be possible to execute the decree against the said legal representative, even although he has not been joined.

The learned Judge of the lower Court held that O. XXI, r. 50, cl. (2) was limited in its operation to a partner living at the date of the decree. But there is nothing in the wording of that clause that, with all deference to the learned Judge, bears out, as it seems to me, his interpretation. O. XXI, r. 50, cl. (2) runs as follows:—

"Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), cls. (*b*) and (*c*), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

I am fortified in my interpretation of this clause by the weighty words of Sir Lallubhai Shah, Acting C. J. in the case of *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1):

"It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner."

The learned Pleader for the respondent has brought to our notice the case of *Ramprataab Brijmohandas* v. *Gavrishankar*

(2) (1899) 1 Q. B. 714 at pp. 718, 719; 68 L. J. Q. B. 604; 80 L. T. 508; 47 W. R. 420.

Kashiram (3) where Mulla, J., took a somewhat contrary view. But the matter was not before the learned Judge and the remarks that he let fall were *obiter dicta* uttered evidently without a consideration of the case of *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1).

For these reasons I would allow the appeal with costs and allow the execution application against the money in the Central Bank and the Mercantile Bank of India.

Lobo A. J. C.—(*December 2, 1925*).—This is a miscellaneous appeal wrongly styled an application in revision.

As I have the misfortune in this matter to disagree with the learned Judicial Commissioner it has become necessary for me to deliver a separate judgment.

The facts involved in this appeal and which it is necessary to refer to are briefly as follows :—

One Visumal as manager of a joint Hindu family consisting of himself and his brother Goumal started many years ago a business under the name and style of Visumal-Wadhumal. Goumal at the time was a minor 6 or 7 years of age. Visumal died in October 1918 leaving a minor son Lachmandas. After the death of Visumal, Goumal who had attained majority managed the business. Visumal in the name of the Firm of Visumal-Wadhumal had entered into certain forward contracts in *Bajri* of *Mangh* 1974 *Vaida* ; these contracts resulted in losses. After Visumal's death suits were filed against the Firm of Visumal-Wadhumal for the recovery of these losses. Goumal represented the firm in this litigation. Several decrees came to be passed against the Firm of Visumal-Wadhumal as a result of the litigation. While the litigation was still pending, somewhere about the end of 1920, there was a disruption of the joint family consisting then of Goumal and Lachmandas the minor son of Visumal. By an award dated 12th January, 1921, the business of Visumal-Wadhumal was allotted to Goumal as a going concern while certain immoveable properties fell to the share of the minor Lachmandas. The realizations from the sale of some of the properties awarded to the minor were deposited in the Central Bank of India Ltd., Karachi and the Mercantile Bank of India Ltd., Karachi in the names of Jethanand and two others appointed managers of the minor's property. The award itself has been, and apparently still is, the subject-matter of litigation in this Court, but with its varying fortunes I am not concerned.

Several of the judgment-creditors who had obtained decrees against the Firm of Visumal-Wadhumal applied in execution for and obtained attachments on the monies in the Central and Mercantile Banks above referred to. These attachments were promptly followed by applications under O. XXI, r. 58, Civil Procedure Code, filed by Jethanand one of the managers of the minor Lachmandas' estate. The Firm of Gokaldas-Khataoo one of the judgment-creditors of the Firm of Visumal-Wadhumal also applied under O. XXI, r. 50, Civil Procedure Code, for leave to execute his decree against Lachmandas, son of Visumal.

By an order dated 30th June, 1924, Rupchand, A. J. C., raised the attachments on the monies in the Central and Mercantile Banks, and also dismissed the application under O. XXI, r. 50, Civil Procedure Code.

The lower Court held that Visumal having died before the institution of the suit against the Firm of Visumal-Wadhumal the decree wherein was being sought to be executed, leave to execute the decree against Lachmandas as the legal representative of the deceased Visumal could not be granted and that the application under O. XXI, r. 50, Civil Procedure Code, was incompetent.

Whether or not the lower Court was right in its decision is the point before us in appeal.

Order XXI, r. 50, Civil Procedure Code, relates to the execution of a decree passed against a firm. To ascertain against whom such a decree can legally be executed it is necessary to be clear in the first place as to the position in law of a firm, and secondly, as to the nature of the proceedings in the form of a suit instituted by or against a firm and the effect of a decree obtained in such proceedings.

"There is no such thing as a firm known to the law," was stated by L. J. James in the case of *Ex parte, Corbett; In re, Shand* (4). The subject is briefly but very clear-

(3) 85 Ind. Cas. 464; 25 Bom. L. R. 7; A. I. R. 1924 Bom. 109

(4) (1880) 14 Ch. D. 122 at p. 126; 49 L. J. Bk. 74 42 L. T. 164; 28 W. R. 569.

ly dealt with by the well-known commentator on the Civil Procedure Code. Mulla, J. in the case of *Ramprataб Brijmohandas* v. *Gavrishankar Kashiram* (3) and I can do no better than quote what he there says: "The Law of England as well as of British India knows nothing of a firm as a body or artificial person distinct from the members composing it. In this respect a firm differs from a Company incorporated under the Companies Acts, such a Company being a corporate entity separate from its share-holders, though the latter can control its action by passing resolutions in general meetings. The word 'firm' is a short, collective name for the individuals who constitute the partners." In the case of *Seodoyal Khemka* v. *Joharmull Manmull* (5) Mr. Justice Page defines a partnership firm as not being a person but "merely a collective name of the individuals who are members of the partnership."

This, therefore, is the position of a firm in law.

The procedure relating to suits by or against firms is regulated by the provisions of O. XXX of the Civil Procedure Code. Order XXX has been modelled entirely on O. XLVIIIA of the Rules of the Supreme Court 1883. In the course of argument attention has been drawn to r. 4 of O. XXX and it has been argued that as no similar provision exists under O. XLVIIIA of the Rules of the Supreme Court, 1883, reference to English cases relating to proceedings against a firm and the effect of a decree obtained in such proceedings is out of place. The argument is, however, unsound, as it ignores the fact that the introduction of r. 4 in O. XXX of the Civil Procedure Code was necessitated by s. 45 of the Indian Contract Act which embodies a principle of law different to that prevailing in England. Whereas in England a surviving partner may sue alone, under s. 45 of the Indian Contract Act one of joint promisees cannot sue without joining the representative of a deceased promisee. There was a conflict between the various High Courts in India as to whether the English Law or s. 45 of the Indian Contract Act was applicable in this respect to a trading partnership and O. XXX, r. 4, Civil Procedure Code, was introduced to adopt the view of the majority of the High Courts declaring that the legal representatives of a deceased partner are not necessary parties to a suit brought in the name of the firm [*vide Mool Chand* v. *Mool Chand* (6)]. In my opinion, therefore, on the question of the nature of the proceedings in the form of a suit instituted against a firm, and the effect of a decree obtained in such proceedings, rulings under English Law would be a safe guide.

Now what must be regarded as the leading case on this subject is the decision of the Court of Appeal in the case of *Ellis* v. *Wadeson* (2). The judgment of the Court of Appeal was delivered by Romer, L. J., who says "Suppose a partner dies before action brought, and an action is brought against the firm in the firm's name, the dead man is not a party to the action, so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case. In that case the action would be an action solely against the surviving partners..... .....If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners *and be enforced against them and against the partnership assets*.....Now, what happens if a partner dies between service of writ and the trial of the action and judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners *and enforced against them and against the partnership assets.*"

Bearing in mind that whether under O. XXX of the Civil Procedure Code or under O. XLVIII A of the Rules of the Supreme Court, a suit against a firm is essentially a suit against the individuals constituting that firm, and bearing in mind further that a suit cannot be instituted or a decree ordinarily obtained against a dead man: *vide Topanram Nathuram* v. *Tekchand* (7) and *Anwar-ul-Haq* v. *Nazar Abbas* (8), the argument of Romer, L. J. and the conclusions drawn by him and quoted above

(5) 75 Ind. Cas. 81; 50 C. 549; A. I. R. 1924 Cal. 74.

(6) 71 Ind. Cas. 951; 4 L. 142 at p. 150; A. I. R. 1923 Lah. 197.

(7) 15 Ind. Cas. 832; 5 S. L. R. 260.

(8) 88 Ind. Cas. 865; 6 L. 313; A. I. R. 1925 Lah. 494.

are to my mind both logical and irresistible.

In the case I have previously referred to in *Rampratab Brijmohandas* v. *Gavrishankar Kashiram* (3) *Ellis* v. *Wadeson* (2) has been adopted with approval by Mulla, J. He states: "It follows that a suit against a firm is essentially a suit against the partners constituting the firm. If a suit is brought against a firm in the firm's name and a decree is passed for the plaintiff, it is a decree against all the partners constituting the firm assuming that they were all alive at the date of the suit and decree. If a partner dies before suit, and the suit is against the firm in the firm's name the suit is one solely against the surviving partners, and judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets. The judgment cannot be enforced against the private estate of the deceased partner unless his legal representative is added expressly as a defendant, for a dead man cannot be sued though his legal representative can be sued in a proper case. If a partner dies between service of the writ and the trial of the suit and judgment, in that case equally the dead man's estate is not bound, and judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets. But if his legal representative is brought on the record, judgment may be obtained against him also as such, and execution enforced against his private estate."

Now in the case before us, the application under O. XXI, r. 50, Civil Procedure Code, is to execute the decree against the estate of the deceased Visumal in the hands of his minor son Lachmandas. The suit in which this decree was passed was a suit against the Firm [of Visumal-Wadhumal. The decree obtained is also a decree against a firm. Visumal having died before the institution of the suit, the suit was essentially one against the surviving partner in the firm. Lachmandas the legal representative of Visumal not having been impleaded in the suit, the decree is a decree against the surviving partner and is enforceable against the property of the firm and the surviving partner. It is not enforceable against the private property of Visumal in the hands of Lachmandas. These are the logical conclusions to be drawn from the application to the facts of this case of the principles laid down in *Ellis* v. *Wadeson* (2) which have been followed in *Rampratab Brijmohandas* v. *Gavrishankar Kashiram* (3) by Mulla, J.

I should have had no hesitation at all in adopting these conclusions were it not for the fact that there is a ruling of a Divisional Bench of the High Court of Bombay exactly to the contrary reported in *Jivraj Laloohbai Patel* v. *Bhagwandas Gordhandas* (1). In that case [*Jivraj Laloobhai Patel* v. *Bhagvandas Gordhandas* (1)] the facts were very similar. In a suit against a firm one of the partners was dead at the date of its institution. The summons was served on one of the surviving partners but there was a decree against the firm *ex parte*. The judgment-creditor's assignee applied for leave under O. XXI, r. 50, Civil Procedure Code, to execute the decree against the estate of the deceased partner in the hands of his executor. The application was allowed. Shah, Acting C. J., holding that sub-r. 2 of r. 50 of O. XXI, Civil Procedure Code, was "wide enough to cover the case of a deceased partner." The lower Court has dissented from this judgment and I cannot but feel rightly so. The grounds on which Shah, Acting C. J., overruled the argument of Mr. Desai that sub-r. 2 of O. XXI, r. 50, applied only to the case of a living partner, and that the provisions of that sub-rule could have no application when the partner was dead are, first, the inequity and injustice involved in such an interpretation of sub-r. 2, and, secondly, the wording of the sub-rule in question. With all respect for the learned Acting Chief Justice the wording of sub-r. 2 of r. 50, if anything, assists the argument that the sub clause applies to a living partner only. The application therein contemplated is an application to cause the decree to be executed against any person, "*as being* a partner in the firm." To my mind this was not the language that the Legislature would have used if it was contemplated that sub-r. 2 should cover the case of a deceased partner.

Again with all respect to the Acting Chief Justice I do not see that the construction confining the application of sub-r. 2 to a living partner would, regard being had to the provisions of O. XXX, Civil Procedue Code, work an injustice on the judgment-creditor. A litigant is always expected to be vigilant about his interests. Visumal had died in 1918, the *Bajri* suits against the Firm of

Visumal-Wadhumal were decided in 1921. The judgment-creditors must undoubtedly have been aware of Visumal's death and it was open to them to have joined the legal representative of Visumal so as to enable them to obtain a judgment and a decree binding upon the private property of Visumal. They did not choose to do so, and it does not lie in their mouths now to complain of injustice. On the contrary, in my humble opinion, it would be unjust in the circumstances of this case, and even generally to allow a decree obtained against a firm to be executed against the estate of a partner who had died before the institution of the suit in which the decree had been obtained without joining in the suit the legal representative of the deceased partner for the simple reason that, whereas if the said legal representative had been impleaded in the suit he would have had an opportunity of contesting the suit on its merits, the failure to implead him and at the same time to attempt to execute the decree against him would entirely deprive him of his opportunity to contest the suit on its merits. One may well imagine a case of a suit filed against a firm in the firm's name after the death of the capitalist partner of the firm, allowed to go *ex parte* by an impecunious or insolvent *gumashta*, and the decree obtained sought to be executed against the estate of the capitalist partner whose legal representative was entirely ignorant of the institution of the suit and suddenly found himself confronted with an application under O. XXI, r. 50, Civil Procedure Code for leave to execute the decree against him. He would be entirely deprived of every opportunity of defending the suit on its merits. The case becomes more aggravated if that legal representative happens to be a minor whose guardian is a *pardanashin* lady. The judgment of the learned Acting Chief Justice dealing with the point in question is somewhat meagre and contains no reference to any authority in support of his grounds, and in my opinion the lower Court was justified in differing from the view of the learned Acting Chief Justice.

For the above reasons I am of opinion that the application under O. XXI, r. 50, Civil Procedure Code, for leave to execute the decree of Gokaldas Khataoo against the estate of Visumal in the hands of his minor son Lachmandas was rightly rejected by Rupchand, A. J. C. I would, therefore, uphold the order of the lower Court and dismiss this appeal with costs.

ORDER.

Kincaid, J. C.—(*December 3, 1925*).—Under s. 9-B, Sind Courts Rules, I direct this appeal be heard by a Bench of the five Judges of this Court. The date of the hearing should be after my return from tour.

Mr. *Tahilram Maniram*, for the Applicants.

Mr. *Kimatrai Bhojraj*, for the Opponent.

JUDGMENT OF THE FULL BENCH.

Tyabji, A. J. C.—This is an application in revision arising out of an application under O. XXI, r. 50 (2) of the Civil Procedure Code for execution of a decree obtained under O. XXX against a firm.

Order XXI, r. 50 provides, *inter alia*, that when a decree has been passed against a firm the Court may, on application being made to it, grant leave for its execution against any person (other than those specified in an earlier part of the rule) as being a partner in the firm. Under the rule where the liability is disputed, the Court cannot grant leave without first trying and determining the question whether there is any liability. But a preliminary objection was taken by the opponent to the present application, that in this case the Court cannot proceed to determine the said question and that leave can in no circumstances be granted, because the party against whom execution is sought is not a partner in the firm, that the application is not for leave to execute against any person as being a partner in the firm, but against the legal representative of an alleged partner who was dead at the time of the suit; and it is argued that unless the deceased partner was a defendant and himself a judgment-debtor (so that s. 50 of the Civil Procedure Code applies) or the legal representative of a deceased partner who has been a party to the suit (so that s. 52 of the Civil Procedure Code applies), the Court has no power in execution proceedings to order that his liability be tried and determined, with the object of giving leave to execute the decree against him.

Order XXX deals with suits both by and against firms: In referring to its first three rules I shall omit reference to irrelevant provisions, in particular to provisions where firms are plaintiffs.

The order commences by providing that

two or more persons being liable as partners, and carrying on business in British India, [which must mean "who have carried on business in partnership for the purpose of the liability which is sought to be enforced:" *In re Wenham; Ex parte Battams* (9)], may be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action. When persons are sued as partners in the name of their firm, it suffices if their written statement is signed and verified by any one of such persons.

Rule 2 deals with firms as plaintiffs. Rule 3 provides for service of the summons; if served upon any one of the partners or a person having control or management of the firm's principal place of business, then the "service shall be deemed to be good service upon the firm so served," and it is particularized: "Whether all or any of the partners are within or without British India". And then there is a proviso to which I shall refer later. The rules speak of "persons suing or being sued as partners in the name of the firm" (rr. 1, 2, 3, 4, 6); as well as "the firm suing or being sued" [rr. 2 (1), 3, 5, 8, 9] and in r. 3 a sentence begins with the former expression and ends with the latter.

Finally r. 4 deals with a case where (1) two or more persons may be sued in the name of a firm; and (2) any of such persons dies whether before the institution or during the pendency of the suit. For such a case it is provided that notwithstanding anything contained in s. 45 of the Indian Contract Act, it shall be necessary to join the legal representative of the deceased as a party to the suit.

Shortly stated, a suit on a cause of action which has accrued against two or more persons who were at the time, carrying on business in partnership in British India and who became liable as partners, may be brought against the said persons in the firm name: the summons in such a suit, if served upon any one of the partners, or on a manager will be good service upon the firm so sued, and though any of such persons dies before the institution or during the pendency of the suit it shall not be necessary to join the legal representative of the deceased as a party to the suit.

The effect of a decree obtained in such a suit will in part depend (r. 3, proviso) upon the circumstance whether the firm was dissolved to the knowledge of the plaintiff before the institution of the suit: if it is so dissolved then the summons shall be served upon every person in British India whom it is sought to make liable. Thus though it is stated who shall be liable in the exceptional case last mentioned, it is not stated what will happen in other cases.

In the present case, at its present stage, reliance cannot be placed on the proviso—the stage is not reached when the merits of the application can be considered; as the preliminary objection set out above was taken and allowed.

It is clear that under O. XXX, the decree, if any, will be against the firm. As said by Brett, L. J.: "The writ (summons) being against the firm the judgment must be against the firm" *Jackson* v. *Litchfield* (10). No individuals will be mentioned as judgment-debtors. But r. 1 provides for ascertaining what individuals are intended to be sued under the firm name and who, therefore, will be the judgment-debtors. They are "the persons who were at the time of the accruing of the cause of action partners in such firm" (r. 1) and it is also provided by r. 4 that if any such person dies whether before the institution or during the pendency of any suit, "it shall not be necessary to join the legal representative of the deceased as a party to the suit."

It follows, therefore, from rr. 1 and 4, I am using the words of the rules "that a person who at the time of the accruing of the cause of action was a partner in the firm, may be sued in the firm name and if he so sued and he dies before the institution or during the pendency of the suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit:" If all the partners were dead still the suit could be brought against the firm in the firm name, but there would be difficulty in serving the summons and in executing the decree except against the partnership property: The statement to which the plaintiff would be entitled under O. XXX, r. 1 would not assist him on the point as to whether any of the partners had died at the time of the suit.

The opponent's contention is, in effect, that in spite of the rules the deceased partner cannot be sued in the firm name if he dies before the institution of the suit.

(9) (1900) 2 Q. B. 698 at p. 705; 69 L. J. Q. B. 803; 48 W. R. 626; 83 L. T. 94; 7 Manson 309.

(10) (1882) 8 Q. B. D. 474 at p. 478; 51 L. J. Q. B 327; 46 L. T. 518; 30 W. R. 531.

If the words are read literally, it seems to me that where a decree is passed against a firm, the deceased partner comes within the terms of s. 50 of the Code; he is a judgment-debtor who dies before the decree has been fully satisfied; though this is subject to any effect that the proviso in O. XXX, r. 3, may have on any partnership that has been dissolved to the knowledge of the plaintiff. I do not overlook that s. 50 was probably intended primarily to cover cases where the judgment-debtor was alive at the date of the decree. Still it seems to me that reliance may well be placed upon s. 50 in this connection for the reason that O. XXX has created a situation altogether different from that in ordinary suits. With a fewexceptions which need not now be considered, the general rule is that each individual sought to be bound by the decree must be served with the summons. It is consequently absurd to contemplate a case in regard to the generality of suits where the plaintiff does not know who the individuals are, against whom the suit is brought. But this last situation is perfectly normal in regard to the suits brought under O. XXX. An unthinkable situation is thus turned into a normal situation.

If a living partner without being served with the summons is bound by the decree whether he is within British India or without why should not the legal representative of a dead partner be bound in the same manner and to the same extent? Being made a party without being served is at best a formality. It is not denied that the legal representative is bound by the decree to the extent mentioned in O. XXI, r. 50, sub r. (1), cl. (*a*), *viz.*, as regards the share of the deceased in the partnership property—a point to which I shall refer again. But it is said that though the deceased partner would have been amenable to sub-r. (2) of the said rule had he been living, his legal representative cannot be subjected to it unless he is made a party to the suit.

The question resolves itself into whether the rules intend the firm name to include only the partners living at the date of the suit, or them and the legal representative of the partner against whom the cause of action accrued, but who died prior to or pending the suit. That the latter was intended to be included seems to me to be indicated by the combined effect of rr. 1 and 4. As rule 1 already includes all the partners at the time of the accrual of the cause of action there is strictly no room for the legal representative to be added in addition to him that is sought to be represented by the legal representative. The seat that Macbeth would occupy has already been filled by the ghost of Banquo.

Would the legal representatives have to be served individually? And if so, would not the object of r. 3 and the whole scheme of O. XXX, that a single person need alone be served be defeated?

The argument that the word 'partner' in O. XXI, r. 50 (2) cannot be taken to include "the legal representative of a partner" is attractive, but it proves too much. If the argument were sound what would the result be where a partner who was living at the time of the decree, and who could not be brought under O. XXI, r. 50 (1), cls. (*b*) and (*c*) had died prior to execution? His legal representative could not (according to the argument) come under r. 50 (2), therefore, either the decree could not be executed against the legal representative at all, or if s. 50 were taken to govern the case, then the legal representative would be deprived of the benefit of r. 50 (2), to which the partner himself would have been entitled. Such anomalies are avoided by reading the rule as follows:—"As being, *or representing*, a partner in the firm": and this is surely not putting any strain on the words of the rule. It is rather reading them in their natural sense when the whole context is borne in mind. On the other hand the canons of construction are, it seems to me, disregarded when the words of O. XXX, r. 1 "the persons who were at the time of the accruing of the cause of action partners in such firm" are read as meaning only such of the said persons as are living at the time of the suit, or rather at the time of the decree—for a partner dying during the pendency of the suit, is placed in no different position from one dying prior to its institution.

But I must not allow these considerations to draw me away from a more careful examination of r. 4. That rule expressly refers to one of the persons sued in the firm name dying before the institution of the suit and to there being no necessity for joining his legal representative as a party to the suit. It would *prima facie* seem, therefore, that this rule must govern the question before us.

On behalf of the opponent it is urged that r. 4 does not throw any light on the question, as it merely counteracts the situation created by the Indian Contract Act, s. 45, under which the suit would be defective without the presence of the legal representative.

Rule 4 deals with firms as plaintiffs as well as defendants. Section 45 of the Indian Contract Act refers to matters which can only affect the firm as plaintiff. That section lays down that the right to claim performance of a promise made to two or more persons, jointly, rests with the representative of the deceased promisee jointly with the surviving promisees. It is, therefore, arguable that r. 4 was necessary to prevent the suit by a firm as plaintiff being defective, unless the legal representative was joined; though it does not follow that the rule was to mean no more.

But r. 4 deals with suits against firms, (who are joint promisors). In regard to them an argument similar to that last considered cannot hold. For, under s. 43 of the Indian Contract Act the representative of a deceased joint promisor need not be made a defendant in the suit. Order XXX, r. 4 (2), cl. (*b*) in so far as it is applicable to the legal representative of a partner in the defendant firm, seems to refer to the right of contribution mentioned in the second para. of s. 43 of the Contract Act.

One other argument was urged on behalf of the opponent that the effect of r. 4 is to bind the share of the deceased partner in the partnership assets though the legal representative may not be joined as a defendant. But this argument overlooks s. 263 of the Indian Contract Act. The share of the deceased partner can only be determined in the surplus after the debts of the firm are paid [ss. 249, 253 (2), 262, 265]. The surviving partners have the right to pay the firm's debts out of the partnership assets; and a decree-holder can compel them to exercise that right. Thus the partnership assets would be bound by decrees against the surviving partners without calling r. 4 in aid. It follows, therefore, that r. 4 cannot be interpreted as the opponent would have it.

Much reliance was placed on a ruling of the Court of Appeal in England, *Ellis* v. *Wadeson* (2), where the actual decision was that one of the two surviving partners, when the suit was against the firm, was not entitled to put in a personal defence, but only a statement of defence for and in the name of the firm. The actual decision, therefore, so far as it goes, shows that the firm (as defined in r. 1) is bound or not bound as a whole. In the course of the judgment, however, other questions are dealt with expressly for future guidance.

The judgment lays down that each partner in the defendant firm appears and puts in a defence on behalf of the firm as a whole "he has to defend for the firm and in the firm name" (page 720*). If the defences taken by the various partners are different, even if inconsistent, the plaintiff must "beat all the defences—that is to say, he must show and satisfy the Judge that not one of the defences prevents a judgment being entered against the partnership" (page 717*); so, on the other hand, if only one partner appears his defence binds the firm; even if the defence is improper.

The judgment then goes on to deal with the case of a partner dying before action is brought. Here the result is said to be that a dead man cannot be a party to the suit. Therefore, Romer, L. J. says that, the action would be an action solely against the surviving partners. In England under the Common Law, the survivors only could be sued, since the passing of the Judicature Act, in the case of a partnership liability, the surviving partners and the legal representatives of the deceased partner may be joined; "but the latter would have expressly to be added as defendants;" *Ellis* v. *Wadeson* (2).

It will thus be seen that the rule laid down in *Ellis* v. *Wadeson* (2) is on the basis that being permitted to join the surviving partners and the legal representatives of the deceased partner is itself an innovation, and that it is an innovation of such a character that it is not possible to indulge in it in a suit against the firm in the firm name. The language used by Lord Justice Romer is significant. He says "the creditor might now join in one action the 'surviving partner' and the legal personal representatives of the deceased partner." In the next sentence he speaks by way of contrast of the action being brought against "the firm in the firm name."

In England (subject to the Judicature Act) the substantive law is that the liability of the partners devolves only on the

*Pages of (1899) 1 Q. B.—[*Ed.*]

surviving partners. The suit based on that liability is, therefore, taken *prima facie* to be against the survivors on whom the liability rests. In India the joint liability devolves not only on the survivors but on them and the representatives of the deceased partners jointly; (Section 42 of the Indian Contract Act). The decision in *Ellis* v. *Wadeson* (2), therefore, read in the light of the substantive law, shows to what extent rules of procedure are made to subserve the substantive law. It would be violating the real principles underlying *Ellis* v. *Wadeson* (2) for us in India (our substantive law being as it is) to adopt bodily the result arrived at in Ellis's decision: for that would make the adjective law not the servant of the substantive law but a tyrannical master.

This result seems to me to be guarded against by the enactment of O. XXX, r. 4 by the Indian Legislature. That rule is an addition to those taken from the Rules of the Supreme Court prevailing in England. Under our rules, it seems to me when a firm is sued in the firm name, the decree must be against the firm, that expression being in effect explained in O. XXX, r. 1, as referring to persons, who were at the time of the accruing of the cause of action partners in the firm notwithstanding that any of such persons dies before the institution or during the pendency of the suit and his legal representative has not been made a party to the suit.

The result at which I have arrived is, that which the Bombay High Court adopted in *Jivraj Laloobhai Patel* v. *Bhagwandas Gordhandas* (1) and, what seems to me of no slight importance, the result is in conformity with the substantive law. For, it is clear that the estate of a deceased partner is liable for his partnership debts. But if this liability is disputed O. XXI, r. 50 gives the legal representative an opportunity of having that question tried and determined. At the earlier stage of the suit, when the Court is considering whether the partnership as a partnership is liable, it is as unnecessary to bring the legal representative before the Court, as it would have been to bring the deceased partner himself had he been living. At the earlier stage, any single partner may be served on behalf of all the partners; the legal representative is represented by the partner actually served, as much as the deceased partner would have been, had he been alive. But, at the latter stage of the suit, contemplated by O. XXI, r. 50, when each partner has to be specifically served and severally brought before the Court, the legal representative has to be so served, as much as the deceased partner would have had to be. At the earlier stage the presence of the legal representative would ordinarily only encumber the proceedings for the question before the Court is whether the firm is liable. At the later stage his presence is as necessary as the specific presence of the deceased would have been necessary, since the question refers to the specific liability of each individual member of the firm. There is no question of suing a dead man; but only of determining the extent of liability against a number of persons jointly, and the question is at what stage the individual joint promissors (or the legal representative of a deceased joint promissor) should be brought before the Court.

For these reasons in my opinion, the decision of the learned Additional Judicial Commissioner who first dealt with the application was erroneous and it should be referred back in order that the liability of the opponent may be tried and determined in accordance with O. XXI, r. 50. The costs of this application both before the Divisional Bench and this Bench must be borne by the opponent.

Barlee, A. J. C.—This application has been made against the decision of Rupchand, A. J. C., in Execution Application No. 172 of 1923, which was an application made under O. XXI, r. 50 (2), Civil Procedure Code, by the judgment-creditor in Suit No. 492 of 1921 against the Firm of Visumal-Wadhumal, for leave to execute his decree against the heirs of Visumal-Wadhumal who, it was said, had been a partner and a member of the joint family Firm of Visumal-Wadhumal. The heir was Lachiram son of Visumal. The application was dismissed, and an appeal was made, which was heard by a Bench of Court consisting of Kincaid, J. C. and Lobo, A. J. C. The learned Judges differed and the appeal has been referred to this Full Bench.

The facts which are not in dispute are these. Visumal and his brother Goumal were joint and undivided, and traded in the name Visumal-Wadhumal. Visumal was the manager, and as such entered into forward contracts for grain. They resulted in

losses; and suits were filed against the firm. But, before they were filed, he was dead and they were defended by Goumal. He was unsuccessful, a number of decrees were made against the firm. It is admitted, also, that after the institution of the suits there was a dispute between Goumal and Tejibai widow of Visumal and that the question of a partition between the former and Visumal's minor son was referred to arbitration. The arbitrators made an award, and some money, the proceeds of the sale of all the immoveable property of the family, was deposited in the two Banks above mentioned on behalf of the minor.

The only other question of fact which is or may turn out to be important is whether, at the date of the institution of Suit No. 492 (that is now under consideration), the plaintiff knew that Visumal was dead, and whether his death dissolved the family partnership. Its importance lies in the fact that, if he had knowledge of the dissolution of the partnership, he ought, on filing his plaint, to have served summonses on all persons whom he wished to make liable (O XXX, r. 3) proviso; and it is probable, that, as he did not do so at that time, he cannot now be allowed the benefit of O. XXI, r. 50 (2). But these questions were not considered by the trying Judge and have, therefore, not been considered by this Bench. For the purposes of this reference I shall assume, therefore, that the plaintiff did not know that the partnership had been dissolved.

The suit, as I have said, was against the Firm of Visumal-Wadhumal, and the plaintiff made use of the procedure first introduced by O. XXX of the Civil Procedure Code of 1908. The object of this Order is to simplify procedure. Up to 1908 a plaintiff had to join by name as defendants all persons connected with the firm. Order XXX, r. 1 permits a plaintiff to sue the members of a partnership firm under the firm name; and r. 3 provides that the service of summons on any one partner shall be deemed good service on the other partners. The partner sued represents the rest, and O. XXI, r. 50 shows that all the partnership property is liable to be sold in execution of any decree obtained by the plaintiff. But such a decree does not affect the private property of partners who have not been served, or have not joined in the suit. To make it liable a plaintiff must serve such partners with summonses, and he can do so under r. 50 (2) of O. XXI even after decree. They are then given an opportunity of defending themselves personally. In other words, though any partner who is served is the representative of the rest so far as the partnership property is concerned, he cannot represent them in what I may call their private capacities.

This equitable and useful rule is that which the decree-holder in the present case wants to use against the legal representative of the deceased Visumal. He wants the Court to allow him to proceed against the estate of Visumal, and *prima facie* his request appears to be just. Visumal was a partner, and after his death his estate remained liable for the debts contracted by his firm during his lifetime, and is still liable in the hands of his legal representative, unless it can be shown that by some rule of law it is no longer liable. It is the opponent Lachiram's case that the plaintiff (applicant) has lost his right to proceed against Visumal's estate by not joining him, Lachiram, as a party on the institution of the suit, that is by not serving him with a summons and giving him an opportunity of defending himself before the decree was made.

I must at once say that what is asked for the opponent Lachiram is a privilege which would not have been given to his father had he been alive to-day. It was, therefore, incumbent on him to show why he, a legal representative should be a privileged person, or rather why the property, which in father's hands would have been liable, should be exempt in his hands. He relies partly on the actual words of the rule but mainly on general principles; and, as these principles have been stated as clearly as possible in the judgments of the learned trying Judge and Lobo, A. J. C., I shall now proceed to an analysis of their reasoning.

The learned trying Judge first stated the following legal principles:—

(1) that a firm is not a legal entity;

(2) that a suit against a firm is a suit against the individual partners;

(3) that a dead man cannot be a party to a suit;

and he drew the conclusion that the decree in suit did not bind the estate of the deceased.

Lobo, A. J. C., adopted this reasoning and reinforced his conclusion by the

authority of Romer, L. J. in *Ellis* v. *Wadeson* (2), and Mulla, J. in *Rampratab Brijmohandas* v. *Gavrishankar-Kashiram* (3). He emphasized the injustice of allowing a plaintiff to have recourse to property in the hands of Lachiram who has had no opportunity of contesting his claim.

The only remark which I need make about the principles which I have stated, is that the second is not exhaustive. A suit against a firm is not a suit against the living partners only. This appears to me to be clear from r. 50, sub-r. (1) of O. XXI. That shows that in execution of a decree against a firm the decree-holder is entitled to proceed against the property of the firm, and that includes the shares to which the legal representatives of deceased partners are entitled, even if those legal representatives have not been personally served with summonses and have not appeared to contest the suit. It follows, as I have said, that the living partners represent part of the estate of the deceased. The correct position must, then, be that a suit against a firm is at the least a suit both against the individual partners, and also against a part of the estate of the deceased partners, their interest of the deceased in the partnership property. This necessitates a re-statement of the third principle. A dead partner cannot be a party to a suit, but his estate can be made liable to satisfy partnership debts, provided that it is represented; and what may be called his partnership property is considered to be represented by any partner who has been served with summons.

The conclusion at which both learned Judges arrived is, however, correct. The decree obtained by the plaintiff, as it now stands, does not entitle him to the private estate of the deceased, but only to the partnership property of the deceased. But with the greatest respect I must say that this is not enough to dispose of the case. The decree does not bind Visumal's private estate in the hands of his minor son. But it would not bind that property in his own hands, were he now alive, unless he had been summoned in the suit. Nevertheless undoubtedly the plaintiff could have made him a party after decree under O. XXI, r. 50 (2) and it could have been made binding on his private estate. I am, therefore, still unable to understand why the private property in his son's hands should be exempt. I am also unable to understand the argument based on justice. It would, of course, be unjust to allow the plaintiff to seize the property without giving Lachiram an opportunity of defending the suit on the merits. But that is not contemplated by sub-r. (2). The procedure contemplated is clear. A decree-holder claims to be entitled to execute his decree against the private property of partners who have not been summoned; the Court issues notice and, if the liability is not disputed, grants leave. In effect it decrees the claim on the admission of the partner, who is by this time a party in his personal capacity, and is no longer represented by the partners already served. But if the liability be denied, the Court orders that it 'be tried and determined in any manner in which any issue in a suit may be tried and determined.' In other words the partner who is served under this sub-rule, has the same right and opportunity of defence as his *ex*-partners. In the same way Lachiram, as legal representative, will have an opportunity of defending himself, and no injustice will be done.

The case *Ellis* v. *Wadeson* (2) does not appear to touch the question which we have to decide. Romer, L. J., held that a deceased partner is not a party to an action against a firm "so far as his private property is concerned," but that the personal property can be made liable by joining the legal personal representatives expressly as partners. If they are not joined the creditor can enforce his judgment against the surviving partners (those joined as parties) and the partnership assets. His Lordship explained that the interests of the deceased partner in a firm can be made liable, though the personal representatives are not personally on record, because, for certain purposes, surviving partners who are served, represent their interests. They represent, also, it may be added, the interests of the unserved living partners. But there is nothing in this judgment to show at what stage it is necessary to put the legal personal representative of a deceased partner on the record, or to show that the private estate of a deceased partner is distinguishable from that of a living partner, so that one can be attached after the decree and not the other; and I am unable to differentiate on principle between the rights and liabilities of Lachiram and those which his father would have had, had he been alive. The private estate has not been touched and will not

be touched (unless there be an attachment before the judgment) unless and until the proceedings under O. XXI, r. 50 (2) end in an order adverse to Lachiram.

It has been argued, however, that the Legislature has made it clear that a plaintiff must summon the legal representative of a deceased partner at the commencement of the suit against the firm, or lose his right to have recourse to the private estate of the deceased. I shall first take O. XXX, r 1. It had been suggested, though not with any show of conviction, that the use of the present participles in the first two lines shows that the procedure provided by O. XXX, can be employed only by or against such persons as are partners at the date of suit. To refute this argument I need only refer to O. XXX, r. 4, which by implication contemplates the joining of the legal representatives of partners who have died before suit; and to the proviso to r. 3, which states that persons sued in the name of a firm *after its dissolution* must be served personally at the commencement of the suit proceedings, if the plaintiff seeks to make their personal estates liable.

The second argument is that the use of the words 'being liable as partners' in r. 1 of O. XXX, and 'as being a partner' in O. XXI, r. 50 (2) necessarily excludes legal representatives, who cannot be liable as partners. A sufficient answer is supplied by O. XXX, r. 4 to which I have just referred, sub-r. (2) of that rule is very clear.

"Nothing in sub-r. (1) shall limit or...affect any right which the legal representative of the deceased may have (*a*) to apply to be made a party."

The deceased referred to is the deceased mentioned in sub-r. (1) "any person who dies *before the institution or during* the pendency of the suit."

If the legal representative of a partner, dead before suit, may himself apply to be made a party, it is an obvious corollary that he may be joined as a party on the application of the plaintiff. It follows that the words in O. XXI, r. 50 (2) mean 'as being a partner or the legal representative of a deceased partner.'

Lastly it has been contended that the plaintiff cannot seize the estate under O. XXI, r. 50 (2) since that rule does not show how the decree can be executed. But he will not execute the existing decree. He will obtain an order which will be executable in the ordinary way as a decree.

To sum up, the personal estate is liable in the hands of Lachiram because it would have been liable in the hands of his father had he died after the decree. It was clearly the policy of the framers of the Code to relax the general rule that liability can only be enforced against the property of those who are parties before decree. The argument that Visumal, if alive, would have been liable because he would have been a party before decree is, I respectfully contend, a mere quibble. Lachiram has been a party to an equal extent. There is, then, no apparent reason why the usual rule should not now be adopted, and a creditor allowed to attach the estate of a deceased debtor in the hands of his legal representative. It was not necessary to include any special rule in O. XXI to safeguard so obvious a right. It is enough, then, to say that as there is no rule which takes that right away directly or by implication the plaintiff can now exercise it.

For these reasons I agree with the order proposed by my learned brother Tyabji, Additional Judicial Commissioner.

Kincaid, J. C.—I have not thought it necessary to write a second judgment in this case. I would allow the appeal and would remand the case as proposed by Tyabji, A. J. C. The costs of the revision applications both before the Division Bench and the Full Bench to be borne by the opponents.

Rupchand, A. J. C.—With all due respect for the learned Judicial Commissioner and for my learned brothers Tyabji and Barlee, I regret I am unable to subscribe to their view as to the effect of O. XXI, r. 50, Civil Procedure Code.

So far as the ordinary procedure of Courts both in England and in India is concerned, the Law contemplates an action being instituted in the name of a living plaintiff and against a living defendant. This rule of law is so rigid that though the Courts have been expressly empowered to substitute one person as plaintiff for another where the suit has been instituted in the name of a wrong plaintiff, it has been held that this statutory power cannot be exercised where the suit is instituted in the

name of a dead plaintiff: *Tetlow* v. *Orela Ltd.* (11).

The law equally contemplates a decree being passed in favour of a living person as a plaintiff and against a living person as a defendant. As observed by Farewell, L. J. in *Brydges* v. *Brydges* (12) the Court has no jurisdiction inherent or otherwise over any person other than those properly brought before it as parties or as persons treated as if they were parties under statutory jurisdiction. With the death of a party to the suit the jurisdiction of the Court as against him ends. And the Court must stay its hands unless some one else is brought in the place of the deceased as his legal representative.

The only statutory exception to the rule that a decree may not be passed for or against a dead man is contained in O. XXII, r. 6, Civil Procedure Code corresponding to O. XVII, r. 1, R. S. C. which provides that where death of a party has taken place between the conclusion, of the arguments, (or under the English Law between the verdict or finding or issues of fact), and judgment, the judgment may be pronounced notwithstanding such death, and has the same effect as a judgment pronounced before such death took place.

As a matter of fact there is no provision in the Code which could enable the Court, to execute a decree passed in favour of a dead plaintiff or against a dead defendant unless it comes within the above exception.

Order XXII, r. 16, Civil Procedure Code, contemplates execution issuing on the application of a transferee, by an act *inter vivos* or by operation of law, of a decree passed in favour of a living plaintiff. And likewise s. 50, Civil Procedure Code, provides for enforcement of a decree against the legal representative of a judgment-debtor who was living at the date of the decree, and who had subsequently died without fully satisfying the decree passed against him.

In *Representatives of Girendronath Tagore* v. *Huronath Roy* (13) while dealing with the effect of s. 210 of Act VIII of 1859 which corresponds to s. 50 of the present Code, Macpherson, J. observed as follows :—

"These words do not embrace a case like the present, because they evidently contemplate only the case of a person who, being alive at the time when a decree is passed against him, dies before execution is fully had of that decree. The section does not include or provide for the case of a person against whom a decree is made, having died before the decree is made. And it is little to be wondered at that the Code does not provide for such contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men. There is no section in the Code of the Civil Procedure, excepting s. 210, under which a decree-holder is empowered to apply for execution against the legal representatives of a deceased judgment-debtor."

These observations equally apply at the present day, and it has been consistently held that unless the case falls within the purview of O. XXII, r. 6, Civil Procedure Code, a decree against a dead person is a nullity and cannot be enforced against his legal representatives: *Janardhan* v. *Ramchandra* (14), *Vishvanath* v. *Lallu Kabla* (15), *Topanram Nathuram* v. *Tekchand* (7), *American Baptist Foreign Mission Society* v. *Ammalanadhuni Pattabhiramayya* (16), *Sripat Narain Rai* v. *Tirbeni Misra* (17), *Anwar-ul-Haq* v. *Nazar Abbas* (8).

It is, however, contended that in providing the alternative and expeditious procedure for suits being instituted by and against persons in their firm name the Legislature intended to depart from this rule, and in the first place to empower a decree being passed in favour of or against a firm, though all its partners were dead at the date of the decree, and in the second place to empower a decree passed against a firm being executed against the legal representative of a partner in that firm, whether such partner had died before or during the pendency of the suit, and that this intention can be gathered from cls. 1 and 2 of O. XXI, r. 50, Civil Procedure Code, read in conjunction with the provisions of O. XXX, Civil Procedure Code, and particularly those of O. XXX, rr. 1 and 4, Civil Procedure Code.

Clauses 1 and 2 of r. 50, Civil Procedure Code are as follows :—

"50. (1) Where a decree has been passed

(11) (1920) 2 Ch. 24; 89 L. J. Ch. 465; 123 L. T. 388.
(12) (1909) P. 187 at p. 191; 78 L. J. P. 97; 100 L. T. 744; 25 T. L. R. 505.
(13) 10 W. R. 455.
(14) 26 B. 317; 4 Bom. L. R. 23.
(15) 4 Ind. Cas. 137; 11 Bom. L. R. 1070.
(16) 48 Ind. Cas. 859.
(17) 45 Ind. Cas. 21; 40 A. 423; 16 A. L. J. 327.

against a firm, execution may be granted—

(a) against any property of the partnership—

(b) against any person who has appeared in his own name under r. 6 or r. 7 of O. XXX, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;

(c) against any person who has been individually served as a partner with a summons and has failed to appear:

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of s. 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), cls. (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined."

Clause 2 is the one which applies in the circumstances of this case. Visumal was admittedly dead at the date of the suit. The present application is for leave to execute the decree not against Visumal as being a partner in the firm of Visumal-Wadhumal but against the legal representative of Visumal. A person in popular language means a person himself and not his legal representative. And, therefore, the plain answer of the legal representative to the present application is that 'he is not the person contemplated under cl. 2.' The onus, if any, is, in my opinion, not on him to prove the negative, but on the execution creditor to show that "a person" in cl. 2 denotes something different from what *prima facie* it means.

There is also nothing in the expression "where a decree has been passed against a firm" to warrant by itself the inference that the decree has been passed not only against the partners of the firm living at the date of the decree but also against the legal representative of a partner who had died either before the institution of the suit or after the date of the institution but before the decree.

Section 239, Indian Contract Act provides that persons who have entered into a partnership with another are called collectively a "firm." A decree against the firm, therefore, means primarily a decree against the persons who have entered into the partnership and not against the legal representatives of any deceased partner. It is also to be remembered that both under the English Common Law and the Indian Law a firm is not recognised as a legal entity [per Farewell, L. J., in *Sadler* v. *Whitman* (18)] but only as a compendious name or as it has been some times described as a convenient symbol or shorthand form for collectively designating all the partners regarded as judgment-creditors or as judgment-debtors: *cf.* Underhill on Law of Partnership; *Ram Prosad Chimanlal* v. *Anundji & Co.* (19), *Seodayal Khemka* v. *Joharmull Monmull* (5), *Rampartab Brijmohandas* v. *Gavrishankar Kashiram* (3) and that it, therefore, means nothing more than a decree against the partners in the firm.

But it is said that this expression must be read in the light of O. XXX, rr. 1 and 4. Now, no doubt, O. XXX, r. 1, Civil Procedure Code, provides for a suit being instituted in a firm name by or against persons who were partners in the firm not at the date of the suit but at the date of the accrual of the cause of action, it does not necessarily follow that this rule empowers the filing of such a suit either on behalf of or against persons who were all dead at the date on which it is filed. In my opinion it only permits of such a suit being filed in the event of at least one of the partners of the firm which sues or is sued being alive at such date. And this is clear from sub-r. 2 of the rule which is as follows :—

Order XXX, r. 1, sub-r. (2) :

"*Where persons sue or are sued as partners* in the name of their firm under sub-r. (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified, or certified *by any such* persons."

Now if a firm consisted of only two partners and both of them were dead at the time of the institution of the suit, whether such firm is made the plaintiff or

(18) (1910) 1 K. B. 868 at p. 869.

(19) 69 Ind. Cas. 885; 49 C. 524; A. I. R. 1922 Cal. 408.

the defendant, there is no "such person who can sign, verify or certify the pleadings or other documents filed in the proceedings. This is further clear from the provisions of O. XXX, r. 3, Civil Procedure Code, where both partners in the firm which is sued are dead, there is no partner under cl. (*a*) of the rule and no manager of a subsisting business under cl. (*b*) of the rule who could be served with the summons. Where, therefore, all the partners of either the plaintiff-firm or the defendant-firm are dead at the date of the institution of the suit, it must necessarily be filed under the ordinary procedure by or against living persons who represent all or some of the deceased partners of the firm. If this be so, then it would appear that to a suit instituted under O. XXX at least one of the living partners of the firm suing or being sued must be a party.

Now, O. XXX, r. 4, Civil Procedure Code is as follows:—

"Notwithstanding anything contained in s. 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-r. (1) shall limit or otherwise affect any right which the legal representative of the deceased may have

(*a*) to apply to be made a party to the suit, or

(*b*) to enforce any claim against the survivor or survivors."

As I read this rule it contemplates in the first place a suit instituted under the foregoing provisions of O. XXX, and, therefore, a suit to which one of the living partners of the firm is a party, in the second place it dispenses with the necessity of the joinder of the legal representative of any partner in the firm who had died before or pending the suit but does not go further and declare that if every one of the partners is dead even then there is no necessity of joining the legal representatives of all or at least one of the partners of the firm, and thirdly, it does not declare that the legal representatives though not joined in the suit are deemed to be parties to the suit, and this is clear both from sub-r. 1 which declares that it shall not be necessary to join the legal representative as a party to the suit and from sub-r. 2 (*a*) which enables a legal representative to apply to be made a party to the suit if he so wishes, and lastly, it does not declare how and against whom a decree passed in a suit under O. XXX, Civil Procedure Code, is to be executed.

With great respect, I am unable to accept the view that r. 4 is an authority for the proposition that the legal representative of a dead partner is a party to the suit or for the proposition that the decree passed against a firm may be executed either with or without leave of the Court against the legal representative of a dead partner who has not been brought on the record before the passing of the decree. I do not, however, wish to be understood that in a fit case where the Court is moved within the period of limitation or on proper cause being shown, a decree may not be vacated so as to afford an opportunity to the plaintiff to join the legal representative of a dead partner and to make his estate liable.

The fact that a decree passed against the firm may be executed under O. XXI, r. 50 sub-r. (1) against the partnership property is again no ground for assuming that the decree is against the legal representative of a dead partner or that he is deemed to be a party to the record. The reason why such a decree may be executed against the partnership property has been lucidly expounded by Romer, L. J. in *Ellis* v. *Wadeson* (2) in the following words:

"I may mention that the reason why the partnership assets can be reached is because, notwithstanding the dissolution by death, the surviving partners for many purposes have authority continued to them to bind the dead partner's interest in the partnership assets, for the authority of partnership extends to enable the surviving partners, in case of dissolution by death, to wind up the affairs of the partnership, to pay the partnership debts, to defend claims against the partnership, and so forth—see, for example, Lindley on Partnership (5th Edition) at pages 217, 218 and 587."

Section 263, Indian Contract Act, is to the same effect, and provides for the rights and obligations of the partners continuing in all things necessary for the winding up of the business after the dissolution of the partnership whether such partnership is dissolved by death or otherwise.

Again, with every respect I am not prepared to hold that because sub-r. (2) of O. XXI, r. 50, Civil Procedure Code, permits the execution of a decree with leave of the Court against a living partner, the same rule should apply in the case of the legal representative of a dead partner and the property of the dead man in the hands of his legal representative may be held liable. It may be unjust in the extreme to allow the legal representative to avoid his liability in this manner, but the duty of the Judge is *jus dicere* and not *jus dare*. He is not at liberty to declare what the law is according to his notion of public policy, *Queen* v. *Khyroollah* (20), but to construe the Act of the Legislature as he finds it, and not to make the law better or more reasonable. *Hiriomal* v. *Hazarisingh* (21), *Balkaran Rai* v. *Gobind Nath Tiwari* (22).

Both in sub-r. (1) and sub-r. (2) of O. XXI, r. 50 the Legislature has clearly referred to the decree being executed against partners and not against their legal representatives. There is nothing in this rule to suggest that the inquiry under r. 2 is a new or separate proceeding on which a fresh decree is to follow, but it only contemplates leave being granted to execute the same old decree against a person who had not appeared or been served in the suit but who was liable as a partner and as such was a party to the suit. If sub-r. (2) is interpreted so as to afford an opportunity to the judgment-creditor to proceed against the legal representatives of a partner who has died before suit, it would bad to a further anamoly and that is this: where a partner has appeared in the proceedings executions may issue against his legal representative without opportunity being afforded to him either of contesting that the claim against the dead partner did not survive after his death or of preventing execution to issue before it is decided if he is the legal representative.

Sub-rr. (1) and (2) of O. XXI, r. 50, Civil Procedure Code, are a reproduction *ipsissimis verbis* of O. XLVIIIA, r. 8, R. S. C. except to the proviso to sub-r. (1) which defines and clears up the position of a minor who is admitted to the benefits of a partnership but who according to the Indian Law is not a partner.

The effect of O. XLVIIIA particularly as to the liability of dead partners has received a judicial interpretation in the Court of Appeal in England in the case of *Ellis* v. *Wadeson* (2). Though the point involved in that case so far as the immediate case was concerned was not very important and referred to the form in which the statement of the defence should have been put in, Romer, L. J., in delivering the judgment of the Court observed that several other questions which had arisen in the course of argument required to be dealt with as a guide in future and has expounded the law on the point at pages 718* and 719* as follows:—

"Now consider the question of death. Suppose a partner dies before action brought, and an action is brought against the firm in the firm's name. The dead man is not a party to the action so far as his private estate is concerned, for a dead man cannot be sued, though the legal personal representatives of a dead man can be sued in a proper case. In that case the action would be an action solely against the surviving partners. At Common Law, if a creditor sued joint debtors and one died, the survivors only could be sued. Since the Judicature Act, undoubtedly, in the case of a partnership liability, the creditor might now join in one action the surviving partners, and the legal personal representatives of the deceased partner, but the latter would have expressly to be added as defendants. If the legal personal representatives of a deceased partner are not added expressly as defendants, and the action is brought against the firm in the firm's name, then judgment can only be obtained as against the surviving partners and be enforced against them and against the partnership assets..... ... I have so far dealt with the case of the death of a partner before action. Now what happens if a partner dies between service of writ and the trial of the action and judgment? In that case equally the dead man's estate is not bound. Judgment can only be obtained against the surviving partners and enforced against them and against the partnership assets. With reference to this...this is clear—that the partner who dies between writ and judgment is not

(20) 6 W. R. Cr. 21 at p. 24; B. L. R. Sup. Vol. App. 11.

(21) 78 Ind. Cas. 583; 18 S. L. R. 19; A. I. R. 1925 Sind 49.

(22) 12 A. 129 at p. 137; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831.

*Pages of (1899) 1 Q. B.—[*Ed.*]

before the Court, and, therefore, judgment could not be obtained against the deceased partner, or execution enforced against him or his assets. Supposing there were two partners, both living at the date of writ, and both were served, and both died before the action came on for trial, no judgment could be obtained."

These observations are not mere *obiter dicta*, and have upto this day served as a guide in the English Courts. According to this decision a decree passed against a firm may not be executed against the legal representative of a deceased partner whether he had died before or pending the suit. It is a well recognised rule of construction that if a Statute upon which a particular construction has been put is re-enacted *ipsissimis verbis* that construction must be considered to have the sanction of the Legislature: *Mansell* v. *Reg.* (23), and this rule applies with greater force when the provisions of an English Statute have been reproduced by the Indian Legislature. In *Trimble* v. *Hill* (24), their Lordships of the Privy Council have observed as follows:—

"Their Lordships think the Court in the Colony might well have taken this decision *Diggle* v. *Higgs* (25), as an authoritative construction of the Statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in Colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it.....It is of the utmost importance that in all parts of the Empire where English Law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."

Reference may also be made to *Vasudeva Mudaliar* v. *Srinivasa Pillai* (26) and *In re Baba Yeshwant Desai* (27). Unless, therefore, there is a clear intention to the contrary, the Court is bound to give the same effect to O. XXI, r. 50, Civil Procedure Code as O. XLVIII A, r. 8 has in England.

In *Jivraj Laloobbai Patel* v. *Bhagvandas Gordhandas* (1), which is the only decided case to the contrary there is no reference to the case of *Ellis* v. *Wadeson* (2), and it is doubtful if the attention of their Lordships of the Bombay High Court was drawn to it. The judgment of his Lordship the Acting Chief Justice on this point is very brief and is as follows:—

"I am, however, unable to accept this contention. It really means that in a case where the decree is passed against a firm the estate of a deceased partner other than the partnership assets would practically remain entirely exempt from the liability to satisfy the decretal debt unless, of course, the partner has been served with a summons of the suit. That is a position which does not appear to me to be just nor does it appear to have been contemplated by sub-r. (2). I am slow to accept the construction suggested on behalf of the appellant which involves such a result. Further, I do not think that, on the wording of sub-r. (2) that construction is proper. That sub-rule provides that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-r. (1), cls. (*b*) and (*c*), as being a partner in the firm, he may apply to the Court which passed the decree for leave to execute it. It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner."

There is no indication in this judgment why the Legislature should have intended to depart from the English rule which had been judicially recognised and if so why appropriate words were not used in O. XXI, r. 50, Civil Procedure Code, to express such intention.

Rule 4 of O. XXX which has been made so much of in the arguments before the Court has also not been referred to or relied on in this judgment. I have already dealt with the meaning to be attached to this rule, and I have attempted to show that this rule has not the effect of making the legal representative of a dead partner *ipso facto* a party to the suit. On the contrary the rule suggests that the legal representative is not a party to the suit though he may if he so wishes apply to be made a

(23) (1857) E. & B. 54; 120 E. R. 20.
(24) (1880) 5 A. C. 342 at p. 345; 49 L. J. P. C. 49; 42 L. T. 103; 28 W. R. 479.
(25) (1877) 2 Ex. D. 422; 46 L. J. Ex. 721; 37 L. T. 27; 25 W. R. 777.
(26) 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 255; 2 M. L. T. 333; 9 Bom. L. R. 1104; 17 M. L. J. 444; 30 M. 426; 34 I. A. 186 (P. C.).
(27) 11 Ind. Cas. 614; 13 Bom. L. R. 505; 35 B. 401; 12 Cr. L. J. 430.

party. I can find nothing in this rule to lead to the inference that it was enacted for the purpose of departing from the English Law. The only object which appears to me as the probable object with which this rule was enacted was to make the procedure under O. XXX conform to that in England except with regard to partners living outside the jurisdiction of the British Courts, and to remove any doubts or difficulties which had arisen and may arise in consequence of the interpretation put upon s. 45, Indian Contract Act. The rule commences with the words "notwithstanding anything contained in s. 45 of the Indian Contract Act....." Though under s. 263, Indian Contract Act, a partner may recover a debt due to the firm and give a valid discharge for it, at least one High Court had held that in view of s. 45, Indian Contract Act, not only all the living partners in the firm but also the legal representative of a deceased partner should join in a suit for recovery of the debt due to the firm and all the High Courts had further unanimously held that though a suit may, in the first instance, be instituted by the partners living at the date of the suit alone, the legal representative of any partner who died pending the suit was, however, necessary party to the suit.

The same objection or difficulty was likely to arise in a suit filed on behalf of the firm. If it was a suit on behalf of the partners of the firm, it was open to argument that the legal representatives of at least all such partners who had died pending the suit should be made parties to it. In like manner though a partner of a dissolved firm has the right to apply partnership funds on payment of the debts of the firm, if in a suit against the firm, the living partners whether known or unknown are deemed to be parties to the suit. The same difficulty might have been raised as to the joinder of the legal representative of a partner who died pending the suit in order to render the partnership property liable for the debt, and had to be prevented. And r. 4, in my opinion, goes no further than to declare that the legal representative of a dead partner is not a necessary party to the suit provided, of course, the parties are otherwise properly represented.

In this connection an argument was advanced at the Bar and which I should have referred to earlier and that is this: that sub-r. (2) of r. 4 throws an obligation on a legal representative to apply to be made a party to the suit if such legal representative wishes to protect his interests, and that if he fails to do so, he may be proceeded with in execution. This again is, in my opinion doing violence to the language used. It is the plaintiff who comes to Court for relief and the obligation is on him to see that proper persons are on the record as defendants. Any option given to a legal representative to apply to be made a party to the suit cannot shift this obligation from the shoulders of the plaintiffs to those of the defendant, and more so, when the defendant is not the person primarily liable but one who may not know either about the liability or of the suit to enforce it. If the plaintiff is content with enforcing the decretal claim against the partnership property or against living partners, he need not join the legal representative of a deceased partner. If, on the other hand, he considers that he may not be able to realize the decretal amount by either means, he has the machinery given to him under O. XXX, r. 1, Civil Procedure Code, to call for the names of the partners and if so advised to join the legal representative of a partner who may have died before or pending suit. If he lies on his oars he has to thank himself.

With all respect I see no reason why the words used by the Legislature in O. XXI, r. 50, should not according to the well recognised canon of construction emphasized in the leading case of the *Bank of England* v. *Vagliano* (28) receive in this case their natural meaning, and more so, when such meaning is consistent with that put upon similar provisions of English Statute by the Court of Appeal in England long before they were adopted by the Indian Legislature.

For these reasons I respectfully disagree with the view that the legal representative of a deceased partner who was not made a party to the suit may be proceeded against under O. XXI, r. 50, Civil Procedure Code.

Lobo, A. J. C.—I agree with the dissenting judgment just pronounced by my learned brother Rupchand. The grounds on which I do so are elaborated in my dissenting judgment in Revision Application No. 98 of 1924 which has occasioned this reference to the Full Bench. To what I have there said, I do not think I could

(28) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

usefully add. With the greatest respect for my learned brothers Tyabji and Barlee whose judgments I have carefully read I am unable to agree with their conclusions. It seems to me that these conclusions involve an interpretation of the plain language of O. XXI, r. 50 and O. XXX r. 1, Civil Procedure Code, unwarranted by the recognised canons of construction.

Z. K. *Order accordingly.*

OUDH CHIEF COURT.

RENT APPEALS NOS. 40 AND 41 OF 1925.
December 10, 1925.
Present:—Mr. Justice Hasan and Mr. Justice Misra.

Musammat THAKURA—PLAINTIFF—APPELLANT
versus
Musammat GOVINDA AND OTHERS—DEFENDANTS NOS. 1 TO 3—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 40, 41, 42, 44—Annual Register, entries in, not conclusive evidence.

Under s. 44 of the U. P. Land Revenue Act entries in Annual Registers are to be presumed to be true only until the contrary is proved, although 'decisions' in disputed cases falling under ss. 40, 41 and 42 constitute conclusive evidence in respect of the subject-matter in dispute in proceedings in Revenue Courts. [p. 224, col. 1.]

Rent appeals from the decree of the Fourth Additional District Judge, Lucknow.

Messrs. *Haidar Husain, Ali Zaheer* and *Daya Kishen Seth*, for the Appellant.

Mr. *Khaliq-uz-zaman* for Mr. *M. Wasim*, for the Respondents.

JUDGMENT.—These are the plaintiff's appeals in the suit which she brought for a share of the profits of an estate under cl. 15 of s. 108 of the Oudh Rent Act, 1886. The suit was dismissed by the first Court and on appeal by the plaintiff the decree of the first Court was confirmed. These are the second appeals from the decree of the Fourth Additional District Judge of Lucknow, dated the 14th of March, 1925. The estate consisted of a certain fractional share in 5 villages in Pargana Siddhour and similar share in other 5 villages in Pargana Satrikh in the District of Barabanki. One suit related to the recovery of profits of the share in the first mentioned 5 villages and the second suit of the share in the latter 5 villages. The entire estate originally belonged to one Bajrang Singh. Bajrang Sing died many years ago. He had four sons Pirthipal Singh, Sarabjit Singh, Chandra Mohan Singh and Sant Bakhsh Singh. It is found by the lower Appellate Court, and the finding is accepted in appeal before us, that the four brothers costituted a joint Hindu family; consequently the estate was joint family estate of the four brothers. Pirthipal Singh died first of all. Then died his brother Sarabjit Singh. After Sarabjit Singh died Chandra Mohan Singh and last of all died Sant Bakhsh Singh. Pirthipal Singh had a son Sheopal Singh, who died in infancy. On the death of Sheopal Singh 1/16th share of the estate was entered in the name of *Musammat* Govinda (who is defendant No. 1 in the two suits) mother of Sheopal Singh, in the Revenue Records. When Sarabjit Singh died the name of *Musammat* Thakura, widow of Sarabjit Singh, was entered in the Revenue Records in respect of a similar share in the estate. *Musammat* Thakura is the plaintiff-appellant in both these appeals. When Chandra Mohan Singh died, his widow *Musammat* Ram Kali who is now defendant No. 2 obtained entry of her name in respect of another 1/16th share in the estate. *Musammat* Bhagwan Dei, defendant No. 3, is the vidow of Sant Bakhsh Singh. Her name was similarly entered in the Revenue Records on the death of her husband Sant Bakhsh Singh. Sant Bakhsh Singh left a son, Ram Singh, who is still alive, and is a minor but not a party to the suits out of which these appeals arise.

The plaintiff *Musammat* Thakura, claimed title to the 1/16th share in the whole estate on the ground that that share was owned by her in the character of an heir to her husband. The defence was that the plaintiff held no share whatsoever for the reason that Sarabjit Singh, husband of the plaintiff was a member of the joint family consisting of his brothers and that the estate in its entirety now vests in the last survivor member Ram Singh, son of Sant Bakhsh Singh.

As already observed the Courts below have upheld the plea in defence and dismissed the plaintiff's suit. The argument in second appeal is two-fold :—

(1) that the entry of the plaintiff's name in the Record of Rights of the villages is conclusive proof of her status of a co-sharer in the estate,

(2) that in any event the said entry should be taken to have been made in recognition of her right of maintenance out of the family estate.

As to the first line of argument it is enough to refer to the provisions of s 44 of the United Provinces Land Revenue Act, 1901. That section is as follows :—

"All entries in the annual registers made under sub-s. (3), of s. 33 shall be presumed to be true until the contrary is proved, and subject to the provisions of sub s. (3) of s. 40, all decisions under ss. 40, 41 and 42 shall be binding on all Revenue Courts in respect of the subject-matter of the dispute; but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by cls. (*a*) to (*d*) of s. 32."

So far as the entries in the Annual Registers are concerned they shall be presumed to be true until the contrary is proved. In this case the contrary has been proved. The Court of first appeal has found that the entry of the plaintiff's name in place of her husband's in the Revenue Records was made by way of consolation and not in virtue of any title to her husband's estate. Under the same provisions only 'decisions' in disputed cases falling under ss. 40, 41 and 42 constitute conclusive evidence in respect of the subject matter of the dispute in proceedings in the Revenue Courts. There is no evidence on the record to show that there was any 'decision' under s. 40, that being the section which would have been applicable to the case.

As regards the second line of argument it appears that it was advanced before the lower Appellate Court also. That Court rejected it on the ground that "the plaintiff has not based her suit on her right of maintenance and the pleadings are silent on this point. In this suit it was not proper to decide the question of maintenance for which there was no prayer." It seems to us that the ground on which the lower Appellate Court rests in respect of this matter is sound but apart from that there is no evidence on the record to prove the fact that the entry of the plaintiff's name in place of her husband's was made on the basis of title to maintenance.

For these reasons we dismiss both the appeals with costs.

A. N. A. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1501 OF 1923.

September 27, 1926.

Present:—Mr. Justice Devadoss.

DALLA LAKSHMINARASARAJU AND OTHERS—DEFENDANTS—APPELLANTS

versus

BADARAVEDA VENKATARAJU—PLAINTIFF—RESPONDENT.

Costs—Successful party, when can be refused costs—False evidence, production of, effect of.

A successful party cannot be refused costs merely on the ground that some of the evidence produced by it is false.

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 139 of 1922, presented against the decree of the Court of the Additional District Munsif, Ellore, in O. S. No. 186 of 1921, (O. S. No. 783 of 1920 on the file of the Court of the Principal District Munsif, Ellore)

Mr. *B. Satyanarayana*, for the Appellants.

Mr. *A. Satyanarayana*, for the Respondent.

JUDGMENT.—The only point in this second appeal is whether the District Munsif was justified in disallowing costs to the appellants. The appellants succeeded before the District Munsif who refused them costs on the ground that there was hard-swearing on both sides. He does not in the course of his judgment state whether the case was unnecessarily protracted by the appellants adducing irrelevant or false evidence. In para. 18 he says:—

"It is likely that they would have been reaching the Punta S. F. Nos. 153 and 155 passing over S. F. Nos. 156 and 157 and taking their carts and cattle thereby."

He does not say that the evidence is false. In cases of this kind it is not proper to disallow costs to the successful party on the ground that some evidence adduced by that party is false. If the time of the Court is wasted by false or unnecessary evidence, the Court would be justified in refusing costs to the successful party. The reason given by the District Munsif for disallowing costs is not a satisfactory one. I, therefore, set aside his decree as regards costs and allow this appeal with costs throughout.

V. N. V. *Decree set aside.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 1680 OF 1926.
January 21, 1927.
Present:—Sir Shadi Lal, KT., Chief Justice.
EMPEROR—PETITIONER
versus
RAHMAT KHAN—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562, scope of—Offence under s. 409, Penal Code, whether covered by the section.

The offence under s. 409 of the Penal Code is beyond the purview of s. 562 of the Criminal Procedure Code, and a Magistrate, therefore, acts without jurisdiction in releasing a person convicted of that offence on probation of good conduct.

Case reported by the District Magistrate, Gujrat, with his No. 1606, dated the 8th November, 1926.

REPORT.—The facts of the case are as follows:—

In this case one Rahmat, the accused, who, being a village school-master at Panjan Kasana was also working as Branch Sub-Postmaster there, has been sent up under s. 409, Indian Penal Code, by the Kharian Police. It is alleged by Ch. Nawab Din, Inspector of Post Offices (P. W. No. 1), that on 17th April, 1926, he inspected the Branch Sub-Post-Office of the accused and noticed that the accused had embezzled some money which he had received as money-order and had not delivered it to the addressees, that the accused was then departmentally charged by him and the case was made over to the Police. The statements of Postal Inspector Ch. Nawab Din (P. W. No. 1), Babu Abdul Aziz, Sub-Post-Master, Kharian, (P. W. No. 3), and Sultan Ali, Sub-Inspector of *Zemindara* Banks, (P. W. No. 4) prove that the accused embezzled Rs 50 in January 1926 and again Rs. 12-2-0 in March 1926 which amounts he had received in his official capacity on account of money-orders, but which he did not deliver and misappropriated. The accused confessed his guilt and apologized and has no defence.

The accused on conviction by S. Muhammad Shah exercising the powers of a Magistrate of the First Class in the Gujrat District was convicted by order dated 31st July, 1926, under s. 409, Indian Penal Code, and was ordered under s. 562, Criminal Procedure Code, to be released on entering into a bond of Rs. 500 with one surety in the same amount for a period of one year undertaking to appear in Court and to receive the sentence whenever called upon during this time and in the meantime to keep the peace and be of good behaviour.

GROUNDS—(1). That the sentence passed by the Magistrate, under the circumstances of the case, is altogether inadequate.

2. The statement of Ch. Nawab Din (P. W. No. 1), Inspector of Post Offices, clearly proves that the accused is a man of depraved character and that he does not deserve any leniency and that he should not have been given the benefit of the provisions of s. 562, Criminal Procedure Code.

3. The case against the accused was proved to the hilt and that he could not help making confession in the Court of the Magistrate.

4. That the offence is a serious one against the public security and requires a deterrent sentence.

5. Though the accused is under 21 years of age, but as the offence is punishable with transportation or 10 years of imprisonment, it is doubtful whether the accused can be legally given the benefit of s. 562, Criminal Procedure Code.

6. It is requested that the sentence passed against the accused by the Magistrate may be altered and it may be enhanced.

Mr. *S. R. Laul*, for the Respondent.

ORDER.—The convict, who was a Branch Sub-Postmaster, has been found guilty of having committed criminal breach of trust in respect of two sums of money, Rs. 50 in January, 1926, and Rs. 12-2-0 in March 1926; but has been released on probation of good conduct under s. 562, Criminal Procedure Code. Now, s. 409, Indian Penal Code, punishes an offence of a criminal breach of trust by a public servant with transportation for life or imprisonment, etc.; and there can be no doubt that this offence does not come within the purview of s. 562, Criminal Procedure Code. It is provided by that section that, when any person under 21 years of age or any woman is convicted of an offence not punishable with death or transportation for life, the offender may be released on executing a security bond. Now, the offender in the present case is certainly under 21 years of age, but the offence committed by him is punishable with transportation for life. The trial Magistrate had, therefore, no jurisdiction to pass an order under s. 562, Criminal Procedure Code. I must, there-

fore, set aside the order of the Magistrate releasing the convict under s. 562, Criminal Procedure Code.

As regards punishment, I have taken into consideration the youth of the offender, but I cannot overlook the fact that he has been guilty of a serious offence in respect of property which was entrusted to him in the capacity of a public servant. Having regard to all the circumstances I sentence the convict to suffer rigorous imprisonment for one year.

R. L. *Accused convicted.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1193 OF 1926.

January 14, 1927.

Present:—Mr. Justice Agha Haidar and Mr. Justice Harrison.

SHERA—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Motive, inadequacy of, effect of.

Where the evidence of the accused having committed the offence of murder is clear it is immaterial whether the motive alleged for the offence is or is not adequate.

Criminal appeal from the order of the Sessions Judge, Rawalpindi, dated the 19th October, 1926.

Mr. *Amar Nath Chona*, for the Appellant.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

JUDGMENT.—Shera sweeper has been found guilty of having murdered his wife *Musammat* Barkate by stabbing her with a knife on the night of the 2nd July, 1926.

The facts are that several temporary houses had sprung up near a kiln at Rawalpendi, in which the brickmakers, who are sweepers, lived as did also two *Munshis* Rajwali and Babu Des Raj. On the night of the 2nd July cries were heard from the part of the quarters occupied by this man Shera and his wife. Various persons, Shadi the brother of the woman, *Musammat* Kamon her mother, *Musammat* Rakhi her sister, Nathu and Abdullah and Jiwan and Sohna all ran up. They found the woman lying on her *charpoy* with her intestines protruding and grievously wounded in the stomach. Her husband Shera was standing by with a knife in his hand and admitted having stabbed his wife. The woman lived long enough to go to the Hospital and there to make a dying declaration, in which she stated that her husband had stabbed her and that the cause of the quarrel was a dispute regarding the return of her step-daughter to her husband. The facts are not seriously questioned and all that Counsel has urged before us is that the story told by the accused must be true, namely, that he woke up to find a man, whom he recognised as Khushia, near his wife's bed and this so enraged him that when Khushia ran away he killed his wife. This story which was told in the Committing Magistrate's Court is supported by the evidence of one witness, a relation, named, Abdullah, P. W. No. 7. None of the other witnesses, of whom most are relations, support it. It is also urged that the motive was inadequate. It appears to us that it is wholly immaterial whether the motive was or was not adequate, for there is no shadow of doubt that this man Shera murdered his wife by stabbing her three times, and we see no reason to doubt the truth of the woman's own statement made on her death-bed that the cause of the quarrel was the return of her step-daughter. Counsel has also urged that there must have been grave and sudden provocation because an ordinary house-hold knife was used and not some more deadly implement. This does not impress us at all. Finally it is urged that there is a difference in the version given of the exact date, on which the step-daughter had returned to her husband. We find it proved beyond all shadow of doubt that this man Shera murdered his wife by stabbing her in the abdomen and that he has wholly failed to prove that there was any provocation of any sort. We find that though he was doubtless annoyed with his wife because she opposed him in the matter of the sending of the daughter to her husband, there was no shadow of justification for his conduct.

We dismiss the appeal and confirm the sentence of death.

Z. K. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE RANGOON HIGH COURT.

December 14, 1926.

Present:—Lord Phillimore, Lord Sinha, Lord Blanesburgh, Lord Salvesen and Sir John Wallis.

V. M. ABDUL RAHMAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Privy Council—Criminal appeal, when entertained—Criminal Procedure Code (Act V of 1898), ss. 190, 360, 361, 535, 537—Complaint—Cognizance of offence not mentioned in complaint—Procedure—Deposition, interpretation and reading of—Procedure—Irregularity.

The Privy Council will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. [p. 230, col. 1.]

No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the Advocate of the accused. [p. 229, col. 2.]

Where a Magistrate who takes cognizance of an offence on complaint discovers that there is a *prima facie* case against the accused person which would support a charge in respect of an offence not mentioned in the complaint, and he frames such charge, he cannot be held to have taken cognizance of the latter offence under cl. (*c*) of s. 190 of the Criminal Procedure Code. The case must still be treated as being one falling within the purview of cl. (*a*) of the section. [p. 228, col. 2.]

The object of reading over a deposition to a witness is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his Advocate to suggest corrections. No doubt, the evidence has to be read over in the presence of the accused or of his Pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But he is not necessarily entitled to the opportunity of suggesting corrections. [p. 230, cols. 1 & 2]

At the same time, it would be a better course if depositions other than mere formal ones were read over so that the accused or his Pleader could hear them and give their undivided attention to them. Care would, of course, have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence, but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his Pleader. Still it should be remembered that the primary object is to fix the witness and to enable him to protect himself against inaccuracy in the words taken down from his lips. [p. 230, col. 2.]

The distinction between s. 360 and s. 361 of the Criminal Procedure Code is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his Pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused. [*ibid.*]

Section 360 of the Criminal Procedure Code lays down that the deposition is to be read over to the witness. This provision is not complied with in terms by giving the witness an opportunity of reading the deposition over to himself and except in cases where reading over to the witness would be absurd, as for example, with a stone-deaf person, the provision should be complied with. [p. 231, col. 1.]

The bare fact of an omission to comply strictly with the provisions of s. 360 or s. 361 of the Criminal Procedure Code unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction which may be supported by the curative provisions of ss. 535 and 537 of the Code. [p. 232, col. 2.]

Appeal from the judgment of the High Court, Rangoon (Mr. Justice Maung Ba and Mr. Justice Doyle), dated the 27th August, 1925) reported as 94 Ind. Cas. 717.

Sir *John Simon, K. C.*, and Mr. *Walter Frampton*, for the Appellant.

Messrs. *A. M. Dunne, K. C.*, and *Kenworthy Brown*, for the Crown.

JUDGMENT.

Lord Phillimore.—This appeal which is presented by special leave, arises in the following circumstances. One, Mani Iyer, presented an insolvency petition in the High Court of Rangoon against the Firm of D. K. Cassim & Sons, alleging that the firm had allowed the attachment of certain immoveable properties to remain undischarged for over three weeks and had thereby committed an act of insolvency.

On hearing of the petition it appeared that the orders for the attachment had been made on the 19th and 21st November, 1923, but that the date of execution was the 27th, and that within three weeks of the 27th, though not within three weeks of the 19th, the attachment had been discharged, and, therefore, there was no act of insolvency.

It appeared, however, that in order to support the petition, the dates of execution of the warrants had been altered from the 27th to the 20th and 21st, respectively.

This being so, the Judge dismissed the petition and reported the case with a view to criminal proceedings, and proceedings were taken against Mani Iyer and against the present appellant Abdul Rahman, who was alleged to have abetted the forgery in order to injure or ruin trade rivals.

After some mistaken steps, the matter finally came before the District Magistrate at Rangoon. He, after taking evidence, formulated two charges against each of the accused. The first was to the effect that each of them acting jointly with the other,

instigated some person unknown to forge false dates and serial numbers on the warrants; and the second was that they attempted to procure the head process-server to alter the dates on the register so as to make them correspond with the forged dates on the warrant.

Upon these two charges the District Magistrate convicted both the accused; and upon the first charge he passed sentence on each of two years' rigorous imprisonment. In respect of the second charge he passed no sentence.

Both the accused appealed from these convictions and sentences to the High Court which affirmed the convictions, but reduced the sentences to rigorous imprisonment for nine months. From this conviction and sentence Abdul Rahman has now obtained special leave to appeal to His Majesty in Council.

One objection which is taken on behalf of the appellant can be disposed of shortly. It takes the form of an attack upon the conviction on the second charge, it being urged by Counsel that though no sentence was passed in respect of this conviction, the Judges may have taken it into account in estimating the quantum of sentence to be passed on the first conviction.

Inasmuch as the sentence passed in respect of the first conviction was one which the conviction by itself would warrant, their Lordships desire themselves to be understood as not expressing any opinion as to the propriety of such a point being taken on an appeal to this Board. It is now well-established that this Board only recommends His Majesty to exercise his jurisdiction in appeals in criminal cases upon certain very restricted grounds. But with this reservation their Lordships will deal with the point as it has been raised, and they are of opinion that it is not a good one.

It arises upon ss. 190 and 191 of the Code of Criminal Procedure, which provide as follows:—

"190.—(1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

(*a*) upon receiving a complaint of facts which constitute such offence;

(*b*) upon a report in writing of such facts made by any Police Officer;

(*c*) upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion, that such offence has been committed. . . .

"191. When a Magistrate takes cognizance of an offence under sub-s. (1), cl. (*c*), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused, if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate."

The complaint is that the Magistrate did not inform the accused that he was entitled to have the case tried by another Court, and for this purpose reliance is placed upon the case of *Emperor* v. *Chedi* (1) where a Magistrate when trying the owners of certain licensed premises on a charge of refusing to admit the Police, acquitted the employers and forthwith proceeded to try and convict the servant without giving him an opportunity of electing to be tried by another Magistrate.

But in that case the Magistrate was proceeding under cl. (*c*) whereas in this case he was proceeding under cl. (*a*). It was not a case in which while trying one person, the Magistrate finds occasion to formulate a charge against someone else, but a case in which he was taking cognizance of an offence after receiving a complaint of the facts which constituted the offence. He formulated this second charge as he formulated the first in consequence of the one complaint.

In this connection *Begu* v. *Emperor* (2) is not without importance.

The second point and the one mainly relied upon on behalf of the accused can be best stated in his favour by setting out the material parts of an affidavit sworn on his behalf by his clerk Narayan which was produced to the Court of Appeal. He deposes that he was present on all the dates on which witnesses were examined before the District Magistrate, Rangoon,

(1) 28 A. 212; A. W. N. (1905) 258; 2 A. L. J. 745; 2 Cr. L. J. 809.

(2) 88 Ind. Cas. 3; 52 I. A. 191; 2 O. W. N. 447; 48 M. L. J. 643; 41 C. L. J. 437; 27 Bom. L. R. 707; 3 Pat. L. R. 95 Cr.; A. I. R. 1925 P. C. 130; 6 L. 226; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059; 7 L. L. J. 324; 30 C. W. N. 581 (P. C.).

"that the procedure adopted by the Magistrate in the said trial in relation to the reading over of the depositions to the witnesses, who did not know English, was to hand over the depositions to the interpreter, who read over and interpreted the same to the witnesses, and that while such reading over and interpretation was going on, the learned District Magistrate went on recording the depositions of other witnesses";

"that in the case of English-speaking witnesses who gave their depositions in English, their depositions were handed over to them to read and the said witnesses read the depositions to themselves silently;"

"that in the case of some witnesses, who were examined in Burmese and could read English, namely, Po Shin, Head Clerk, Ba Kyaw, the Copyist, and Shwe Htun, the process-server, the depositions were handed to them and they read their depositions to themselves silently;"

"that in none of those instances where the witnesses read over their depositions to themselves silently, the depositions as recorded were read over and explained to the accused;"

"that even in the case of Burmese depositions, the statements of witnesses were in no time read over and explained to the accused;" and

"that his master does not know Burmese."

The procedure is regulated by the following sections of the Code of Criminal Procedure.

"Section 360.—(1) As the evidence of each witness taken under s. 356 or s. 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his Pleader, if he appears by Pleader, and shall, if necessary, be corrected.

"(2) If the witness denies the correctness of any part of the evidence, when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

"(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is aken down, the evidence so taken down hall be interpreted to him in the language in which it was given, or in a language whch he understands.

"Section 361.—(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

"(2) If he appears by Pleader and the evidence is given in a language other than the language of the Court, and not understood by the Pleader, it shall be interpreted to such Pleader in that language."

The point having been raised by this affidavit and the additional grounds of appeal on behalf of the accused, the High Court required a report from the District Magistrate, and it appeared that the course taken was adopted in order to save time and to meet the wishes of the Counsel for the accused.

Their Lordships have thought it right that this should be stated in exoneration of the District Magistrate, and because in applying s. 537 of the existing Code of Criminal Procedure, the Court is directed to have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings, but they wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the Advocate of the accused.

Now with regard to the objections taken in this affidavit, they are two: the first being that the depositions were read over while other stages of the case were proceeding, so that the accused and his Advocate could not attend to the reading over, being occupied with listening to the further evidence that was being given, and indeed, that they were not so loudly read that the accused or his Advocate could hear them, and the second objection being that in some cases the depositions were not read out to the witnesses at all, they being left to read them to themselves.

What is more remarkable about this affidavit than its averments are its omissions.

It does not aver, and as has been shown it could not aver, that any objection was taken by the accused or his Advocate to the course pursued. It does not aver that the accused suffered any prejudice or that there was any correction of the evidence which any witness would have made, or which the accused or his Advocate might

with propriety have suggested, if all the depositions had been read out loud to the witnesses and to the accused and where necessary, translated.

It does not suggest that there was any actual or possible failure of justice by reason of the course pursued, and this being the case, it would be contrary to the rule according to which this Board proceeds, if their Lordships were to entertain this appeal.

It has, indeed, been submitted by Counsel that inasmuch as special leave to appeal has been granted, the ordinary rules limiting the exercise of this jurisdiction ceased to apply. But this is not so.

The case of *Channing Arnol* v. *Emperor* (3) was a case where special leave had been given and where notwithstanding such leave, their Lordships adopted and repeated the language of Lord Watson in *In re Dillet* (4) which was as follows:—

"The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

These considerations really dispose of the appeal. Inasmuch, however, as questions have been raised as to the propriety of the course pursued at the trial, the duty of Indian Courts of Appeal in criminal matters and the effect of ss. 535 and 537 of the Code of Criminal Procedure upon which there has been some difference of opinion in India, their Lordships think it desirable for the guidance of the Courts that they should pronounce their opinion upon these points.

With regard to one objection made on behalf of the accused, a careful study of the sections will show that the object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It it not to enable the accused or his Advocate to suggest corrections.

The distinction between s. 360 and s. 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his Pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused. Thus if the depositions are taken down in English, and the language of the accused is Hindee and the language of a witness is Burmese (as in the present case) the depositions will have to be taken by getting the witness' answers in Burmese, having them interpreted to the Court so that they may be taken down in English, and further interpreted to the accused so that he may understand them in Hindee. When, however, the deposition comes to be read over, as it will be in English, it will be interpreted to the witness in Burmese, but not to the accused in Hindee; and if the accused knew neither English nor Burmese, he will be none the wiser.

No doubt the evidence has to be read over in the presence of the accused or of his Pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But he is not necessarily entitled to the opportunity of suggesting corrections. Their Lordships are of opinion that upon the strict construction of the sections of the Code there was no violation of their provisions in the course taken with respect to those witnesses whose depositions were read over to them as already described.

At the same time, their Lordships cannot but see that it would be a better course if depositions other than mere formal ones were read over so that the accused or his Pleader could hear them and give their undivided attention to them. Care would, of course, have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence, but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his Pleader. Still it should be remembered that the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips.

(3) 23 Ind. Cas. 661; 41 I. A. 149; 18 C. W. N. 785; 26 M. L. J. 621; 15 Cr. L. J. 309; 1 L. W. 461; 7 Bur. L. T. 167; (1914) M. W. N. 506; 16 M. L. T. 79; 12 A. L. J. 1042; 20 C. L. J. 161; 16 Bom. L. R. 544; 8 L. B. R. 16; 41 C. 1023; (1914) A. C. 644; 83 L. J. P. C. 299; 11 L. T. 324; 30 T. L. R. 462 (P. C.).

(4) (1887) 12 A. C. 459; 56 L. T. 615; 36 W. R. 81; 16 Cox C. C. 241.

The second objection is more serious. Section 360 says that the deposition is to be read over to the witness. This provision is not complied with in terms by giving the witness an opportunity of reading it over to himself. He may do so in a slovenly and imperfect manner. He may not easily decipher the handwriting. He may not feel the responsibility in the same way that he would if it were read over to him. No doubt, there are cases in which it would be more likely that accuracy would be obtained if the witness read over the deposition to himself, as for instance if the pronunciation of the Magistrate or of the interpreter in a language not his own, was difficult to follow, or if a witness was partially deaf. But it is dangerous in cases of Criminal Law to accept equivalents, and except in cases where reading over to the witness would be absurd, as, for example, with a stone-deaf person, the provision should be complied with. The course adopted in this case seems to be that which was condemned in the case of *Jyotish Chandra Mukerjee* v. *Emperor* (5).

Then arises the further question whether non-compliance in this respect should vitiate a trial, and in this connection their Lordships have to consider the provisions of ss. 535 and 537 of the Code of Criminal Procedure, which are as follows:—

"535.—(1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless in the opinion of the Court of Appeal or Revision, a failure of justice has in fact been occasioned thereby.

"(2) If the Court of Appeal or Revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be re-commenced from the point immediately after the framing of the charge.

"537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch XXVII or on appeal or revision on account—

(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code: or

* * * * *

(*c*) of the omission to revise any list of Jurors or Assessors in accordance with s. 324; or

(*d*) of any misdirection in any charge to a Jury,

unless such error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

"*Explanation*—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

The passage beginning "unless such error" does not qualify (*d*) only but also the other letters of the alphabet.

The legislation on this matter is of long standing. Their Lordships have referred to ss. 426 and 439 of the Code of 1861; ss. 283 and 297 of the Code of 1872; and ss. 535 and 537 in the Codes of 1882 and 1898.

The variations are not important, the chief thing to note being that a rather trivial illustration which appeared in the Code of 1898 has disappeared from the present Code.

There have been a number of decisions in India upon these enabling or curing sections, but the only important one which came before this Board is the case of *Subrahmania Ayyar* v. *King-Emperor* (6). There the trial of a man on charges of extortion in which 41 criminal acts extending over a period of two years were brought against him in contravention of a section of the Code which provides that a man can only be tried for three offences and those committed within a period of 12 months, was held bad, and the conviction was quashed because the provisions of s. 537 of the then Criminal Procedure Code, did not cure it.

The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.

The other authorities which have been brought to their Lordships' notice, are decisions of the High Courts in India. There

(5) 4 Ind. Cas. 416; 36 C. 955; 14 C. W. N. 82; 10 Cr. L. J. 581.

(6) 28 I. A. 257; 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

is *Emperor* v. *Chedi* (1), already quoted on which their Lordships offer no comment, and several decisions in Calcutta. One of the earliest is the case of *Sheikh Bazu* in 1867 where it was held by a Full Bench of the High Court of Calcutta that there had been an error in the action of the Magistrate in sending up joint charges against persons who took part in the riot on opposite sides, but that inasmuch as the accused had had a fair trial notwithstanding, the conviction should not be set aside.

A more apposite case is that of *Jyotish Chandra Mukerjee* v. *Emperor* (5) decided in 1909 already cited. The error in that case seems to have been the same as the error in the present case; but Jenkins, C. J., delivering the judgment of the Court, said that they were able to hold that in the special circumstances, the omission was not fatal.

On behalf of the appellant, reliance was placed upon two later decisions of the High Court of Calcutta, both in the year 1924, and both reported in Volume 52 of the I. L. R. (Calcutta).

In the first case, that of *Hira Lal Ghosh* v. *Emperor* (7) (page 159*), with regard to five depositions, it did not appear positively that they had been read over to the witnesses, and the matter was left as one of inference; two others had not signed their depositions, and the Court held that these irregularities could not be cured. It will be observed that the irregularity or omission in that case was graver than the irregularity in the case now under appeal because in the present case, all the witnesses signed their depositions as having either had them read over, or having read them over themselves. But even so, their Lordships cannot accept the reasoning in that case and they are of opinion that though it is regrettable that such an irregularity should creep in, and though it might be taken into account with other elements (if such there were) of objection to the satisfactory character of a trial—it would not by itself be ground sufficient for quashing a conviction.

If, indeed, it were shown that the omission did lead or even with probability might have led to some material error in the depositions not being checked, the case would be otherwise.

The second case before the same Judges that of *Dargahi* v. *Emperor* (8) page 499* follows on the same lines, and the only further comment to be made upon it, is that it was somewhat doubtful whether any error in fact had been committed, and that the learned Judges would rather seem to have neglected to use all the means which they might have used to enquire into the correctness of the facts alleged in objection to the conviction.

To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which, in their Lordships' view, may be supported by the curative provisions of ss. 535 and 537. Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Waterhouse & Co.*

Solicitor for the Crown:—The India Office.

(1) 83 Ind. Cas. 905; 52 C. 159; 28 C. W. N. 968; A. I. R. 1924 Cal. 889; 26 Cr. L. J. 201; 41 C. L. J. 224.

*Page of 52 C.—[*Ed.*]

(8) 88 Ind. Cas. 733; 52 C. 499; A. I. R. 1925 Cal. 831; 26 Cr. L. J. 1213.

*Page of 52 C.—[*Ed.*]

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 937 OF 1926.

January 6, 1927.

Present:—Mr. Justice Jai Lal.

LAJJA AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 147—Unlawful assembly—Common object, proof of—Execution of decree—Possession delivered to decree-holder—Judgment-debtor allowed to collect crops—Entry by decree-holder—Private defence of property, right of.

In order to establish the common object of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence; such intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons upon another it is a perfectly valid and reasonable inference that they all had a common object and were, therefore, members of an unlawful assembly. [p. 233, col. 2.]

Where in execution of a decree for possession of land, possession is given to the decree-holder, but the judgment-debtor is not actually ejected from the land by reason of the fact that his crops are standing on the land and he is allowed to collect the crops when they mature, the decree-holder is entitled to enter upon the land after the crops have been collected and if such entry is resisted by the judgment-debtor it cannot be held that the decree-holder was an aggressor and that the judgment-debtor had any right of private defence of property against the action of the decree-holder. [p. 233, col. 2.]

Criminal appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Karnal, dated the 24th July, 1926.

Mr. *Duni Chand*, for the Appellants.

Mr. *I. C. Chopra*, for the Respondent.

JUDGMENT.—Tulla, Lajja, Kallu, Kanshi, Raja, Moti and Sadhu appellants have been convicted under s. 325 of the Indian Penal Code read with s. 149 and have been sentenced to various terms of imprisonment.

It appears that a suit for possession of certain land instituted by one Jai Ram against Lajja and Tulla was decreed and in execution of the decree possession of the land was given to decree-holder, but as the judgment-debtors' crops were standing on the land they were not actually ejected, and were allowed to collect the crops. The fact of the possession having been given to Jai Ram was proclaimed by beat of drum on the spot. After Lajja and Tulla had removed their crops Jai Ram, who is stated to be an old man, and his two sons Ramji Lal and Karta Ram went to plough the land on 31st January, 1926, and started ploughing it, but Tulla apparently objected to their doing so. Hearing some altercation between Jai Ram and his sons and Tulla the other appellants armed with *lathis* arrived on the scene and beat Jai Ram, Ramji Lal and Karta Ram. Jai Ram died as a result of the injuries received and the other two received 29 injuries both simple and grievous. The death of Jai Ram was due to a fracture of the skull. There is no doubt as to the facts stated above. They have been sufficiently established by the testimony of disinterested witnesses including Mai Dhan, Munshi Ram and Kundan. It may be mentioned that Mai Dhan also received injuries when attempting to separate the parties.

The learned Counsel for the appellants contends that the accused did not form members of an unlawful assembly and that they acted in the exercise of the right of private defence of property. With these contentions I am unable to agree. In order to establish the common intention of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence, but such intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons it is a perfectly valid and reasonable inference that they all had a common intention and were, therefore, members of an unlawful assembly.

With regard to the existence of the right of private defence the learned Counsel contends that only symbolical possession had been given to Jai Ram. This does not, in my opinion, affect the criminality of the appellants. A decree had been passed against Tulla and Lajja and in execution of the decree possession had been given to the decree-holder. If instead of their actual dispossession the judgment-debtors were allowed to reap the standing crops they had no right to remain in possession when such crops had been removed. It cannot, therefore, be said that they were in lawful possession when Jai Ram and his sons went to plough the land. But I am of opinion that this was not a case in which symbolical possession was given. On the other hand, it was actual possession that had been given to the decree-holder with permission to the judgment-debtors to remove their crops. The decree-holders, therefore, were not the aggressors when they went to plough the land and the judgment-debtors were not entitled to resist their action by force. In my opinion no right of private defence has been established.

Having regard to the brutal nature of the assault I do not think that there is any ground for interference with the sentences.

The appeal is dismissed.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1238 OF 1926.

January 15, 1927.

Present:—Mr. Justice Harrison.

EMPEROR—PETITIONER

versus

SHER SINGH AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 439 (6)—Conviction affirmed by High Court—Revision—Enhancement of sentence, notice as to—Accused, right of, to question conviction—Penal Code (Act XLV of 1860), ss. 307, 325—Attempt to murder—Grievous hurt.

Where a High Court has given a finding on appeal or in revision as to the guilt of an accused person and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced, the right which he would have had under s. 439 (6) of the Criminal Procedure Code to re-open the question of his guilt had no such finding been given, vanishes because of the inherent incapacity of a Judge of the High Court to re-consider a decision given by another Judge. [p. 234, col. 2.]

Emperor v. *Jorabhai Kishnabhai* (1), followed.

Two persons armed with *lathis* made a sudden attack upon a third, beat him to the ground, broke his thigh and ulna bone, struck at nine places and continued to strike after he had fallen on the ground. Only one injury was caused on the head:

Held, that the accused were guilty of an offence under s. 325 of the Penal Code and not of an offence under s. 307 of the Code [*ibid.*]

Petition, under s. 439 of the Criminal Procedure Code, 1898, for enhancement of the sentences passed upon the respondents by the Magistrate, First Class, Gurgaon, dated the 30th March, 1926, and modified by the Sessions Judge, Hissar, dated the 1st June, 1926.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Petitioner.

Mr. *N. C. Mehra*, for the Respondents.

JUDGMENT.—Sher Singh and Bhup Singh sons of Nand Lal were convicted by Mr. Khan Chand Janmeja of having attempted to murder Nanu Ram *Lambardar* and were sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs. 200 each. On appeal the convictions were changed and shown under s. 325 and the sentences of imprisonment were reduced to one year in the cases of both the accused. From this order an application for revision was presented which was dismissed by a Judge of this Court. Subsequently an application was made by the Government Advocate for revision of the sentences by enhancement and at the opening of the hearing Mr. Ram Lal who appears for the Crown, has drawn my attention to a very recent authority, *Emperor* v. *Jorabhai Kishanbhai* (1), which Mr. Nihal Chand concedes lays down good law. This is to the effect that where a High Court has given a finding on appeal as to the guilt of the accused person and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced the right which he would have had under s. 439 (6) to re-open the question of his guilt had no such finding been given vanishes because of the inherent incapacity of any Judge of a High Court to re-consider the decision given by another. This principle, it appears to me applies equally to a previous order on revision and a previous order on appeal, and I follow this authority which dissents from the view taken in *Mangal Naran* v. *Emperor* (2). The only question, therefore, is whether the finding of the Sessions Judge is correct, and whether on that finding the sentence is adequate. Counsel has drawn my attention to the fact that the Sessions Judge is wrong in saying that the assailants scrupulously avoided all vital parts for there was one contused wound on the back of the head of Nanu Ram, and he has asked me to find that the facts establish a deliberate attempt to murder.

The facts are that about half past ten in the morning the two accused armed with *lathis* rushed out and made an attack upon their enemy Nanu Ram, beat him to the ground, broke his thigh and ulna bone, struck him at nine places and continued to strike him after he had fallen on the ground. There was only one injury on the head. It is contended by the Counsel for the Crown that had they not been interrupted they would have put an end to their victim. This no man can tell. Taking the injuries as a whole I think the inference drawn by the Sessions Judge is correct that they did not intend to kill him but merely intended to cause him very serious injuries. I, therefore, maintain his finding.

The question of sentence remains, and this, I think, is very inadequate indeed. It is one thing for two men to quarrel and for one to strike the other with a *lathi* and it is quite another matter for a determined premeditated attack to be made by two men on one as in this case. I accept the application for revision presented by

(1) 97 Ind. Cas. 805; 50 B. 783; 28 Bom. L. R. 1051; A. I. R. 1926 Bom. 555; 27 Cr. L. J. 1173.

(2) 87 Ind. Cas. 424; 49 B. 450; 27 Bom. L. R. 355; A. I. R. 1925 Bom. 268; 26 Cr. L. J. 968.

the Crown to the extent of enhancing the period of imprisonment to three years. I have taken into account the fact that substantial fine has been imposed in addition to the imprisonment.

Z. K. *Application accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 47 OF 1926.
(CRIMINAL REVISION PETITION No. 40 OF 1926.)
August 2, 1926.
Present:—Mr. Justice Jackson.
In re V. RAMANADHAM—ACCUSED—PETITIONER.

Factories Act (XII of 1911), ss. 2 (2) (3), 23, 41—'Factory,' 'premises,' 'precincts', 'employment'—Drying yard away from main building, whether factory—Sorting ground-nuts by children for decorticating them, whether amounts to employment—Offence—Manager's liability.

The word 'premises' in s. 2 (3) of the Factories Act means the main building and its appurtenances and the word 'precincts' is intended to include any adjunct thereof. [p. 235, col. 2.]

A factory includes everything, machine, rooms, sheds, godowns and yards, if within the premises or precincts mechanical power is used in aid of any process for altering for transport or sale of any article. The test is whether mechanical power is used in aid of a manufacturing process used in the premises. If it is so used in a particular room, the whole premises are a factory and not merely the room. [*ibid.*]

A drying yard 5 or 6 yards from the wall of the building in which machinery for decorticating ground-nuts is used is part of a factory within the meaning of s. 2 (3) of the Factories Act and the employment of children therein in contravention of the provisions of s. 23 of the Act is an offence. [p. 236, cols. 1 & 2]

The sorting of ground-nuts for use in a ground-nut decorticating machine is work connected with the article, subject of manufacturing process, within the meaning of s. 2 (2) and amounts to *employment* under the Act. [p. 236, col. 2.]

Law v. *Graham* (1), distinguished.

Once it is found that children are employed in a factory in contravention of s. 23 of the Factories Act the occupier or manager is liable under s. 41 of the Act. It is immaterial who actually pays them their wages. [*ibid.*]

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Vizianagaram, dated the 5th September, 1925, in C. C. No. 33 of 1925.

Mr. *G. Lakshmanna*, for the Petitioner.
The Public Prosecutor, for the Crown.

ORDER.—The petitioner seeks to revise the judgment in C. C. No. 33 of 1925 on the file of the Sub-Divisional Magistrate, Vizianagaram, whereby he has been fined Rs. 25 under s. 41, Indian Factories Act, XII of 1911, for employing children in his factory in contravention of s. 23.

The first ground taken is that the dyeing (probably drying) yard in which the children were employed does not form part of the factory.

This place is five or six yards from the wall of the building, and has no connection with machinery or any work incidental to the manufacturing process (D. W. No. 1).

A factory as defined by s. 2 (3) means "any premises wherein, or within the precincts of which....." Pausing here for a moment it may be observed that these terms "premises or precincts" are the most comprehensive that can be conceived. Premises means the main building and its appurtenances, and lest that should omit any part of the establishment, "precincts" are added which mean any adjunct. Therefore, factory includes everything, machine, rooms, sheds, godowns and yards. If within these premises or precincts mechanical power is used in aid of any process for altering for transport or sale of any article, then these premises or precincts are a factory. The definition does not run—if in any part of such premises mechnical power is used then such part is a factory. The vital question would be, is mechanical power in aid of a manufacturing process used in the premises? If the answer is yes, in the decorticating room, then the whole premises, including the yard, are a factory, and not merely the decorticating room, as petitioner contends.

In support of this contention Mr. Lakshmanna relies upon *Law* v. *Graham* (1) where it was held that premises occupied by a mechanical bottle washer, and used for bottling beer by hand were not a factory. But the decision of this case turned upon the question whether washing the bottles was a manufacturing process. Lord Alverstone, C. J., conceded that putting beer into bottles, might, by a somewhat strained construction of the words, be said to be an adopting of the article for sale. But he held that the washing of bottles by mechanical means cannot be fairly called a process which is used "in aid of" the bottling of

(1) (1901) 2 K. B. 327; 70 L. J. K. B. 608; 65 J. P. 501; 49 W. R. 622; 84 L. T. 599; 17 T. L. R. 474; 19 Cox C. C. 725.

beer. To put the present case on all fours with *Law* v. *Graham* (1) one must postulate premises wherein the children put ground-nuts into bags, and somewhere on those premises is a machine for washing the bags and no other machinery for any other purpose, then such premises will not be a factory, for the reason that the machinery is not in aid of a manufacturing process, not for the reason that the machinery is in some other portion of the premises. But, if in the premises there is machinery admittedly in aid of the process, then the premises would be a factory.

In *Paterson* v. *Hunt* (2) the premises consisted of two rooms separated by a closed door. In one room several girls sorted rags by hand and in the other room a mechanical shaker for cleaning the rags was occasionally used for some of the rags. Lord Alverstone held that the process in question, sorting rags for sale, was not adopting for sale. This ruling would help the petitioner if the process in his factory were confined to sorting ground-nuts, a portion of which was occasionally cleaned by a mechanical shaker. But the fact that a mechanical decorticator is used on the premises carries the present case beyond the scope of *Paterson* v. *Hunt* (2). Darling, J., puts the point succinctly: "I cannot come to the conclusion that there was *here* any manufacturing process whatever..." "here," of course, referring to the whole premises, and not to that portion of the premises occupied solely by manual workers. In the present case it cannot possibly be said that there is no manufacturing process whatever on the premises.

Part of the premises used solely for some purpose other than the manufacturing process carried on in the factory, may, under s. 149 of the English Factory and Workshops Act, Edward VII, Ch. 22, constitute a separate factory, or be excluded from the operation of the Act; Halsbury's Laws of England, Vol. XIV, pages 443, 444; but these circumstances do not assist the interpretation of the Indian Act. On the first ground I hold that the drying yard does form part of the factory.

It is next urged that there was no employment of children in the factory as contemplated by the Act. Under s. 46 if a child is found in any part in which children are employed and in which work incidental to any manufacturing process is being carried on he shall be deemed to be employed in the factory until the contrary is proved. Under s. 2 (2) a person who works in a factory in any kind of work incidental to the manufacturing process or connected with the article subject of the manufacturing process, shall be deemed to be employed therein.

The question then arises whether sorting ground-nuts can be said to be incidental to the process or connected with the article subject of the process. The article subject of the decorticating process being ground-nut, it must be held that sorting that article, is work connected with the article subject of the manufacturing process. No doubt mere sorting was held to be no manufacturing process in the case of rags [*Paterson* v. *Hunt* (2)], but then the rags were not subject of any manufacturing process on the premises. They were simply collected, and the only mechanical process, which brought the case as their Lordships observed near the line, was the intermittent use of the shaker for some of the rags. The regular use of the decorticator for all the ground-nuts leaves no room for doubt that the article has been subject of manufacturing process.

It must be held, therefore, that the children were employed within the mischief of the Act.

Once it is found that the children were employed in the factory it is immaterial who actually paid them their wages, the occupier or manager is liable under s. 41.

No other ground was raised, and there is no reason to revise the judgment of the lower Court.

The petition is dismissed.

V. N. V. *Petition dismissed.*

A. N. A.

(2) (1909) 101 L. T. 571; 7 3. J. P. 496.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 1179 OF 1926.

September 2, 1926.

Present:—Mr. Justice Chari.

M. RAMANATHAN—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Hindu Law—Marriage among sub-castes, legality of—Offence relating to marriage—Necessity of strict proof of marriage.

In proving an offence in which marriage is an essential ingredient it is necessary that the factum of marriage must be strictly proved. [p. 237, col. 2.]

It is doubtful whether there could be a valid marriage under Hindu Law between an Oriya male and Telegu female. [p. 237, col. 2.]

Appeal from the order of the Fifth Additional Magistrate's Court, Rangoon, in Criminal Regular Trial No. 547 of 1925.

Mr. *Vakharia*, for the Appellant.

JUDGMENT.—The complainant R. K. Behara, an Oriya Hindu of the Sudra caste filed a complaint against Ramanathan, the accused, charging him with enticing away his legally married wife with intent that she may have illicit intercourse with him, an offence punishable under s. 498 of the Indian Penal Code. The Trial Magistrate found the accused guilty, and convicted and sentenced him to 3 months' rigorous imprisonment and to pay a fine of Rs. 300 or in default to suffer 3 months' further rigorous imprisonment.

The accused appeals to this Court and it is argued by the learned Advocate on his behalf that (1) no valid marriage was possible between the complainant and Satyanarayana who is alleged to have been his wife; (2) no marriage has been proved; (3) there has been no enticement in the Indian Penal Code.

The first point to consider is whether there could be a valid marriage between an Oriya Sudra and a Telegu woman presumably also of the Sudra caste. In the earlier rulings of the Indian High Courts it was held that marriages between persons belonging to the different sub divisions of the same caste is illegal unless sanctioned by custom. A different view was taken in the later rulings, and it has been held that there is nothing in the Hindu Shastras to prohibit such a marriage. *Upoma Kuchain* v. *Bholaram Dhubi* (1) and *Mahantava Irrappa* v. *Gangava Malappa* (2). In all these cases, however, the persons belonging to the different subdivisions spoke the same language and were residents of the same Province. In the present case the complainant is an Oriya speaking a language which is a branch of the Bengali, while the girl Satyanarayana is a Telegu speaking a Dravidian language. Whether a marriage between these two people is legal or illegal it is so unusual and unheard of that the evidence relating to the marriage has to be scrutinised with more than usual care. In all my experience I have never heard of such a marriage ever having taken place.

The evidence as to the marriage is that of the complainant himself. He says that he was married according to the Hindu rites and customs, whatever that may mean. The second witness is the girl's mother. She admits that she has been living with the complainant ever since the marriage of her daughter. She has been in a sense dependent on him. Her evidence does not carry the case much further. The complainant says that a man by the name of Molaram Dass was the Oriya priest who officiated at the ceremony. In this peculiar marriage a noticeable feature is that priests belonging to the Oriya caste and priests belonging to the Telegu caste are alleged to have officiated. The person who was actually called, however, is an entirely different man by the name of Bhola Nath Panda who did not himself officiate at the marriage, but whose brother Fakir Charan Panda is alleged to have officiated. The other two witnesses Bhattacharjee and Misra are merely to show that such marriages are possible. The adoptive father of the girl says that he does not know of any such marriage, as the complainant alleges having taken place. He would, undoubtedly, have known of such a marriage, if it had taken place.

In proving an offence in which marriage is an essential ingredient, it is necessary that the fact of the marriage must be strictly proved. In this case the probabilities are entirely against there having been any valid marriage between the parties. The complainant admits that he had two, if not three, other Telegu women as his mistresses before he took Satyanarayana. He is an Oriya Hindu and has got an Oriya wife in his own country. It is also proved that before Satyanarayana came to the complainant she passed through the hands of one Chelleya. In these circumstances when it would have been the easiest thing possible for the complainant to obtain this woman as a mistress, it is inconceivable that he would have gone out of his way to perform a ceremony of marriage and make her his legal wife with the probability and almost the certainty of her being discarded from the caste in his own country and by his own people.

In these circumstances I have no hesitation in holding that a valid and legal marriage has not taken place, and that

(1) 15 C. 708; 13 Ind. Jur. 108; 7 Ind. Dec. (N. S.) 1055.

(2) 3 Ind. Cas. 962; 33 B. 693; 11 Bom. L. R. 822.

therefore, the accused could not have been convicted of the offence of enticing away a married woman. I set aside the conviction and sentence passed on the accused Ramanathan, and direct that he be acquitted and that the bail-bond executed by him be cancelled. The fine, if it has been paid, will be refunded to him.

Conviction set aside.

R. L.
A. N. A.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 278, 364 AND 418 OF 1926.

(CRIMINAL REVISION PETITIONS NOS. 248, 318 AND 342 OF 1926).

October 28, 1926.

Present:—Mr. Justice Curgenven

DEVARAKONDA LAKSHMINARASIMHAM—COMPLAINANT—PETITIONER

versus

NALLURI BAPPANNA AND OTHERS—ACCUSED NOS. 1 TO 6—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 247, 439—Summons case—Absence of complainant—Dismissal of complaint—Order, whether of discharge or acquittal—Revision—Interference.

An order dismissing a complaint in a summons case for default of appearance of the complainant under s. 247 of the Criminal Procedure Code amounts to an order of acquittal and not of discharge and the Magistrate in such a case has no jurisdiction to set aside the order even on good cause being shown for the complainant's non-appearance. [p. 238, col. 2.]

An acquittal under that section does not stand on any different footing from an acquittal under other circumstances and the High Court, will not set aside the order of acquittal in revision except under very rare circumstances. [p. 239, col. 1.]

It is a sound rule of practice not to interfere in revision when there is no error of law on the face of the record. [*ibid.*]

In re Sinnu Gounden (1), relied on.

Petitions under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Stationary Sub-Magistrate, Tanuku, in C. C. Nos. 659 of 1925, 69 of 1926, and 659 of 1925, respectively.

Mr. *N. Kameswara Rao*, for the Petitioner.

Mr. *V. Suryanarayana*, for the Respondents.

The Public Prosecutor, for the Crown.

ORDER.—These are three Criminal Revision Petitions arising out of C. C. Nos. 659 of 1925 and 69 of 1926 on the file of the Stationary Sub-Magistrate of Tanuku. The complainant filed a complaint of mischief against 6 persons and after some witnesses had been examined, the case was adjourned to 25th January, 1926, for further evidence. On that day when the case was called on, the complainant was not present either in person or by Pleader and the Sub-Magistrate, therefore, acquitted the accused under s. 247, Criminal Procedure Code. The next day the complainant applied to have it restored to file and on 2nd February, 1926, the Sub-Magistrate passed an order accepting his explanation for his absence and restoring the case. On 13th February, 1926, the accused filed a petition to cancel that order nd on 19th February, 1926, the Magistrate cancelled it. Criminal Revision Case No. 278 of 1926 is against the order of acquittal dated 25th January, 1926, Cr. R. C. No. 418 of 1926, presented by the accused, is against the restoration of 2nd February, 1926, and Cr. R. C. No. 364 of 1926, presented by the complainant is, against the cancellation of that order.

It is apparent that, the order of 25th January, 1926, being one of acquittal, the Sub-Magistrate was incompetent to restore the case and accordingly that both that order and the subsequent order of cancellation must be deemed to be void for want of jurisdiction. The only question I have to decide, therefore, is whether there are grounds for setting aside the order passed under s. 247 acquitting the accused. The argument in favour of such inference is in substance that upon the merits the Sub-Magistrate was right in the course he adopted, that the interests of justice require that the complaint should be proceeded with, and that since this Court can do legally what the Sub-Magistrate did illegally it ought to regularise his action. It is quite true that the petition which the complainant presented on the day following the order contains a very reasonable explanation for his failure to appear when the case was called and, had it been open to the Sub Magistrate to accept this explanation and restore the case, no fault could have been found with the exercise of his discretion. Unfortunately, however, the Criminal Procedure Code contains no provision analogous to O. IX, r. 4, Civil Procedure Code, enabling a Court to set aside an order passed on default of appearance. Not only so, but in a summons case, such as we are now dealing with, such a default entails not a mere discharge of

the accused but his acquittal. I do not think that there is any reason to hold that an acquittal under this section stands on any different footing from an acquittal ordered in any other circumstances, as for instance, under s. 258, Criminal Procedure Code, and it is unnecessary to cite authority for the rule of practice that upon an application in revision an acquittal should very rarely be set aside. Apart from these general principles of procedure, there is authority more precisely applicable here. *In re Sinnu Gounden* (1) relates to a case in which owing to the complainant's absence, the Magistrate acquitted the accused under s. 247, Criminal Procedure Code, and it was subsequently discovered that the accused himself had contrived the absence of the complainant by getting him arrested on a false charge. The District Magistrate referred the case for the orders of the High Court under s. 438, Criminal Procedure Code, but Miller and Spencer, JJ., refused to set aside the order of acquittal partly no doubt because the District Magistrate might have moved the Government to appeal, but partly also because the Magistrate's action in acquitting the accused, upon the information which he had at the time before him, was perfectly a legal order. As observed by Spencer, J., it has always been regarded as a sound rule of practice not to interfere in revision when there is no error of law on the face of the record. The same principle was followed in a recent unreported case (Cr. R. C. No. 772 of 1925*) which also related to an acquittal under s. 247, Criminal Procedure Code. There, although the complainant appeared five minutes after the case was disposed of, the learned Judges found that the Magistrate had acted within his powers, that his order was not illegal and that it would not, therefore, be right for the High Court in revision to interfere with it. Adopting this principle I must dismiss Cr. R. C. No. 278 of 1926. It follows that Cr. R. C. No 418 of 1926 is allowed and Cr. R. C. No 364 of 1925 is dismissed.

V. N. V. *Petitions Nos. 278 and 364*
A. N. A. *of 1926 dismissed.*
Petition No. 418 of 1926
allowed.

(1) 23 Ind. Cas. 188; 38 M. 1028; 26 M. L. J. 160; (1914) M. W. N. 273; 15 Cr. L. J. 236.

*Since reported as *Nagarambilli Tankya* v. *Matta Jagannatha*, 96 Ind. Cas. 652.—[*Ed*]

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 250 OF 1926.
(CRIMINAL REVISION PETITION No. 227 OF 1926).

November 2, 1926.

Present:—Mr. Justice Curgenven.

KANAGAMMAL—PETITIONER

versus

PANDARA NADAR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Order for maintenance against husband—Wife rejoining husband and subsequently leaving—Application to enforce original maintenance order, whether maintainable—Procedure.

It is a general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled; and *prima facie* this rule applies to maintenance orders passed under s. 488, Cr. P. C. In such cases, therefore, until the person against whom the order has been made obtains either the cancellation or a modification of the original order, the original order must be deemed to continue in force. [p. 240, col. 1.]

The mere fact that a wife who has obtained an order for maintenance against her husband has returned to live with him will not have the effect of bringing the order to an end automatically. [*ibid.*]

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying, the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Tuticorin, dated the 29th September, 1925, in M. C. No. 26 of 1925.

Mr. *P. N. Appuswami Ayyar*, for the Petitioner.

Mr. *V. Rajagopalachariar*, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—In 1921 the petitioner applied for and obtained an order against her husband, the counter-petitioner, under s. 488, Criminal Procedure Code, for the payment of maintenance for herself and her daughter at the rate of Rs. 10 per mensem. Subsequently, during the years 1922-23, she returned to the counter-petitioner and lived with him, bearing him another child. She then left him again and in 1924 applied to execute the maintenance order, but her petition was dismissed. Then she came up to this Court in revision (Criminal Revision Case No. 52 of 1925) and Jackson, J., cancelled the Sub-Divisional Magistrate's order rejecting her application, leaving it to him either to give her arrears under the old order or, if it was found that the order was no longer in existence, to let her file a fresh

application. Accordingly on 22nd August, 1925, she filed a petition for 11 months' arrears of maintenance up to that date. The learned Sub-Divisional Magistrate, in the order which it is now sought to revise, held that the reconciliation between husband and wife had brought the old order to an end automatically so that it lay on the petitioner to adduce further proof that she was entitled to maintenance. The point now arising for decision, therefore, is whether the original order granting maintenance may be deemed to be still in existence.

It is a general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled; and *prima facie* this rule applies to maintenance orders pased under s. 488, Criminal Procedure Code. Sub-section (5) of that section provides that in certain specified circumstances, where a wife is living in adultery, where without sufficient reason she refuses to live with her husband, or where the parties are living separately by mutual consent, the Magistrate shall cancel the order. It is also open to the Court, under s. 489, to make an alteration in the allowance on proof of a change in the wife's circumstances. In such cases, it will be for the counter-petitioner to obtain either the cancellation or the modification of the original order, and until he does that, the original order must be deemed to be still in force. The mere fact, for instance, that a wife is living in adultery, will not bring the order to an end automatically. If it did so, there would be no need for the Court to cancel it. And similarly, the mere fact that a wife has returned to live with her husband will not have this effect, although it is true that the Code makes no provision for its cancellation upon such an event occurring. Nor does it make any provision, to take another example, for cancelling the order upon proof that the husband has divorced his wife. A case of the latter kind came before the Allahabad High Court in *Shah Abu Ilyas* v. *Ulfat Bibi* (1) and it was held to be the duty of the Court, if the plea of divorce were established, to decline to enforce the order which it had discretion to do under s. 490, Criminal Procedure Code, and so, if a wife returns to live with her husband, it would be open to the Court to decline to enforce the order, whether or not, it would have the power in the absence of any statutory provision, to cancel it. The order would remain in suspense. This was the view taken in *Parul Bala Debi* v. *Satish Chandra Bhattacharjee* (2) where a wife had temporarily returned to her husband and left him again: "A mere temporary stay of this kind, though it may have suspended the operation of the order, had not the effect of cancelling it in the way in which it could be cancelled under s. 488 (5) of the Code." A contrary view seems to have been taken by Straight, J., on the case referred to by the learned Joint Magistrate in *Phul Kali* v. *Harnam* (3), *viz.*, that upon a wife voluntarily returning to her husband the order would permanently "become ineffectual" notwithstanding that at the date of the subsequent proceedings, she had left him again, but I think with respect, that this is not the correct position.

It was accordingly open to the petitioner to apply for the execution of the order, as still subsisting. The counter-petitioner might then have resisted the application upon any of the grounds specified in sub-s. (5). To enable this course now to be adopted, I set aside the Sub-Divisional Magistrate's order, dated 29th September, 1925, and direct him to restore to file the petition dated 22nd August, 1925, and to dispose of it in the light of the foregoing observations. If the counter-petitioner fails to show that the petitioner is now disentitled to maintenance under sub-s. (5), it will be for the Court to consider with effect from what date the payment of arrears should be enforced. Under the second proviso to s. 488 (3) the Court's power extends to the recovery of arrears falling due over a period of one year next before the date of application, that date being 22nd August, 1925, but it does not follow that that power should be fully exercised, and I observe that the petitioner herself only asked for the recovery of 11 months' arrears.

V. N. V. *Case remanded.*

(1) 19 A. 50; A. W. N. (1896) 173; 10 Ind. Dec. (N. s.) 33.

(2) 75 Ind. Cas. 529; 37 C. L. J. 180; A. I. R. 1923 Cal. 456; 24 Cr. L. J. 945.

(3) A. W. N. (1888) 217.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 479 AND 480 OF 1925.

October 20, 1926.

Present :—Mr. Justice Waller.

KALIBA SAHIB AND OTHERS—APPELLANTS

versus

PERIATHAMBIA PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), Sch. I, Art. 8—Limitation Act (IX of 1908), Sch. I, Art. 166—Suit for rent by landholder under registered lease deed - Limitation.

A suit for rent by a landholder under the Madras Estates Land Act even when based on a registered lease deed is governed by the 3 years' period of limitation under Art. 8, of the first Schedule of the Madras Estates Land Act and not by the 6 years' period under Art. 116 of the Limitation Act.

Ramakrishna Chetty v. *Subraya Iyer* (1), *Sundaram Iyer* v. *Muthuganapatigal* (2) and *Rajah of Pittapur* v. *Gani Venkat Subba Rao* (3), followed.

Second appeals against the decrees of the District Court, East Tanjore at Negapatam, in A. S. Nos. 444 of 1923 and 180 of 1924, preferred against the decrees of the Court of the Sub-Collector, Nagapatam, in Summary Suits Nos. 50 of 1923 and 2 of 1924, respectively.

FACTS.—The plaintiff brought two suits for recovery of rent against the defendants under the Madras Estates Land Act. The defendants were holding under a registered lease deed, dated 30th October, 1914, for a period of 7 *Faslis*. The suits were in each case more than 3 years and less than 6 years from the date when the cause of action accrued.

The Sub-Collector dismissed both the suits holding that they were barred by limitation on the ground that the suits were governed by Art. 8 of the first Sch. of the Madras Estates Land Act and not by Art. 116, Limitation Act, applicable to registered contracts. The decrees were confirmed in appeal. Against the said decrees the above second appeals were filed.

Mr. *R. Kuppusami Iyer*, for the Appellants.

Mr. *Pento*, for the Respondents.

JUDGMENT.—The only question for consideration is that of limitation. The decisions of this Court seem to me to lay down that the claim for *Faslis* 1326 and 1327 is barred by limitation [*Vide Ramakrishna Chetty* v. *Subraya Iyer* (1), *Sundaram Iyer* v. *Muthuganapatigal* (2) and *Rajah of Pittapur* v. *Gani Venkat Subba Rao* (3)] and that it makes no difference whether the landlord is suing on a registered deed or not.

The appeals are dismissed. Second Appeal No. 480 of 1925 is dismissed with costs.

V. N. V. *Appeals dismissed.*

(1) 18 Ind. Cas. 64; 38 M. 101; 24 M. L. J. 54; (1913) M. W. N. 303.

(2) 14 Ind. Cas. 184; 11 M. L. T. 276; (1912) M. W. N. 652.

(3) 30 Ind. Cas. 94; 39 M. 645; 29 M. L. J. 1; 18 M. L. T. 67; 2 L. W. 661; (1915) M. W. N. 547.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 21 OF 1926.

December 20, 1926.

Present:—Mr. Justice Hasan and Mr. Justice Misra.

SHAH MOHAMMAD NAIM ATA—DEFENDANT—APPELLANT

versus

MOHAMMAD SHAMSH-UD-DIN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Waqf, *creation of—Property dedicated for upkeep of* khanqah, *whether* waqf—*Dedication of income, effect of—Grant in name of* sajjadanashin, *effect of—Government, whether can create* waqf—*Decree against* sajjadanashin—Waqf *property, whether can be attached.*

A *khanqah* is a religious institution like a monastery where disciples live and religious instruction is imparted to them. [p. 244, col. 1.]

Under the Muhammadan Law the moment a *waqf* is created all rights of property pass out of the *waqif* and vest in God. The curator, whether called a *mutawalli* or *sajjadanashin* or by any other name, is merely a manager of the property and not a "trustee" as understood in the English system of law. [p. 244, col. 2.]

Where property is given to the *sajjadanashin* of a *khanqah* for the purposes of the maintenance of the *khanqah*, it cannot be said that the property is given to the *sajjadanashin* personally and not to the institution. The gift is virtually according to the spirit of the Muhammadan Law, to God Almighty for the purpose of the upkeep of the institution and the property must, therefore, be regarded as *waqf*. [*ibid.*]

Where the income of any specified property is to be permanently devoted to certain religious and charitable objects, such a permanent dedication is termed *waqf*, and it is not absolutely necessary in order to create a *waqf* that this term should be used in the instrument creating it. [p. 245, col. 1.]

Just as a private person can create a *waqf* by dedicating the income of certain property to the maintenance of a religious or charitable object, so Government may create a *waqf* by directing that the income of the property should go towards the upkeep of a religious institution. [p. 247, col. 1.]

Where property has been gifted or devised to a trustee with the object of providing for certain religious duties, neither the whole nor any portion of the corpus can be sold in execution of a decree obtained against the trustee personally. [p. 248, col. 2.]

Certain property had been granted by the Kings of Oudh to the *sajjadanashin* of a *khanqah* for the upkeep of the *khanqah*. After the introduction of the British Administration into the Province of Oudh the Chief Commissioner of Oudh, under the authority of the Governor-General-in-Council, confirmed the grant and stated expressly in the *sanad* that the tenure granted by the former Government was maintained. It was, however, further stated that in certain conditions the grant would be resumed:

Held, (1) that the property comprised in the original grant had become *wakf* under the Muhammadan Law; [p. 244, col. 1.]

(2) that the British Government had restored to the *sajjadanashin* the same tenure which he was in possession of, prior to Lord Canning's Proclamation and that the property, therefore, continued to be *wakf* in spite of the terms of the Proclamation; [p. 249, col. 2.]

(3) that inasmuch as it was expressly provided by the Crown Grants Act that it was open to the Crown to impose limitations and restrictions upon grants made by it or under its authority and that such conditions and limitations were to be valid notwithstanding any rule of law to the contrary, the condition laid down in the *sanad* that the grant would be resumed in certain events did not operate to take away from the property the character of *wakf*. [*ibid.*]

(4) that, therefore, the property was not liable to attachment and sale in execution of a decree obtained against the *sajjadanashin* personally. [*ibid.*]

Appeal against the decree of the District Judge, Rai Bareli, in Appeal No. 121 of 1924, dated the 10th October, 1925, reversing that of the Additional Subordinate Judge, Rae Bareli, dated the 20th October, 1924.

Messrs. *Naimat Ullah* and *Muhammad Wasim*, for the Appellant.

Mr. *Hyder Husain*, for the Respondent.

JUDGMENT.

Misra, J.—This is a defendant's appeal arising out of a suit for declaration to the effect that certain rents and profits sought to be taken in execution of a decree against the appellant are liable to be attached in satisfaction thereof. The facts are that the plaintiff-respondent, Muhammad Shamsh-ud-din, obtained a simple money-decree from the Court of the Subordinate Judge of Rae Bareli on the 1st May, 1915, for Rs. 2,250 against the defendant-appellant, Shah Mohammad Naim Ata, the *sajjadanashin* of a *khanqah* (monastery) known as *Khanqah* Karimiah, situate in Salon, District Rae Bareli. In execution of the said money-decree the plaintiff attached rents and profits of two villages, namely, Ataganj Usri and Khwajapur both situate in the District of Rae Bareli. The appellant objected in the execution proceedings that these villages were endowed property belonging to the aforesaid *khanqah* and that the rents thereof were not liable to attachment. The objection was allowed in the Execution Court upon which the plaintiff-respondent brought the present suit for declaration.

The learned Additional Subordinate Judge of Rae Bareli by his decree, dated the 20th October, 1924, dismissed the plaintiff's suit holding the two villages, the rents of which had been attached in execution of his decree by the plaintiff to be endowed property. On appeal the learned District Judge of Rae Bareli took a different view of the matter and by his decree dated the 10th October, 1925, holding that the property was not *wakf* set aside the decree of the learned Subordinate Judge and allowed the plaintiff's appeal.

The defendant has now come to this Court in second appeal; and the only question which we have to decide is whether the two villages, Ataganj Usri and Khwajapur, form part of the endowment appertaining to *Khanqah* Karimia, Salon, and thus constitute *wakf* property.

The two villages in dispute were conferred by the British Government upon Shah Husain Ata, grandfather of the present defendant-appellant Shah Mohammad Naim Ata by virtue of a *sanad*, dated the 26th September, 1862, under which these two villages along with several others were granted for the upkeep of the buildings and the school belonging to *Kkanqah* Karimia, Salon. The document has been filed in the case and is marked as Ex. A 8. To understand the history of the endowment we think it proper to quote the terms of the *sanad* in full which run as follows:—

"It having been established after due inquiry that Shah Husain Ata held the under-mentioned land in Tahsil Salon, *Zila* Partabgarh (now *Zila* Rae Bareli) in rent-free tenure under the former Government, the Chief Commissioner, under the authority of the Governor-General-in-Council, is pleased to maintain the tenure so long as the grantees perform their duties and keep up the buildings and the school according to the terms of the grant on the following conditions:—

That he shall have surrendered all *sanads*, title-deeds and the documents relating to the tenure in question;

That he and his successors shall strictly perform all the duties of landholder in matters of Police and any Military or Political service that may be required of them by the Authorities; and

That they shall never fall under the just suspicion of favouring, in any way, the designs of enemies of the British Government. If any one of these conditions is broken by the present incumbent or any of his successors the tenure will be immediately resumed."

The *sanad* is in both English and vernacular, and we think it proper to quote below a portion from the vernaculur inasmuch as it brings out the intention of the Government more clearly:—

"Nawab.....Governor General Bahadur... *jalsa kounsil dam iqbalhu us arazi ko jab tak amadni sarf us makan wa madarsa men awae jis ke waste diya gaya, hasb sharait mufasil zail qaim farmate hain.*"

It will appear from the terms of the aforesaid *sanad* that the endowment was not made by the British Government for the first time but was one which was maintained by it having been held as such under the former Government, namely, the King's Government in Oudh. The institution for which this endowment existed is an old *khanqah* situate in Salon, District Rae Bareli, and the endowment, which was maintained by the British Government, was a very old endowment made by Aurangzeb, Emperor of Delhi. This is evident from the history of the endowment given on pages 100 to 102 of the District Gazetteer of Rae Bareli which is quoted below:—

"One of the largest estates not held by *taluqdars* is the Salon *waqf* or endowment, representing an old religious grant made by Aurangzeb, and increased at various times by different Sovereigns up to the days of Asafudaula. The Pirzada family claim to be Faruqi Sheikhs and to have come from Yaman in Arabia, whence their ancestors migrated to Jaunpur. There Shah Addahan became celebrated as a saint, and from him the Pirzadas acquired the name of Addhani. His descendant Shah Abd-un-Nabi, came to Salon, and his son, Shah Pir Muhammad, obtained some celebrity. He went to Manikpur, where he became a disciple of Qazi Abdul Karim, the *sajjadanashin*; later he returned to Salon, taking up his abode at the tomb of Piran Parontha a companion of Saiyid Salar. In 1086 *Hijri* he received from Aurangzeb the revenue-free grant of Mirzapur Bakhtiyar, and his son, Shah Pir Ashraf, obtained Ashrafnagar Singhol in 1090 *H.*, Palipur in 1109 *H.*, and Kishandaspur from Bahadur Shah in 1119 *H.* The remaining villages were given by Shah Alam in 1175 *H.* Shah Pir Ashraf died at the age of 90, and left two sons, Pir Ata, who died childless, and Pir Muhammad Panah. The latter was succeeded by his son, Shah Karim Ata, as *sajjadanashin*, during whose tenure certain additions were made to the grant by Shuja-ud-daula and Asaf-ud-daula, of whom the latter visited Salon on pilgrimage. In 1824 Shah Karim Ata divided his whole property equally between his three sons, Shah Ashraf Ata, Shah Panah Ata and Shah Gafur Ata, reserving one village Muhammadabad, for the maintenance of his two daughters. The first son died during his father's lifetime, and then the partition was annulled, Panah Ata being declared *sajjadanashin* and the sole proprietor; but this was apparently never acted upon, and endless litigation ensued up to 1835, and again after annexation till 1886. At the death of Karim Ata in 1833, Ahsan Ata, son of Ashraf Ata, and Shah Ghafur Ata sued the *sajjadanashin*, Panah Ata for their shares; and the Nazim, Khadim Husain Khan, being appointed to settle the dispute, drew up an agreement whereby Panah Ata was to retain his position with a half share of the property, the remainder being equally divided between the other claimants, while the former had to bear the expense of the charitable donations. In 1856 Major Barrow, Deputy Commissioner of Salon, enquired into the titles; all the old *sanads* and *farmans* were filed in his office, and were destroyed in the Mutiny. In 1860 a second inquiry, or rather series of inquiries, was instituted and the result was that, firstly, twelve villages in the Parganas of Bihar, Kunda and Dhingwas were given unconditionally in perpetuity to the *sajjadanashin*; secondly, other villages six in number, were granted to the *sajjadanashin*, Shah Husain Ata, son of Panah Ata, who had died in 1860, and other members of the family, either for life or conditionally; and thirdly, 14 villages and nine *mahals* comprising Mirzapur Bakhtiyar and Dhankasra in Parshadepur, 12 villages and seven *mahals* in Salon, Ashrafnagar Singhol in Manikpur, and Afzalpur Sataon in Karra of Allahabad, were granted to the *sajjadnashin* conditionally for the upkeep of the school and certain religious buildings, including the *dargha*, three mosques at Salon, and various mosques and other institutions elsewhere. The *sanad* is dated the 26th of August (*sic*), 1862, and the main con-

dition provides that "the said lands shall be continued to him so long as the income is devoted to the buildings and the school for which they were granted." We may note that the actual date of the *sanad*, as it is before us, is 25th September, 1862.

It will thus appear that the institution is a very old one and the Kings of Delhi had given property including the two villages in suit as *waqf* for the upkeep of the buildings and the school at Salon. A *khanqah* is a religious institution like a monastery where disciples live and religious instruction is imparted to them The *madrasa* referred to above is obviously for the imparting of such religious instructions. No doubt is, therefore, left in our minds that the two villages in dispute having been given to Shah Muhammad Ata, who was the *sajjadanashin* of the *khanqah* at Salon, for the upkeep of the buildings and the school connected therewith are the *waqf* property and cannot, therefore, be attached in execution of decree; nor can the rents and profits of the said property be held to be liable to attachment. In *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (1), their Lordships of the Privy Council observed as follows:—

"But the Muhammadan Law relating to trusts differs fundamentally from the English Law. It owes its origin to a rule laid down by the Prophet of Islam; and means 'the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings.' When once it is declared that a particular property is *waqf*, or any such expression is used as implies *waqf*, or the tenor of the document shows, as in the case of *Jewan Doss Sahoo* v. *Shah Kubeer-ood deen* (2), that a dedication to pious or charitable purposes is meant, the right of the *waqif* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The manager of the *waqf* is the *mutawalli*, the governor, superintendent, or curator. In *Jewan Doss Sahu's case* (2), the Judicial Committee call him 'procurator.' That case related to a *khanqah*, a Muhammadan institution analogous in many respects to a *math* where Hindu religious instruction is dispensed. The head of these *khanqahs* which exist in large numbers in India, is called a *sajjadanashin*. He is the teacher of religious doctrines and rules of life, and the manager of the institution and the administrator of its charities, and has in most cases a larger interest in the usufruct than an ordinary *mutawalli*. But neither the *sajjadanashin* nor the *mutawalli* has any right in the property belonging to the *waqf*; the property is not vested in him and he is not a 'trustee' in the technical sense."

Their Lordships further observed (*vide* p. 315*) as follows:—

"Neither under the Hindu Law nor in the Muhammadan system is any property 'conveyed' to a *shebait* or a *mutwalli*, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Muhammadan Law, the moment a *waqf* is created all rights of property pass out of the *waqif*, and vest in God Almighty. The curator, whether called *mutawalli* or *sajjadanashin*, or by any other name, is merely a manager. He is certainly not a 'trustee' as understood in the English system."

It was argued on behalf of the plaintiff-respondent that the villages having been expressly conferred upon Shah Husain Ata under the terms of the *sanad*, they could not be deemed to have been dedicated to God Almighty. We are not prepared to accept this contention. As observed by their Lordships of the Privy Council in the above referred case (*vide* p. 311*) when the gift is directly to an idol or a temple (or to a *khanqah*), the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. When, therefore, the property was given to the *sajjadanashin* of *khanqah*, Salon, and when his name was used in the endowment, it could not by any means be said that the property was given to him and not to the institution. The gift is virtually, according to the spirit of the Muhammadan Law, to God Almighty for the purpose of the upkeep of the institution, it being one of the sacred and religious objects specified in the said law.

The learned Counsel for the plaintiff-respondent also contended with great

(1) 65 Ind. Cas. 161; 48 I. A. 302 at p. 312; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; A. I. R. 1922 P. C. 123 (P. C.).

(2) 2 M. I. A. 390; 6 W. R. P. C. 3; 1 Suth. P. C. J. 100; 1 Sar. P. C J. 206; 18 E. R. 348.

*Pages of 48 I. A.—[*Ed.*]

earnestness that the property could not be deemed to be *waqf* property inasmuch as it was nowhere so expressly stated in the *sanad*. This argument, in our opinion, has no force. In Wilson's Anglo-Muhammadan Law, Chap. XI, s. 317, p. 337 (5th Edition) it is stated that where the income of any specified property is to be permanently devoted to certain religious and charitable objects, such a permanent dedication is termed '*waqf*', and that it is not absolutely necessary to the validity of the endowment that this term should be used in the instrument creating it. The fact that no such words are used in the *sanad* granted by the British Government, does not show that such words were not originally used in the grants given by the Emperors of Delhi or in the grants made in confirmation thereof by the Kings of Oudh. The original documents showing those grants had been filed in 1856 in the office of Major Barrow, Deputy Commissioner of Salon, while the inquiry was being conducted by him into the titles and were subsequently destroyed in the Mutiny. Absence of the word '*waqf*' in the *sanad* granted by the British Government in the year 1862, to our minds, is of no significance whatever. We may, however, state that it was held so far back as 1840 by their Lordships of the Privy Council that the term "*Altamgha*" or "*Altamgha enam*" in a royal grant, does not, of itself, convey an absolute proprietary right to the grantee; where from the general tenor of the grant it is to be inferred, that a *waqf* or endowment to religious and charitable uses, was intended; *vide*, *Jewun Doss Sahoo* v. *Shah Kubeer-ood deen* (2). In that case the terms of the *farmans* of Alamgir ran thus:

"As it has come to the knowledge of His Majesty, that agreeably to a *sanad*, furnished by the *hakims*, certain *mouzahs* situate etc., have been appropriated for the purpose of meeting the charges of *fakeers* and students of the *madrasa*, and the *khanqah* and *Musjid* of *Moola* Dervish Hoossein, son of *Moola* Gholam Ali, and the aforesaid individual is hopeful for the royal munificence and favour, His Majesty's royal commands are, that in the event of the aforesaid *mouzahs* being in the occupation and enjoyment of that individual, the whole of their *mouzahs* shall continue as they formerly were at a *jumma* of 15,000 *dams* (from such a date), in the character of a *maddad mash* (aid for subsistence), according to the tenor of the grant; and in order that he may apply the produce of these lands to meet the charges of the students of his *madrasa* and *musjid*, and the present and future *hakims*, the *amils*, etc., are enjoined to relinquish the *mouzah* in question to that person's occupation, to deem them *maaf* (exempt from tax), and blotted with the pen in every respect, and not to require of him a fresh *sanad* annually. Should that individual occupy anything in any other way, they are not to countenance him."

The question was referred to the *Kazi* for opinion and he gave his *fatwa* as follows:—

"As in the *farman* it is written that the produce of the lands specified therein is to be applied to meet the charges of students of *madrasa* and *Musjid* of *Moola* Dervish Hoossein, and as it is not written that the said *Moola* shall appropriate the produce to meet the charges of his family and children, or that he shall enjoy the same with his family and children, it, therefore, appears to us, that the lands in question have been paid as *wakf* in the character of *maddad mash*, and are not liable to sale or gift."

It is to be observed in this case that the word '*wakf*' was not mentioned in the *farman* and that the individual, on whose application, the grant was made, was one *Moola* Hossein expressly named therein and that the property under the terms of the *farman* was to be under the general superintendence of Darwish Hossein and was to remain vested in him, his heirs and successors and yet it was held that because the purpose of the grant was to maintain a religious and charitable institution the persons to whom the grant was made were not considered to be proprietors but were to be considered merely as *mutawallis* of the *khanqah*. We would like to quote a passage from the judgment of their Lordships of the Privy Council to be found on pp. 421 and 422* of the said report, which runs as follows :—

"This decision is in accordance with the doctrine laid down in the *Hedaya*, Book XV, of *Wakf* or appropriation, Hamilton's translation, Vol. II, p. 334, where it is said '*wakf*' in its primitive sense means 'detention'. In the language of the law, (according to Haneefa), it signifies the appropriation of any particular thing, in such a way that the appropriator's right in it shall continue, and the advan-

*Pages of 2 M. I. A.—[*Ed.*]

tage of it go to some charitable purpose, in the manner of a loan. According to the two disciples, '*wakf*' signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God, by the advantage of it resulting to his creatures. The two disciples, therefore, hold appropriation to be absolute, though differing in this, that Aboo Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Muhammad holds it to be absolute only on the delivery of it to a *mutawalli*, (or procurator) and, consequently, that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term "*wakf*" in its literal sense, comprehends all that is mentioned, both by Haneefa, and by the two disciples.

"Again (p. 344) it is said, 'Upon an appropriation becoming valid or absolute, the sale or transfer of the thing appropriated is unlawful according to all lawyers: the transfer is unlawful, because of a saying of the Prophet, "Bestow the actual land itself in charity in such manner that it shall no longer be saleable or inheritable."'"

Their Lordships came to the conclusion that the endowment being a perpetual "*wakf*" the alienation by the grantee or his representative was illegal.

In a case reported in *Piran* v. *Abdool Karim* (3) their Lordships of the Calcutta High Court, Macpherson and Ameer Ali, JJ., took the same view. The question for decision in that case was that a certain village named Khandwa situate in the District of Shahabad had been attached to a *khanqah* known as *khanqah* of Shah Budhan, situate in Pargana Saseram of the said District. In an inquiry held by the Government in the year 1835 one Rahimuddin Ahmad who happened, at that time, to be the *sajjadanashin* of the *dargah* was called upon to prove his title to hold the village in his possession free from Government revenue. He alleged that the villages including *Mouza* Khandwa had originally been granted as *maddad maash* for the support of the *khanqah* Shah Budhan. The documents produced by him in support of his allegation were held to be not genuine, and the property was resumed by the Government. Shortly after the property was again conferred upon *Musammat* Hamida, the widow of Rahimuddin Ahmad to whom he had conveyed the village in lieu of her dower. After the death of the lady the names of her two sons were brought on the Collectorate record; and the question for decision in the case was whether the said village was a '*wakf*' property. Before their Lordships it was contended that there was no indication of a dedication in the deed executed by Rahimuddin Ahmad. It was urged that had it been intended to create a '*wakf*' the word '*wakf*' would have been used. Their Lordships observed (*vide* p. 216*) that it was clear upon the authorities that in order to constitute a *wakf*, it was not necessary to use the word '*wakf*'. So long as it appeared that the intention of the donor was to set apart any specific property or the proceeds thereof for the maintenance or support in perpetuity of a specific object or a series of objects recognized as pious by the Musalman Law, it amounted to a valid and binding dedication. The Privy Council case [*Jewun Doss Sahoo* v. *Shah Kubeer-ood deen* (2)) referred to above was quoted in support of the said view.

A similar case relating to the shrine of Makhdum Sheikh in Khairabad, District Sitapur, came up for decision in the late Court of the Judicial Commissioner of Oudh in 1905. After the annexation of Oudh the British Government granted in that case a *sanad* in respect of a village called Ladhupur to one Imam Ali for the expenses of the said shrine with a condition that as long as the income of the property was devoted for the upkeep of the shrine no revenue would be taken in respect of the said village. One of the heirs of the original *sajjadanashin*, to whom the *sanad* had been granted, obtained a decree from the Settlement Court in respect of the said village; and his name as well as the names of the various members of his family were entered in the *khewat*. It was held by the Subordinate Judge that the Government did not intend to create a *wakf* because if that had been its intention a trustee or body of trustees would have been appointed and the fact that the names of the different members of the family were entered in the *khewat*, showed that it was

(3) 19 C. 203; 9 Ind. Dec. (N. S.) 581.

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a private property and that only the revenue was held in trust by the co-parceners for the maintenance of the shrine. Mr. Wells, J. C., held that the property was '*wakf*' although there was no mention of the word '*wakf*' in the *sanad* and quoted the Privy Council decision reported in *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen* (2) in support of his view. The original *farman* under which this property had been granted by the Emperors of Delhi had been produced but the *sanad* of the British Government indicated an intention to carry on the views of the previous Government about this property. It was also held in that case that although the descendants of the saint, upon whom the village had originally been conferred, had a right to share in the profits of the property that remained after meeting the expenses of maintenance of the shrine, the property was still constituted a *wakf* by the Government. With regard to the argument that the Government had not appointed any trustee, the learned Judicial Commissioner observed that it was probably not considered necessary in those early days of administration; the Government seemed to have accepted the appellant Haji Husain's father as the *sajjadanashin* or the administrative head. It was also observed in that case that just as a private person created a '*wakf*' by dedicating the income of the property to the maintenance of a religious or charitable object so the Government intended to create a *wakf* by directing that the income of the property should go towards the upkeep of the shrine (*vide* the decision in Second Civil Appeal No. 89 of 1905 by Wells, J. C., dated the 12th June, 1905).

Reliance was also placed on behalf of the respondent on a decision of the late Court of the Judicial Commissioner of Oudh in Execution of Decree Appeal No. 15 of 1913 (*Shah Mohammad Naim Ata*—Judgment-Debtor—Appellant v. *Thakur Gauri Shankar Singh* and others—Decree-Holders—Respondents), by Mr. Lindsay, J. C. (now Mr. Justice), dated the 12th June, 1913. In that case the question for decision was whether certain villages held by the appellant before us in Pratabgarh District constituted *wakf* property. The villages in dispute in that case had also been conferred upon the ancestors of the appellant by virtue of a *sanad* granted by the British Government after the annexation of the Province of Oudh. That *sanad* was different from the one which we have to interpret in the present case. The learned Judicial Commissioner held that there was nothing in the language of the *sanad* in dispute in that case to show that the profits of those villages were to be devoted to any charitable or religious purpose. The *sanad* merely intended to confer a tenure in perpetuity, upon Shah Ata Husain and his successors. The *sanad* filed in the present case (Ex. A-8) was produced in that case before the learned Judicial Commissioner and he observed regarding it as follows:—

"It is noticeable that in addition to these villages a grant of certain other villages or shares of villages situate now in the Rae Bareli District was made also by *sanad*. I have had this *sanad* produced before me and its language is very different from that of the *sanad* which relates to the villages in dispute. In the case of these Rae Bareli villages it is clearly expressed that one of the conditions of the tenure is that certain buildings and a school should continue to be maintained out of the revenues of the property granted—and thus the language imports that this particular property is endowed."

The learned Counsel for the respondent relied upon a recent decision of their Lordships of the Privy Council reported in *Muhammad Raza* v. *Yadgar Hussain* (4) in which a certain Hindu ruler of Nagpur had granted villages to a Muhammadan subject, the royal physician, "as *mohasa* for the *Imambara* of Pir Hussein for ever," the *mohasa* to be continued from year to year and from generation to generation." On an interpretation of the terms of that deed and on consideration of the entire history of that case their Lordships held that the grant was a personal grant subject to a condition as to the maintenance of the *Imambara*. In our opinion that case can be no authority for interpreting the present grant. Their Lordships expressly stated in that case (*vide* p. 199*) that the grant had been dealt with on its own terms and conditions and the issue had been settled against it being the con-

(4) 80 Ind. Cas. 615; 51 I. A. 192; A. I. R. 1924 P. C. 109; 7 N. L. J. 116; 51 C. 446; (1924) M. W. N. 447; 20 L. W. 3; 28 C. W. N. 937; L. R. 5 A. (P. C.) 71; 21 N. L. R. 1 (P. C.).

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stitution of a *wakf*. Here we would like to refer also to another recent decision of their Lordships of the Privy Council reported in *Muhammad Hamid* v. *Mian Mahmud* (5). It was contended in respect of certain properties in dispute in that case that they could not be considered to constitute *wakf* inasmuch as there was no clear evidence as to their formal dedication to religious uses. Their Lordships repelled this contention and after quoting the decision reported in *Jewun Doss Sahoo* v. *Shah Kubeer-ood deen* (2) laid down that although the word '*wakf*' had not been used, yet the facts proved in the case were sufficient from which dedication to religious purposes could be inferred.

It was next contended by the learned Counsel for the respondent that it was not provided in the *sanad* as to how much profits of the property covered by it were to go towards the upkeep of the shrine. It was urged that there were no less than 22 items of property granted by the *sanad* and it was quite optional for the *sajjadanashin* to spend income of such villages as he might choose for the upkeep of the buildings and the school and to spend the income arising out of the rest for his own purposes and in such a case the property in dispute could not be definitely stated to be one marked as *wakf* property under the terms of the *sanad*. We are of opinion that this argument has no substance. In the year 1887 a case reported in *Bishen Chand Basawant* v. *Nadir Hossein* (6) went up to their Lordships of the Privy Council. That was a suit which was brought by one Nadir Hossein to establish his right as trustee of certain properties situate in Murshidabad District, Bengal Presidency, and to set aside execution proceedings taken against that property. The decree in execution whereof the disputed attachment had been placed on the property, was against the estate of one Mahomed Ali deceased who was the predecessor of Nadir Hossein as trustee in possession of the property. The trust had been created by a Muhammadan lady Khairunissa Khanam by her Will dated the 13th of April, 1859, executed in favour of the said Mahomed Ali. According to the terms of that Will the trustee was after paying the Government revenue, to defray expenses of *taziadari* etc. and from whatever surplus remained in his hands he was to draw as trustee's due a monthly sum of Rs. 40 and to pay certain other monthly stipends to persons named in the Will. On the death of Mahomed Ali, Nadir Hossein succeeded as trustee. The question raised in the case was whether the trust so created amounted to what in Muhammadan Law is called a '*wakf*,' or whether it was merely a trust for the performance of religious duties. Their Lordships held that the property was '*wakf*,' and the judgment-debtor had no disposing power over it which he could exercise for his own benefit and, therefore, the property was not liable to be seized in attachment in execution proceedings. Their Lordships repelled the contention which was advanced before them on behalf of the decree-holder that the property had actually vested in Mahomed Ali subject to certain definite trust declared in the *wasiatnama* (Will) of the lady Khairunnisa Khanam and held that where property had been devised to a trustee with the object of providing for certain religious duties, neither the whole nor any portion of the corpus could be sold in execution of a decree against the trustee personally. They observed that the real question to be considered was whether Mahomed Ali's creditor was entitled to attach the property itself when in the hands of the plaintiff Nadir Hossein; and in deciding this point they observed (*vide* pp. 339 and 340*) as follows:—

"If the whole property is to be sold, it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, devised by a Muhammadan lady to a Muhammadan trustee with the object of providing for certain Muhammadan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subse-

(5) 77 Ind. Cas 1009; 50 I. A. 92; A. I. R. 1922 P. C. 384; 44 M. L. J. 149; 32 M. L. T. 52; 27 C. W. N. 701; 4 L. 15; 25 Bom. L. R. 660; 38 C. L. J. 231; 1 P. W. R. 1923 (P. C.).

(6) 15 C. 329; 15 I. A. 1; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113; 7 Ind. Dec. (N. S.) 803 (P. C.).

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quently appointed by him to succeed him as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Muhammadan Law? For example, that a Hindu might be substituted for a Muhammadan trustee for the purpose of providing funds for the *mohurrum*, and taking care that it should be duly and properly performed, when it is well-known what disputes and bitter feelings frequently exist between Hindus and Muhammadans at the time of the *mohurrum*. The High Court says: 'If there was a margin of profit, that margin of profit might possibly have been attached.' Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts, or whether any surplus profit after the performance of those trusts, would belong to Mahomed Ali or the trustee substituted by him. The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties."

We now proceed to consider two other arguments which are noted in the judgment of the learned District Judge. One argument is to the effect that Lord Canning's Proclamation, dated the 15th March, 1858, swept away the then existing tenures in the Province of Oudh and that a fresh title had been created by the subsequent grant evidenced by the letter of the Governor-General, dated the 10th October, 1859, and consequently the former grant even for *wakf* by the Kings' Government had been swept away. The other argument is to the effect that the *sanad* provided for resumption of the grant in certain cases of misfeasance or non-feasance mentioned therein and this was wholly repugnant to the idea of the grant being considered as '*wakf*.'

Regarding the first argument we are of opinion that it cannot be upheld in view of the terms of the grant itself. The *sanad* expressly states that the Chief Commissioner under the authority of the Governor-General-in-Council is pleased to maintain the tenure which was granted by the former Government. It is thus abundantly clear that the Government intended to restore to the *sajjadanashin* the same tenure which he was in possession of, prior to the confiscation. We have already held that the tenure under which Shah Mohammad Naim Ata held under the Kings' Government was that of '*wakf*' and that when the British Government in clear and express terms maintained the same tenure, the property covered by it must be considered to have remained '*wakf*.'

Regarding the second argument we are of opinion that under the Crown Grants Act (XV of 1895) it has expressly been provided that it is open to the Crown to impose limitations and restrictions, whatever it chooses to prescribe, upon grants made by it or under its authority and that such conditions and limitations are to be valid notwithstanding any rule of law to the contrary. We are, therefore, of opinion that the fact that the Government laid down certain conditions in the *sanad* granted by it to the effect that in certain conditions the grant was to be resumed, could not mean that the property, which had been created as endowed or *wakf* property by the Kings of Delhi and Oudh and subsequently maintained by the British Government, ceased to be '*wakf*' owing to the imposition of such conditions.

On a consideration of the entire evidence on the record we are, therefore, of opinion that the villages, Ataganj Usri and Khwajapur, constitute *wakf* property, the profits of which are to go towards the upkeep of the buildings of *Khanqah* Karimia and the religious school attached thereto, situate at Salon, District Rae Bareli; and that the plaintiff respondent is not entitled to attach rents and profits of those villages in execution of his personal decree against the defendant-appellant Shah Mohammad Naim Ata.

We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance dismissing the plaintiff's suit, with costs in all the three Courts.

Hasan, J.—I do not think I can usefully add anything to the very able judgment, if I may respectfully say so, of my brother Misra, J. I entirely agree with the view of law as to *wakf* which he has taken in this case and I concur with him that the appeal should be allowed and the

plaintiff's suit be dismissed with costs in all Courts.

By the Court.—The appeal is allowed; the decree of the lower Appellate Court is set aside and that of the Court of first instance restored. The plaintiff's suit is dismissed with costs in all the three Courts.

Z. K. *Appeal allowed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 26 OF 1925.

June 7, 1926.

Present:—Sir Guy Rutledge, KT., Chief Justice, and Mr. Justice Carr.

MA GYI—PLAINTIFF—APPELLANT

versus

MA ME AND OTHERS—DEFENDANTS—RESPONDENTS.

Benami *transaction—Practice of* benami *among Burmans—Gift, presumption of* benami *character of —Proof of* benami *character—Evidence Act (I of 1872), s. 114, Illus. (g)—Witness expected to know not called —Presumption.*

Among Burmans the practice of *benami* is not indigenous and though it has to some considerable extent taken root, it is yet not so common as among the Natives of India proper. The device is very seldom employed except as a means of defeating or delaying the immediately impending claims of some creditor or other person. [p. 253, col. 1].

In fact more proof is needed of the *benami* nature of a transaction where parties to it are Burmans than is necessary where the parties concerned are Hindus or Muhammadans. [*ibid.*]

Where a witness of high standing expected to know a party's case is not called to give evidence, the presumption is that if called his evidence will not be favourable to such party. [p. 252, col. 1.]

Appeal by the plaintiff.

Messrs. *N. M. Cowasji* and *Dantra*, for the Appellant.

Mr. *Keith*, for the Respondents.

JUDGMENT.—The plaintiff, Ma Gyi, is an old lady who was possessed of considerable property. She has been a widow for many years. She had one son, Maung Po Nyun, who by an earlier marriage had a son named Kyaw Tha. His last wife was the first defendant, Ma Me, whose five minor children by Po Nyun are the other defendants in the suit. So far as can be determined it appears that throughout his life Po Nyun lived with his mother. At any rate it is common ground that for a long time past he and his wife Ma Me and their children lived with Ma Gyi. Po Nyun died about three years before the suit —that is, about 1921.

In 1922 Kyaw Tha laid claim to a share of the property possessed by Ma Gyi, as an heir of Maung Po Nyun. He alleged that Po Nyun had been a joint owner with Ma Gyi of the property. In August, 1922, Ma Gyi executed the deed of gift, Ex. A, in favour of Ma Me and her six children (one of whom died before the suit). In terms this deed is one of absolute gift. And admittedly the property which it purports to convey is practically the whole of Ma Gyi's immoveable property. But it covers no moveable property.

In January, 1923, Ma Gyi published in both English and vernacular newspapers an advertisement stating that she had transferred all her properties to her daughter-in-law, Ma Me and her six grandchildren, to whom she had given possession of the properties.

In February, 1923, Kyaw Tha filed an application to sue as a pauper for his share of his father's share of the properties.

But shortly after that he died and his application abated and was dismissed on the 3rd May, 1923. The record of this proceeding is filed as Ex. T.

It is common ground that Ma Me had assisted Ma Gyi in the management of her property and had held powers-of-attorney from her. Exhibit 5 is a special power, dated 1918. Exhibit 6 is a general power, dated December, 1920, and Ex. 8 is another general power dated June, 1922, and said to have been executed because Ex. 6 had been mislaid. Under these powers Ma Me had let out the paddy lands and collected rents, etc.

The parties continued to live together until about the beginning of May, 1924, when there was a quarrel which resulted in Ma Gyi leaving the house. Thereafter there were criminal proceedings in respect of paddy godowns, and this suit was filed in July, 1924.

In her plaint Ma Gyi alleged that the deed of gift was a *benami* transaction, executed into at the suggestion of Ma Me in order to defeat the claim of Kyaw Tha. It was not intended to have any effect at all and she was assured by Ma Me that it would not affect her rights at all. She alleged further that since the execution of the deed she had been, as before, in possession of the properties mentioned and enjoying the rents and profits thereof. But curiously enough she prayed not only for a declaration that the deed of gift was

of no effect, but also for possession of the properties and for mesne profits.

There was also an allegation that the properties belonged to the plaintiff alone and that Kyaw Tha's claim that his father Po Nyun, was a joint-owner was false.

The defendants in their written statement alleged that Po Nyun was in fact a joint owner with the plaintiff and that his share was half. They denied all the allegations that the gift was *benami* and alleged that it was made in consideration of the services of Ma Me and in order to prevent litigation on the death of Ma Gyi. They alleged also that Ma Me had been in possession of the properties and had enjoyed the rents and profits from them from the date of execution of the deed of gift.

Several issues were framed but there have not been precise decisions on any of the issues, except that it was found that the deed was not *benami*.

The finding was, of course, sufficient in itself to conclude the suit, but it was not really on that finding that the suit was dismissed. In the evidence of the plaintiff and her witnesses a story was set up that at the time of execution of the deed of gift another agreement had been executed by which the gift was not to take effect until after the death of Ma Gyi. It was contended that the transaction was thus a testamentary disposition and, therefore, void, since a Burman Buddhist cannot make such a disposition. The learned District Judge held that this was a case different from and inconsistent with that set up in the plaint and that for that reason alone the suit must fail. He recorded his finding that the gift was not *benami* only in view of the possibility of an appeal being filed.

We think that the District Judge has exaggerated the difference between the cases as stated in the plaint and as set up in the evidence, and that the difference might have been dealt with by an amendment of the plaint. We propose, therefore, to consider the evidence.

The plaintiff, Ma Gyi, is evidently a lady of considerable business ability, and though she has attained the age of 75 she is still in full possession of her faculties. Of recent years, no doubt, owing to her advancing age she has entrusted the management of her affairs to the defendant, Ma Me, and there can be no doubt that before the unfortunate quarrel Ma Me enjoyed her entire confidence. Even prior to the deed of gift leases or tenancy agreements were executed in the joint names of "Daw Gyi and daughter Ma Me." Examples of these are Exs. N, O and P executed in 1921 and 1922. This practice continued in 1923 as is shown by most of the M series of exhibits. Exhibits M 5, 6, 16 and 18 are bonds securing either loans or the hire of cattle, executed in 1923 and all in favour of Ma Gyi and Ma Me jointly. Thus in this respect the execution of the deed of gift made no difference in the practice. Nor was there mutation of names in the Revenue Registers. After the quarrel it is clear that each of the parties set to work to induce the tenants to attorn to her only, but this is immaterial.

Up to about the beginning of May, 1924, the parties continued to live together in the same house, and there seems to have been no external indication of any change in either possession or ownership of the property. These facts tend to support the plaintiff's case, but are not conclusive. It is possible to explain them by the state of complete confidence then existing between the parties.

The publication of the advertisement does not seem to us to help the defendant's case very much. Ma Gyi's explanation of this as a counterblast to Kyaw Tha's action is a reasonable and probable one and it has not been contradicted. On the other hand, it is urged that the absence of mutation of names is in favour of the genuineness of the gift, since, had the object been to defeat Kyaw Tha, steps would at once have been taken to transfer the land to the names of the defendants in order to add verisimilitude to the gift. There is some force in this argument, and also in the argument that, no gift could possibly affect Kyaw Tha's vested rights, if he had any, and that therefore, the alleged purpose of the *benami* gift could not be attained. But these arguments also are not conclusive.

Ma Gyi herself says that when Kyaw Tha put forward his claim Ma Me suggested the gift as a means of defeating him. She consulted U Pe Tun, the Sub-Registrar, as to the advisability of this suggestion. He recommended it and she accordingly agreed to execute the deed. It was arranged that registration should be effected at her house, lest Kyaw Tha might intervene and object to the registration. The deed

was prepared, being written by U Pe Tun's son, Kyaw Zaw Aung, and was brought to her house for execution and registration. There were present U Pe Tun, Kyaw Zaw Aung, the Registration Clerk Tha Tun, Po Sin, a stamp vendor and her nephew, Po Thet. The deed of gift was read over to her and she at once said that she could not execute it because it would deprive her of all her property. It was then arranged that to protect her a separate agreement should be executed by herself and Ma Me. This agreement was written out by Tha Tun and was executed there and then. By it Ma Me agreed that she and her children would not make any use of the properties until Ma Gyi's death.

The evidence in support of Ma Gyi's story is not strong. U Pe Tun was not called, though on her story he would have been able to give evidence as to the inception of the idea and of the execution of the separate agreement. And he was, apparently, the witness of highest standing available. His son, Kyaw Zaw Aung, and the stamp vendor, Po Sin, also were not called. The failure to call these witnesses necessarily raises the presumption that their evidence would not have been favourable to the plaintiff's case.

The Clerk, Tha Tun, says that he wrote out the agreement which was dictated to him by the Sub-Registrar, U Pe Tun, and it was then executed. According to him the terms of the agreement were that Ma Me should not deal with the property in any way without first obtaining the permission of Ma Gyi. He says nothing at all about the death of Ma Gyi.

Po Thet who, as already mentioned, is Ma Gyi's nephew, the son, she says, of her half sister, says that the agreement was that Ma Me and her children should not make any use of the property against Ma Gyi's Will and that the property should become theirs only on her death. We cannot regard this evidence as very strong.

Ma Gyi goes on to say that she kept this agreement in her own box but about two or three months after its execution she missed it from there. She asked Ma Me if she knew anything about it and Ma Me said that she had taken it to show to the lawyers in connection with Kyaw Tha's case, and promised to return it. This was in *Tasaungmon* (about November). Tha Beik was present when this was said. The old lady was rather vague as to the time of this incident. She said later that she thinks it was after Kyaw Tha's death. But it is clear from Exhibit T, that Kyaw Tha did not die until well on in 1923, whereas she puts the incident about November 1923. Later again, when cross-examined as to the reason of Tha Beik's presence and as to what he had stated in evidence in the criminal case, she said that he did not come in *Tasaungmon* but in *Tabaung* (about March). He was not present on the first occasion when she asked about the document.

Tha Beik says that he heard a dispute about an agreement in "*Tabaung* last." As he gave evidence in November, 1924, that would be about March, 1924. He does not know what the agreement was about. He is indebted to both Ma Gyi and Ma Me, but more heavily to the former. On the 6th May, 1924, he executed a tenancy agreement Ex. 15, in favour of the defendants. This was a few days before the final split between the parties, which Ma Gyi puts on the 9th May, but relations were probably already strained. Subsequently, he executed a fresh agreement in favour of Ma Gyi. The District Judge noted that this witness hesitated long over his replies and tried to avoid direct answers.

Lun Bye is a medical practitioner. He says that both Ma Gyi and Ma Me told him that the registered deed was made because of Kyaw Tha's case. Ma Gyi said that though Kyaw Tha had filed a suit she would not give him a single pice and so had given all the property to Ma Me. As it stands this statement does not support Ma Gyi's case. He speaks also to hearing a dispute between Ma Gyi and Ma Me, about an agreement, which Ma Me said she had given to a "Mingyi." He does not know what the agreement was about, nor does he date this dispute, even approximately.

Maung Ba Gale is a masseur and neighbour of the parties. He speaks to a preliminary discussion between Ma Gyi and Ma Me as to what was to be done about Kyaw Tha's suit, and to a subsequent consultation with U Pe Tun. His version of these events does not agree with Ma Gyi's own and he was not mentioned by Ma Gyi as having been present on any occasion. He further says that in *Tabaung* 1285 *B. E.* (about March. 1924) Ma Gyi reported to him that Ma Me had stolen an agreement out of her box. He spoke to Ma Me about

this and she said that she had promised to return the agreement to Ma Gyi. This witness has been prosecuted criminally by Ma Gyi and has himself prosecuted her.

At its very highest the evidence of these three witnesses proves nothing more than that there was a dispute between the parties about some document of the nature of which the witnesses know nothing. And even as to that their evidence is not very convincing.

No evidence was given for the defence and Ma Me herself did not go into the box and give her account of the affair. Her case necessarily suffers from this omission.

It has been urged that in cases such as this there is a presumption that the gift was *benami* and numerous authorities have been cited on this subject and also on the subject of advancement. The question of advancement does not arise, and the decisions as to *benami* transaction give us comparatively little help because all relate to transactions between Hindus and Muhammadans. Among Burmans the practice of *benami* is not indigenous, and though it has to some considerable extent taken root it is yet not so common as among Natives of India proper. The device is very seldom employed except as a means of defeating or delaying the immediately impending claim of some creditor or other person. In view of these considerations we think that there is no presumption that the gift now in question was *benami*. We think, moreover, that more proof of its *benami* nature is required than would be necessary were the parties concerned Hindus or Muhammadans.

The case would have been considerably more satisfactory had the defendant, Ma Me, herself gone into the box and given her account of the execution of the deed of gift. But giving the plaintiff the full benefit of Ma Me's omission to do this we are still not satisfied with the oral evidence of what is alleged to have happened at the time of execution of the deed of gift, and we are unable to hold it proved that any other agreement was entered into at that time or that the gift was expressly limited in any way.

The evidence actually given on that point is unsatisfactory and contradictory and several available witnesses were not called.

There remain the circumstances which tell somewhat in favour of the plaintiff's claim. The first of these is the improbability that she would thus divest herself of all her property. This loses some of its weight in view of the complete confidence then existing between the plaintiff and Ma Me. The plaintiff would very likely feel quite sure that she could rely on Ma Me to treat her and maintain her properly, and that confidence would, we think, have been justified had the unfortunate quarrel not occurred in consequence of the elopment of one of Ma Me's daughters.

The second circumstance is that Kyaw Tha's claim suggests that the gift was made to defeat him and in regard to this publication of the advertisement seems to us to lend some further support to the plaintiff's case. But as a means of defeating Kyaw Tha's claim the gift was very obviously a futile expedient. Possibly Ma Me and Ma Gyi might not fully realise this but if, as she alleges, Ma Gyi consulted U Pe Tun on the subject it is likely that he would so have advised her. And although Kyaw Tha's claim may have been the immediate occasion of the gift it seems quite possible that it merely operated by directing attention to the likelihood of litigation occurring on Ma Gyi's death. Kyaw Tha would on that occurrence undoubtedly have had a claim to share in the estate and it is possible that Ma Gyi made the gift in order to punish him. There appear also to be other possible claimants. Ma Gyi says now that she has an adopted daughter, Ma Thon, and from the proceedings in Kyaw Tha's case (Ex. T) it appears that Po Nyun had left a daughter by a wife intermediate between Kyaw Tha's mother and Ma Me. In view of the close association between Ma Me and Ma Gyi it is quite possible that Ma Gyi would wish her estate to go to Ma Me and her children instead of to any of those other claimants. She could attain that end only by giving the property to Ma Me and her children in her own lifetime.

On the case as a whole, therefore, we think that the plaintiff has not succeeded in proving that the deed of gift was *benami* or otherwise ineffective.

The appeal is, therefore, dismissed with costs.

R. L. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 12, 1926.

Present:—The Lord Chancellor, Lord Parmoor and Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

PURSUTTAMDAS AGARWALA—APPELLANT

versus

GOBIND PROSAD AGARWALA AND OTHERS—RESPONDENTS.

Hindu Law—Will, construction of—Trusts, failure of—Disposal of surplus.

A Hindu testator directed in his Will that out of the income of his estate a sum of Rs. 650 (subject to the increase mentioned in a subsequent para. of the Will) be remitted monthly by his executors or trustees to the Managers for the time being of a certain temple out of which a sum of Rs. 100 should be paid to certain persons in succession and the residue should be appropriated towards the expenses of performing *puja* at or otherwise maintaining the said temple and of the daily feeding of the poor there. In a subsequent clause of the Will the testator further directed that after making the payments mentioned in the Will the surplus of the income of his estate should be applied in the manner respecting the said monthly sum of Rs. 650, or so much thereof as was not required for the support of the persons mentioned in the earlier clause, towards the performing of *puja* and other religious ceremonies and for the daily feeding of the poor at the temple previously mentioned. The trusts in respect of the sum of Rs. 100 mentioned in the earlier clause failed:

Held, (1) that the latter clause in the Will was a general residuary clause sweeping up all that was not disposed of by the previous clauses and that, therefore, this monthly sum of Rs. 100 fell into the residue of which trusts were declared by the latter clause; [p. 255, col 1.]

(2) that under the latter clause the residue was applicable for the religious and charitable purposes mentioned in the earlier clause and that, therefore, there was no sum not disposed of by the Will to which the rules of intestacy would apply. [*ibid.*]

Appeal from the decree of the Calcutta High Court, (Sir Lancelot Sanderson, KT., C. J. and Richardson, J.), dated the 26th November, 1923.

Sir *G. Lowndes K. C.* and Mr *G. D. McNair*, for the Appellant.

Messrs. *L. deGruyther, K. C.*, and *E. B. Raikes*, for the Respondents.

JUDGMENT.

The Lord Chancellor.—This appeal raises a question as to the construction of the Will of Babulal Agarwalla, who died in the year 1873. The Will is in the English Language and states (among other things) the testator's intention to erect a *Mundir* and suitable buildings for the residence of members of his family and for the reception of poor and homeless persons at Sri Brindaban. Then by a clause, which has been referred to as cl. 17, he directs that out of the income of his estate "a sum of Rs. 650 (subject to the increase hereinafter mentioned) be remitted monthly and every month by my executors or trustees to the managers for the time being of the *Mundir* of Brindaban to be erected as aforesaid out of which sum Rs. 100 shall be paid to" certain persons in succession; and then the clause continues: "and the residue or surplus shall be appropriated towards the expenses of performing *pujas* at or otherwise maintaining the said *Mundir* and of the daily feeding of the poor there:"

The beneficiaries of the monthly sum of Rs. 100 named in this clause are all dead, and it is common ground that the trusts declared of that monthly sum for the benefit of other persons not there named are inoperative, those persons not having been born in the testator's lifetime. Then by cl. 23 of the Will the testator says this:

"I further direct that after paying the monthly sums and the monthly expenses hereinbefore directed to be paid or incurred and also after providing for the payment of taxes, Government revenue and assessments and repairs of my immoveable property, the surplus of the rents, income and profits of my property and estate shall be monthly and every month remitted to Brindaban and applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there, towards the performance of *pujas* and other religious ceremonies, and for the daily feeding of the poor at my *Mundir* there."

Upon these clauses three points arise. The first question is whether the trusts of the sum of Rs. 100 per month having failed, that sum falls into the residue of the Rs. 650 a month and is applicable according to the trusts of cl. 17. It is not necessary to decide that question, as it has been assumed throughout, and their Lordships will assume in favour of the appellant, that the Rs. 100 a month does not fall into that particular residue of which the trusts are declared by cl. 17.

The second question is whether, assuming that to be so, the Rs. 100 a month falls into the general residue which is disposed of by cl. 23. In their Lordships' opinion it does. Clause 23 is a general

residuary clause, sweeping up all that is not disposed of by the previous clauses; and, accordingly, by virtue of the ordinary rule, the monthly sum of Rs. 100, assuming it not to be disposed of by cl. 17, falls into the residue of which trusts are declared by cl. 23.

Then a third question is raised: cl. 23 directs the surplus to be "applied in manner respecting the said monthly sum of Rs. 650, or so much thereof as is not required for the support of my family there towards the performance of *pujas* and other religious ceremonies, and for the daily feeding of the poor at my *Mundir* there."

It is suggested on behalf of the appellant and, the learned Judge who first dealt with the matter was disposed to hold that the effect of that trust was that a proportion of the residue, bearing the same proportion to the whole as the Rs. 100 bore to the total sum of Rs. 650, became applicable for the support of the testator's family, described in cl. 17, and that particular trust having failed, is undisposed of and passes to the testator's heirs. In their Lordships' opinion that is not the true effect of the clause. The clause in substance directs that the residue shall be applied for the religious and charitable purposes referred to in cl. 17, being the purposes applicable under that clause applied to the residue of the Rs. 650 per month after deducting the Rs. 100 per month, and this view is supported by the words "subject to the increase hereinafter mentioned," contained in cl. 17. The result is that, in their Lordship's opinion, there is no sum not disposed of by the Will, and, accordingly, that the judgment of the High Court at Calcutta is right and should be affirmed. Their Lordships will, therefore, humbly advise His Majesty that the appeal fails and should be dismissed with costs.

Z. K. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Morgan, Price & Co.*

Solicitors for the Respondents:—Messrs. *Watkins* and *Hunter.*

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 13 OF 1926.

December 3, 1926.

Present:—Mr. Justice Pratt, Officiating Chief Justice, Mr. Justice Cunliffe and Mr. Justice Maung Ba.

THE COMMISSIONER OF INCOME-TAX

versus

A. EGGAR—RESPONDENT.

Income Tax Act (XI of 1922), s. 4 (3)—Income from property held in trust—Salary of Professor dedicated to charitable object—Executory trust—Exemption from income-tax.

The salary of a Professor who, as a condition for holding the office, had agreed to dedicate the whole of it to the benefit of students and who in fact on receipt of it devoted his emoluments for the purpose agreed upon, is not exempt from income-tax under s. 4 (3), Income Tax Act, as the salary cannot be said to be income from property held in trust. [p. 256, col. 2; p. 259, col. 1; p. 260, col. 1.]

Mr. *Keith*, for the Commissioner.

Mr. *Davies*, for the Respondent.

JUDGMENT OF THE FULL BENCH.

Pratt, Offg. C. J.—The Commissioner of Income Tax has under s. 66 (2) of the Indian Income Tax Act referred to this Court the question whether the remuneration received by Mr. Eggar for his services as Senior Law Lecturer, University College, and Professor of Law, University of Rangoon, should be included in his personal income for purposes of assessment to income tax.

Mr. Eggar was Deputy Government Advocate and the sanction of the Local Government was required before he could take up the appointments under the University. The Local Government consented to Mr. Eggar accepting the appointments on the condition that he assigned the whole of the salary received from the Lectureship and Professorship to the Vice-Chancellor to be held by him on trust and expended for the benefit of the students (and of the University) upon (1) the expense of producing a series of printed lectures on the laws of India and Burma, and (2) the encouragement of rowing and aquatic sports and the establishment of a Boat Club for the University.

The Chief Secretary to the Government in his letter stating that there was no objection to Mr. Eggar taking up the posts under the University stated that he was desired to ask him to take the necessary steps to put his offer regarding the pay of the two appointments into effect,

Mr. Eggar accordingly drew up a draft trust deed, but no trust was formally constituted.

The income-tax was deducted in advance from the sum due to Mr. Eggar from the University at the time of payment by the disbursing officer under s. 18 (2) of the Income Tax Act. In his appeal against the assessment of his salary as Professor and Law Lecturer as personal income before the Assistant Commissioner of Income-Tax Mr. Eggar took the position that the emoluments of his office under the University became the income of a trust from the time that he undertook his duties under the University and were never in fact his income.

Before us it has been argued on behalf of Mr. Eggar that under the circumstances there is a trust and that he received the money as agent of the trust and as trustee thereof himself. From the statement of facts drawn up by the Commissioner of Income-Tax it appears that each month, on drawing the salary attached to the appointments of Law Lecturer and Professor of Law, Mr. Eggar paid these amounts into a separate account and that the monies in question have been devoted to the purposes of the University Boat Club.

Under these circumstances it is to my mind clear that the money was the personal income of the assessee and only became trust money, if at all, when paid into the separate account for the purposes of the Boat Club.

The exemption set forth in sub-s (3) (1) of s. 4 of the Act has no application since the emoluments in question are not income derived from property held under trust or other legal obligation wholly for religious or charitable purposes.

Mr. Eggar accepted the office of Law Lecturer and Professor under the condition that he disposed of his salary for the benefit of the University as proposed by him, but it did not cease to be his salary by reason of his accepting the condition.

The position would have been different had he accepted the office on condition that he should draw no salary. It was open to him to accept the appointment without pay, and to leave the University with liberty to devote the emoluments which would ordinarily be paid to a Lecturer and Professor to charitable purposes, if they thought fit. He made no such agreement. He cannot, therefore, claim as of right exemption from income tax with respect to a portion of his income, which he devotes to charitable purposes under an agreement with the Local Government, even if he has created a trust with respect thereto.

It does not appear necessary to quote authorities on the point, but I note that a similar view was taken by a Bench of the Allahabad High Court recently in *In the matter of Messrs. Lachhman Dass-Narain Dass* (1).

It was there held that a dedication by the three active members of the firm of a share of the profits of their business to charitable purposes did not convert that portion of their income into income derived from property held under trust or other obligation wholly for religious or charitable purposes, and that it was not exempt from assessment under cl. (3) (1) of s. 4 of the Income Tax Act.

My answer to the reference would be that the sum of Rs. 7,299 stated in the assessment to be allowances as Professor of Law and Law Lecturer should be included in the personal income of the assessee.

We are agreed that the reference shall be answered in these terms, but we make no order as to costs.

Cunliffe, J.—I concur. In my opinion this assessment should be upheld but on a technical point and a technical point only. In the month of December, 1922, the respondent, Mr. Eggar, was occupying the dual position of Deputy Government Advocate and Secretary to the Legislative Assembly. On the 22nd of that month, he received an offer from the Governing Body of University College, Rangoon, to take up the post of Lecturer and Professor of Law at the College. On the same day he applied for sanction to the Chief Secretary for his acceptance for the offer made. On the 9th of January, the Chief Secretary replied regretting that the Home Member was unable to sanction the acceptance as "your appointment is a whole-time one and it is felt that the additional work would be too heavy a tax on your time." On the 17th January, 1923, Mr. Eggar again wrote to the Chief Secretary proposing, if sanction could be given to him, to assign the whole of his salary from the lecturership and the professorship (Rs. 600 a month) to the Vice-Chancellor to be held by him on trust and expended for the benefit of

(1) 84 Ind. Cas. 207; 47 A. 68; 22 A. L. J. 913; L. R. 5 A. 640 Civ.; A. I. R. 1925 All. 115.

the students of the University upon (1) the expenses of producing a series of printed lectures on the laws of India and Burma, and (2) the encouragement of rowing and aquatic sports and the establishment of a Boat Club at the University. This altruistic offer appears to have touched a chord. The question of the too heavy tax upon Mr. Eggar's time was waived and the Chief Secretary on the 23rd January replied that there would be no objection on the part of Government to Mr. Eggar's accepting the two positions and he desired Mr. Eggar to take the necessary steps to put his offer regarding the pay of the two appointments into effect.

Mr. Eggar then informed the authorities of the University that Government had withdrawn their objection and he was at liberty to take the position on the terms laid down. He was duly appointed. Subsequently, we find the Chief Secretary writing on behalf of the Home Member to the Vice-Chancellor, Sir Robert Giles, asking whether the conditions approved of had been complied with and Sir Robert replied that Mr. Eggar "has made arrangements for his emoluments in both capacities to be placed in trust for the purpose of defraying the cost of printing his law lectures, etc., and instituting and maintaining a Boat Club for University students. He is to be one trustee, the Vice-Chancellor the other." Sir Robert added that for the purpose of this trust, Mr. Eggar had drafted a rough trust deed, which he, Sir Robert, had not yet had time to look at. He also added: "That the Standing Committee approved of Mr. Eggar's proposals to deal with the emoluments, but this Committee is not really concerned with the manner in which the Lecturer spends his salary." That, indeed, appears to have been all that ever was done in the matter of establishing a trust; presumably, however, the young Burmans received their preliminary tuition in rowing and aquatic sports and no doubt Mr. Eggar's lectures were printed and available to those who wished to profit by their perusal and study.

On the 3rd May, 1926, Mr. Rodriguez, Income-Tax Officer, Salaries, assessed Mr. Eggar, who, by this time, had become Government Advocate of the Province, for income-tax and among the items of Mr. Eggar's annual income he included Rs. 7,299 allowances as Professor and Law Lecturer. On the 17th May, 1926, Mr. Eggar petitioned against the assessment, alleging that the sum of Rs. 7,299 mentioned above was not part of his annual income, but was the income of a trust for the benefit of the students of Rangoon University. He put forward an appeal against the assessment on the 17th May, in which he elaborated his standpoint on the same lines contained in the petition; and he added that he only accepted the post of Professor and Law Lecturer on the condition that he should receive no income or salary from the University and that the honorarium granted him for the performance of his duties as far as the University was concerned should be held in trust for the benefit of the students. His appeal was disallowed. Mr. Alexander, the Deputy Commissioner, took the view that he had actually received the allowances as remuneration for the services rendered. Mr. Alexander also wrote another order on the subject after this first order had been revised. He came to the same conclusion as before and for very much the same reasons. A reference was then made to the High Court and we have had the benefit of the views of Mr. Mackenzie, the Commissioner of Income-Tax, in his statement of facts and questions referred to. Mr. Mackenzie also takes up the view that this Rs. 7,299 was Mr. Eggar's salary; that he never executed a deed embodying the terms of the proposed trust and that s. 5 of the Indian Trusts Act, 1882, lays down that to make a valid trust of moveable property, it is necessary either (*a*) to execute a deed and register it, or (*b*) in the case of a verbal trust to hand over the property to the trustee. Mr. Mackenzie adds that in the present case no deed has been executed and it is accordingly clear to him that the money comes into the hands of Mr. Eggar *in propria persona* and is not paid to a trust. Mr. Mackenzie winds up his opinion by saying: "Even if Mr. Eggar hands over the money to himself as trustee, he received it first *qua* Mr. Eggar."

Several questions here arise and must be determined before one is able to approach the main question of exemption or non-exemption. The trust deed, which is dated January, 1923, runs as follows: "I declare that all the emoluments to which I may be or become entitled as Professor of Law at the University of Rangoon and Senior Law Lecturer at the University College shall be held in trust for the benefit

of the University and the students and expended upon (1) printing, typewriting and incidental costs of producing a series of lectures on the laws of India and Burma, and (2) establishing a Boat Club for the students, purchasing boats and so forth. Power to settle the details of these schemes and the application of the fund, as well as power to cancel this trust, shall be vested in the Vice-Chancellor for the time being of the University and myself subject (where necessary) to the final decision of the Chancellor of the University."

At the hearing Mr. Eggar contended through his learned Counsel that effect should be given to his intention on an equitable principle which is laid down in the well-known English Chancery case of *Holroyd* v. *Marshall* (2). That case is an authority for the equitable doctrine that on a contract agreeing to make a transfer of property, the beneficial interest in that property is immediately passed to the transferee provided the contract is one of which a Court of Chancery would decree specific performance. I am inclined, however, to think that the principle laid down in *Holroyd* v. *Marshall* (2) and in the long line of English and Indian cases which have followed its decision, cannot be applied in the present case. The maxim in equity which considers as done that which ought to be done is almost invariably applied to cases in which some default or fraud has taken place for which reason the assistance of the Court is asked. I am much more inclined to regard the whole of this transaction as being nothing more nor less than an executory trust. The deposit of the draft so-called trust deed was in my view in law a direction to create an executory trust. Executory trusts are exceedingly common in the United Kingdom. The directions to create them are usually found in Wills and marriage settlements and often covenants to settle after acquired property have been confirmed. Where, too, the creator of the trust nominates himself as a trustee for the *cestui que trust*, the Courts have always looked generously upon the intention of the declaration. It is quite true that covenants to settle usually only affect corpus and not income, but effect has been given where a plain intention is shown to trusts concerned with income alone; for trusts and legal estates are governed by the same rules. It is quite true that a voluntary covenant to create a trust is not enforceable, but if the whole of the circumstances of this case are examined, it will be seen that there was a valid contract between the Government and Mr. Eggar enforceable in law from which this voluntary trust sprang and the true test is whether, on the whole construction of the letters passing between the parties and also of the draft trust deed, there was an intention to give third parties immediate equitable rights. In my opinion, that test is fulfilled.

The Commissioner for Income-Tax, however, contends that any question of a trust in India is controlled by the provisions of the Indian Trusts Act of 1882. That is quite true if the trust in question does not happen to be a charitable trust. But the pre-amble to that Act has been interpreted to exclude all charitable trusts from the operation of the Statute. I, therefore, arrive at the next question as to whether this executory trust is in fact a trust for charitable purposes. I think that the arrangement entered into here comes well within the definition of a charitable trust laid down by Lord MacNaughton in *Income-Tax Commissioners* v. *Pemsel* (3).

Such being the case, is this charitable executory trust exempted under the Indian Income Tax Act of 1922? Section 4, sub-s. (3), sub-para. (1), of the Act reads: "This Act shall not apply in the following classes of income. Income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes the income applied or finally set apart for application thereto." And sub-para. (2) of the same sub-section runs: "Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes."

It is with a good deal of regret that I am unable to hold that Mr. Eggar's gift comes within the ambit of either of these paragraphs. Paragraph (2) obviously does not apply as the income there mentioned is, of course, the income, once it is in their

(2) (1862) 33 L. J. Ch. 193; 10 H. L. C. 191; 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171; 11 E. R. 999; 138 R. R. 108.

(3) (1891) A. C. 531; 61 L. J. Q. B. 265; 65 L. T. 621; 55 J. P. 805.

hands, of the charitable or religious institutions. As to para. (1), in my view the trust would fulfil all the requirements laid down were it derived from property. The legal definition of personal property is a very wide one. It has been held to apply to debts, in certain circumstances, to choses in action of all kinds, to copyrights, to patents, to debentures and even to Government annuities, but I cannot think that even this wide interpretation can include the right to a future salary. It is true that Mr. Eggar, having regard to his covenant with the Chief Secretary, received his salary and his position in a fiduciary capacity alone, but as that salary was not income derived from property held on trust he cannot be considered as able to obtain the benefit of the exemption. It is with reluctance, as I have said, that I uphold this assessment. Whether such action on the part of the authorities will encourage similar public-spirited efforts it is not for me to say. I can well imagine, for example, that on different facts the receipt of extra emoluments such as this might place the assessee within a different category of assessment, for example in relation to super-tax. There a real hardship would accrue.

For these reasons, however, I think the assessment should be upheld.

Maung Ba, J.—I have had the advantage of reading the judgments of the learned Chief Justice and my learned brother Cunliffe.

The facts leading up to this reference made by the Commissioner of Income-Tax have been fully set out in their judgments. The question referred is: Whether the sum of Rs. 7,299 stated in the assessment to be allowances as Professor of Law and Law Lecturer should be included in the personal income of the assessee, or should be treated as the separate income of a trust?

When the Government permitted Mr. Eggar to accept the Law Lecturership and Professorship, which carried an allowance of Rs. 300 each, he most generously agreed to a condition that he should assign the whole of the salary that he should receive from these appointments to the Vice-Chancellor of the Rangoon University to be held by him on trust and expended for the benefit of the students upon (1) the production of a series of printed lectures on the laws of India and Burma, and (2) the encouragement of aquatic sports and the establishment of a Boat Club for the University.

To his credit it may be mentioned that Mr. Eggar has carried out the condition of his appointment. The Commissioner of Income Tax in his statement admits that, each month on drawing the salary attached to the appointments of Law Lecturer and Professor of Law, Mr. Eggar paid these amounts into a separate account, and that the moneys in question have been devoted to the purpose of the University Boat Club. But the Commissioner was of the opinion that the moneys came into the hands of Mr. Eggar *in propria persona* and were not paid to the trust. For that opinion he gave these reasons:- (1) that Mr. Eggar had not executed a deed embodying the terms of the proposed trust, and (2) that s. 5 of the Indian Trusts Act, 1882, lays down that to make a valid trust of moveable property it is necessary either to execute a deed and register it, or in the case of a verbal trust to hand over the property to the trustee.

It is true that Mr. Eggar has not executed a trust deed. He has, however, submitted a draft deed of trust to the Vice-Chancellor but the latter has not had time to examine it. In forwarding a copy of the draft deed to the Principal of the University College, Mr. Eggar stated that "the Government have no objection to my taking the appointment of Law Professor and Senior Law Lecturer on the terms that I dedicate my salary in the manner indicated in the draft deed which is forwarded herewith for the approval of the authorities concerned." In that draft we find this "I declare that all the emoluments to which I may be or become entitled as Professor of Law at the University of Rangoon and Senior Law Lecturer at the University College shall be held in trust for the benefit of the University and the students, etc." So it seems clear that Mr. Eggar has made a clear declaration of his intention to create a trust and that he has carried out that intention. He has practically divested himself of his rights to the salary in question and has held it in trust for the University. The learned Commissioner of Income-Tax has overlooked the saving clause in s. 1 of the Indian Trusts Act by which private religious or charitable endowments are exempted from the operation of the Act. Of course, the principles

laid down in that Act may be accepted for guidance. Under the Act executory trusts may be claimed as obligations in the nature of trusts as provided for in ss. 92 and 94 of the Trusts Act. The principle laid down in s. 92 is founded on the maxim that equity imputes an intention to fulfil an obligation. Although the salary in question may be treated as trust money, it still remains to be seen whether it can be brought within the exemption laid down in cl. (1) of sub-s. (3) of s. 4 of the Income Tax Act. The clause reads: "Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, etc." The language used is plain. The income to be exempted is the income derived from property held under trust or other legal obligation wholly for religious or charitable purposes. The income in question can in no sense be considered as income from property so held. That being the case, the benefit of this clause cannot be claimed for the income in question. According to that clause, the income derived by investment of the trust money may be brought within its exemption. It, therefore, seems hard that the trust money itself will not be exempted and unless and until this clause is amended to include such trust property that hardship must continue. The learned Judges of the Allahabad High Court who decided a similar reference by the Commissioner of Income-Tax of the United Provinces, *In the matter of Messrs. Lachhman Dass-Narain Dass* (1), held a similar view. In that case a certain portion of the profits of a registered business firm was allocated to charitable purposes. The learned Judges held that the portion thus allocated could in no sense be treated as income derived from property held under trust or legal obligation. So my answer to the question referred will be that the remuneration in question cannot be brought within the exemption of that clause but is taxable as salaries under s. 6 of the Income Tax Act.

R. L. *Reference answered.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 27 OF 1926.

November 23, 1926.

Present:—Mr. Justice Boys.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF AGRA—DEFENDANT—APPLICANT

versus

FIRM THAKUR DAS-RAM SAHAI THROUGH MUNNI LAL—PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 47 (1) (g)—Change of freight rates between maximum and minimum rates—Publication of change, whether necessary.

Section 47 (1) (*g*) of the Railways Act and its related provisions require only the publication of a general rule governing the maximum and minimum rates of freight. As regards a change of rates between the maximum and the minimum provided for in the general rule, publication is not necessary in order to bind the public by that change.

Civil revision from the order of the Judge, Small Causes Court, Agra, dated the 14th October, 1926.

Mr. *G. W. Dillon*, for the Applicant.

JUDGMENT.—The learned Judge of the Court of Small Causes has decreed the plaintiff's suit for a refund, on the ground that the alteration in the frieght rates was not published. He says "no circular issued to the Railway Staff, without due publication could affect the plaintiff's right to get his goods carried at the rate entered in the Goods Tariff then in force." The Secretary of State has applied in revision to this Court urging that publication of a change in freight rates is not necessary in order to bind the public by that change. The lower Court has not suggested under what law it holds that publication is necessary. I have had the advantage of hearing the learned Government Advocate for the Secretary of State, but the plaintiff-respondent has not seen fit to be represented. The only provision which the learned Government Advocate can draw to my attention, or which I can find in the Railways Act calling for publication, is s. 47 (1) (*g*). That and its related provisions require publication of a general rule. The general rule governing the maximum and minimum rates has been published in the pamphlet No. 1 dealing with rates dated the 18th of November, 1921, and there has been no change in the general rule. There is nothing, so far as I am informed, which requires publication of a change of rates between the maximum and the minimum provided for in the

general rule in the pamphlet just quoted. A very similar case was decided by my brother Mr. Justice Daniels on the 23rd of April, 1926, Civil Revision No. 26 of 1926. If the plaintiff desired to be absolved from the higher rate by proving that the publication was necessary, it was for him to prove it. As far as I am able to ascertain, no such publication was necessary and that being so, the decree passed by the Court below must be set aside.

This application is, therefore, allowed and the decree of the lower Court is set aside and the plaintiff's suit dismissed with costs.

A. N. A. *Application allowed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 120 OF 1926.

November 29, 1926.

Present:—Mr. Justice Pratt Officiating Chief Justice, and Mr. Justice Cunliffe.

V. ZOLLIKOFER & Co.—APPELLANTS

versus

THE OFFICIAL ASSIGNEE—RESPONDENT.

Mortgage—Mortgage of entire property by partial owner—Redemption of previous mortgage over entire property by mortgagor—Mortgagor obtaining decree against other co-owners for amount representing share of mortgage redeemed by him—Mortgagee's right to benefit of decree—Rangoon High Court Rules and Orders, Ch. V, r. 3—Advocate's fees, assessment of, in miscellaneous appeal.

S mortgaged an entire property to *Z*. Subsequently it was found that *S* had acquired a valid title only to three-fourths share and the remaining one-fourth share belonged to *J*. But a mortgage over the entire property created by the original owner had been redeemed by *S* who thus had acquired a mortgagee's lien on *J*'s share. *S* then obtained a decree against *J* for a sum representing one-fourth share of the mortgage redeemed by him which was made the first charge on *J's* share. A copy of the decree was handed over by *S* to *Z*. *S* became an insolvent:

Held, that though the making over of a copy of the decree to *Z* did not amount in law to an assignment of the decree, yet on the facts of the case *Z* had a first charge on the decretal amount in equity. [p. 262, col. 2.]

Though a Court has a discretion in the matter yet it is not customary to assess Advocate's fees in a miscellaneous appeal on a scale in excess of that fixed in r. 3 of Ch. V of the Rules and Orders of the Rangoon High Court. [p. 263, col. 1.]

Miscellaneous appeal from an order on the Original Side made in Insolvency Case No. 18 of 1924.

Mr. *Paget*, for the Appellants.

Mr. *Doctor*, for the Respondent.

JUDGMENT.—The main facts of this case are to be found in the amended petition of V. Zollikofer & Co., at page 121 of Insolvency Case No. 18 of 1924 on the Original Side of the Court, in which Y. A. Shakoor and E. A. Shakoor were the petitioning debtors. On the 24th September, 1920, Y. A. Shakoor being in debt to Zollikofer & Co., to the extent of about one lakh of rupees mortgaged to them a house and site in Edward Street, Rangoon, for two sums of Rs. 80,000 and Rs. 20,000 by deposit of title-deeds. Zollikofer & Co., similarly sub-mortgaged the property to the Netherlands Trading Society Bank for Rs. 80,000. It was subsequently found that Shakoor's title to the mortgaged property was defective and that he had in fact a valid title only to an undivided three-fourths share, the remaining one-fourth share having become vested in one H. V. M. Jeewabhai by purchase from the owner, Maung Po Dike, who was one of the heirs of Maung Po Maung, the original owner of the mortgaged property.

Maung Po Maung had mortgaged the whole property to one S. C. George, who transferred the mortgage to Ma E Mai.

Maung Po Maung died leaving as heirs Ma Yin, Ma Thet, Ma Shin and Maung Po Dike. Ma Thet acquired the shares of Ma Yin and Ma Shin and conveyed the three shares to Shakoor subject to the mortgage.

Shakoor redeemed the mortgage in full, and Ma E Mai, as mortgagee, conveyed the whole property to Shakoor.

It is clear that under this transaction Shakoor could not succeed to more than Ma E Mai's lien on Po Dike's interest under her mortgage. The next step was that in Civil Regular Suit No. 454 of 1920, Shakoor Brothers obtained a consent decree against Maung Po Dike and H. V. M. Jeewabhai for Rs. 7,117-8-3 principal and interest representing the one-fourth share of Ma E Mai's mortgage redeemed by Shakoor. In the decree this sum was made a first charge on the one-fourth share of Maung Po Dike in the property. The date of the decree was March 27th, 1922. In 1923 Zollikofer learned that Shakoor's title to the one fourth share of the property was defective and pointed it out to Shakoor, who admitted the facts and made over a certified copy of the decree to Zollikofer.

On the 18th January, 1924, Shakoor was adjudicated an insolvent.

In the course of the insolvency proceedings Zollikofer & Co., obtained an order for sale of the property in question. Jeewabhai, as purchaser from Maung Po Dike of one-fourth, objected.

The Official Assignee held an inquiry and found that Zollikofer & Co. had only a good title to three-fourths of the property and that Jeewabhai was owner of the remaining one-fourth share.

Zollikofer & Co., by deed dated March 30th, 1925, purchased from Jeewabhai Maung Po Dike's one-fourth share in the property for Rs. 18,000 and retained the sum of Rs. 7,961 representing the decretal amount in Suit No. 454 of 1920. The three-fourths share of the property was sold by auction by the Official Assignee and was bought in by Zollikofer & Co. for Rs. 73,000, which they set off, by permission, against the mortgage-debt. By a deed dated the 6th of February, 1926, the Official Assignee assigned the decree in Civil Suit No. 454 of 1924 to Zollikofer & Co. on condition that, if their claim to the decretal amount was not upheld by the Court, they would pay the amount to the Official Assignee.

The creditors, Zollikofer & Co., then put in a formal claim that the one-fourth share of Maung Po Dike in the property vested in them free from the charge created by the decree in favour of Shakoor and that they were entitled to retain for their own benefit as absolute owners the decretal amount.

The matter came before a Judge on the Original Side who held that Shakoor had a three-fourths interest in the property and that Zollikofer was entitled to that only, that there had been no assignment of the decree, and the decree would not be barred as Zollikofer had brought himself on the record. The application was accordingly dismissed. Zollikofer & Co. have appealed against this order on the ground that the decree had not become time-barred, and that they were entitled to a mortgage or charge upon the decretal amount in dispute. The appeal has been argued at very considerable length.

It is clear that at the time of the original mortgage of the property by Shakoor to Zollikofer & Co., the former had only a three-fourths interest; but that he represented himself as absolute owner of the property and purported to mortgage the whole.

When Shakoor found that his title was defective and that the remaining one-fourth share had been purchased by Jeewabhai from Maung Po Dike, he proceeded to obtain a decree for the sum, which represented one-fourth of the amount for which he had redeemed the property from Ma E Mai, against both Maung Po Dike and his vendee, Jeewabhai, and the decretal amount was made a first charge on Maung Po Dike's one-fourth share.

The making over by Shakoor of a copy of his decree to Zollikofer & Co. did not amount in law to an assignment of the decree, but on the facts it must be held that Zollikofer & Co. had a first charge on the decretal amount in equity.

As already pointed out Zollikofer & Co. were given a mortgage of what purported to be the whole property. Shakoor obtained a decree for the amount of his lien on Po Dike's one-fourth share by virtue of his redemption of Ma E Mai's mortgage over the whole property.

Zollikofer & Co. by virtue of their mortgage from Shakoor were clearly entitled to the whole interest in the property, which Shakoor obtained by the redemption of Ma E Mai's mortgage under the conveyance which she gave to Shakoor.

The decree in issue merely represents a portion of the interest, which Shakoor obtained by the redemption of Ma E Mai's mortgage.

By virtue of their mortgage, therefore, Zollikofer & Co. must be held to have a prior lien on the decretal amount.

They are not, as has been argued before us, in the position of an ordinary creditor.

On this view the question of whether the decree was time-barred or not is irrelevant.

We would set aside the order of the learned Judge on the Original Side and grant appellants a declaration of their right to retain the decretal amount as prayed with costs in both Courts on the sum involved *ad valorem*.

[Their Lordships passed the following order as to costs:—]

Mr. Doctor for Official Assignee objects to the order as to costs *ad valorem* and contends that under r. 2 of Ch. V of this Court's Rules and Orders this method of assessing Advocate's fees is inadmissible.

Whilst not prepared to concede that the Court has not full discretion in the matter, it appears that it is not customary to assess Advocate's fees in a miscellaneous appeal on a scale in excess of that fixed in r. 3.

The amount involved in the appeal is Rs. 7,961 and the Advocate's fees on that would be approximately Rs. 390.

In modification of our previous order the Advocate's fees in this Court are fixed at Rs. 300.

In the original proceedings the costs will be as fixed by the Presiding Judge.

R. L. *Order set aside.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 596 AND 597 OF 1926

AND

CIVIL MISCELLANEOUS PETITIONS NOS. 2562 AND 2563 OF 1926.

August 24, 1926.

Present:—Mr. Justice Jackson.

In re VENKITAKRISHNA PATHER—DEFENDANT No. 6—PETITIONER IN ALL.

Court Fees Act (VII of 1870), s. 7, iv (c), proviso, Madras Court Fees (Amendment) Act (V of 1922), s. 6—Suit for declaration of easement and injunction—Court-fee.

A suit for a declaration of plaintiff's right of way and drainage over a piece of land and for a mandatory injunction to remove the fences and walls built in defiance of the said right falls within s. 7 *iv* (*c*) of the Court Fees Act. In Madras, by virtue of the proviso added by Madras Court Fees (Amendment) Act (V of 1922), the valuation should not be less than one-half of the value of the immoveable property calculated under s. 7, *v*. [p. 263, col. 2.]

Vaiyapuri Chetty v. *Ramachandra Thevar* (1), distinguished.

C. R. P. Nos. 596 AND 597 OF 1926.

Petitions under s. 115 of Act V of 1908 and s. 107 of the Government of India Act to revise the orders of the Court of the District Munsif, Palghat, dated the 22nd June and 8th July, 1926 respectively, on issue No. 2 in I. A. No. 1747 of 1926 and in I. A. No. 1748 of 1926 respectively, in O. S. No. 76 of 1226.

C. M. P. Nos. 2562 AND 2563 OF 1926.

Petitions praying that in the circumstances stated in the affidavit filed in C. M. P. No. 2562 of 1926, the High Court will be pleased to issue an order directing stay of proceedings in O. S. No. 76 of 1926 (I. A. Nos. 1747 and 1748 of 1926) on the file of the District Munsif, Palghat, pending disposal of C. R. P. Nos. 596 and 597 of 1926, preferred therefrom to the High Court.

Mr. *C. S. Swaminathan*, for the Petitioner.

ORDER.—Petitioner seeks to stay proceedings in O. S. No. 76 of 1926 on the file of the Court of the District Munsif of Palghat pending the revision of a question of the Court-fee proper to the suit.

The plaintiffs sue for a declaration of rights of way and drainage over a certain *paramba* and for a mandatory injunction ordering defendants to remove the fences, walls, etc, that have been built in defiance of the said rights.

The plaintiffs sought to value their suit under s. 7, cl. *iv* (*d*), Court Fees Act (VII of 1870), as if it were a simple suit for injunction. The District Munsif has correctly pointed out that it is a suit for declaration, and consequential relief falling under s. 7, *iv* (*c*). He has then held applying the Madras proviso, and that as the relief sought is with reference to immoveable property the valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by para. *v* of the section. Accordingly, plaintiffs have been ordered to pay half the value of the *paramba*, which they have reckoned according to s. 7, cl. *iv* (*b*) at five times the revenue. The petitioner, 6th defendant, contends that the value should be calculated according to s. 7, cl. *v* (*c*) because the suit is really for the *paramba* and buildings. The District Munsif did right to reject this argument. The plaintiffs are claiming neither the right to possess the buildings nor the right to remove the buildings except in so far as they may affect the right of easement. In *Vaiyapuri Chetty* v. *Ramachandra Thevar* (1) the plaintiff sued to restrain the defendants from putting up a fence on the plea that the property was his, and this Court held that the question of title was not incidental and, therefore, the Madras proviso must apply. In the present suit the question of title is not raised at all; it is only a question of easement and the difficulty is to decide how far the Madras proviso is applicable to such cases. Inasmuch as the relief sought is the declaration of a right of easement the relief may be said to be with reference to immoveable property; but it refers to no immoveable property that can be possessed

(1) 89 Ind. Cas. 930; 21 L. W. 699; A. I. R. 1925 Mad. 1143.

as contemplated by cl. *v*. It almost seems that the proviso should be read with the clause, so as to make "with reference to" mean "involving the possession of land, houses or gardens"; and then the proviso would not be applicable to easements at all. And the petitioner's case supports this interpretation; for it carries the contrary argument to absurdity. He would have it that a suit for relief with reference to immoveable property must be valued under cl. *v* and is, therefore, tantamount to a suit for the possession of that property with reference to which relief is sought. Therefore, a person claiming the right to drain off water through a house is for the purposes of the Court Fees Act, claiming possession of the house, and must value his suit according to the market value of the house, which is absurd. If cl. *iv* is applicable to suits for declaration of an easement right and a mandatory injunction enforcing the same, the Court must reckon, how much land or building is actually affected by the path, drain, or such other relief as is sought, and value accordingly.

But considering that the subject-matter is neither land, nor house, nor garden, but an easement over the same, there seems to be no practical object in ordering Courts to apply cl. *v*. When valuing suits for easement, it only imports unnecessary difficulty into what ought to be the plain and simple mechanical process of assessing Court-fee.

There is no doubt in the present case, that the plaintiffs have fully paid any fee that is rightly leviable, and the petitioner 6th defendant, has no case for enhancement.

The petitions for stay are dismissed and the petitions for revision not admitted and dismissed.

V. N. V. *Petitions dismissed.*

CALCUTTA HIGH COURT.

CIVIL REVISION No. 544 OF 1925.

July 12, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Cammiade.

Srimati MABIA KHATUN—PETITIONER

versus

Sheikh SATKARI AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 1—Pauper, application for leave to sue as—Ornaments and dower-debt, whether property—Plaintiff suing in representative character—Personal property, whether can be considered for purposes of determining pauperism.

Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel for the purpose of determining whether she is or is not a pauper. Unless, therefore, it is shown that the ornaments which a woman possesses are something beyond and more valuable than what a woman of her class ordinarily uses, it cannot be held that she is not a pauper merely by reason of the fact that she possesses such ornaments. [p. 265, col. 1.]

A dower-debt due to a wife from her husband even where the husband has sufficient means to pay the debt cannot be said to be property or means of which the wife is "possessed" within the meaning of r. 1 of O. XXXIII of the Civil Procedure Code. [p. 265, col. 2.]

When a plaintiff sues in a representative character, such as a *mutwalli*, trustee or a *shebait*, unless it is shown that he has in his possession property belonging to the *waqf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. [*ibid.*]

Civil revision against the order of the Subordinate Judge, Burdwan, dated the 26th April, 1926.

Mr. *Sarat Chandra Bose* and Babu *Narendra Krishna Bose*, for the Petitioner.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar, Opposite Party.

Dr. *Sarat Chandra Basak* and Babu *Pramatha Nath Bandopadhyaya*, for the other Defendants-Opposite Party.

JUDGMENT.—This Rule arises out of an order of the Subordinate Judge of Burdwan refusing the application of the petitioner to sue as a pauper under O. XXXIII, Civil Procedure Code. The petitioner proposed to sue the opposite party as *mutwalli* with regard to certain *waqf* property. The learned Subordinate Judge presumably after taking the preliminary steps laid down in rr. 3, 4 and 5 did not reject the application. He issued notices to the opposite party and the Government Pleader and received evidence as to the proof of the pauperism of the applicant. The Government Pleader did not raise any objection as to the pauperism of the applicant. But the application was opposed by the opposite party. The value of the property sued for is over Rs. 9,000 and the *ad valorem* Court-fee payable on the plaint is said by the Subordinate Judge to amount to Rs. 735. The learned Subordinate Judge has held that the applicant has no property in her possession as *mut-*

walli, but he considers that she has personal property out of which she could pay the Court-fee payable on the plaint and that she should not be allowed to sue as a pauper.

With regard to the question as to whether she has got any personal property the Subordinate Judge has held that she is entitled to prompt dower from her husband which she has not realized. He considers that her husband is a person capable of paying the dower debt as he has some properties and is in receipt of an allowance of Rs. 41 per month from the Government for looking after preserved monuments. The Subordinate Judge has not come to any finding as to what the amount of the prompt dower is. The Subordinate Judge was, however, of opinion that the amount of the dower, whatever it may be, should be taken into account as part of the means of plaintiff.

The Subordinate Judge next observes that the ornaments belonging to the petitioner have been under-valued. During her examination on commission at her husband's house she was asked to show her ornaments but she would not produce them saying that they were with her husband. Under the circumstances the Subordinate Judge held that the applicant had sufficient means to pay Court-fees on the plaint.

Taking the last point first it seems strange that without taking evidence as to the value of the ornaments of the applicant the Subordinate Judge should think that the value of the ornaments would in any way enable her to pay the Court-fee. She was not asked to produce the ornaments in a proper way and she certainly could refuse to produce her ornaments at the time of her examination. Besides if the ornaments were such as are ordinarily worn by women of her class, those ornaments could not have been taken as means enabling her to pay the prescribed fee. Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel. Without any finding that the ornaments were some thing beyond and more valuable than what a woman of her class ordinarily uses the Subordinate Judge's conclusion cannot be accepted as correct.

Nor can we accept his conclusion as to the dower. The Explanation to r. 1, O. XXXIII, runs thus: "A person is a 'pauper' when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit...." Can a debt which is due from a third person be said to be means of which the applicant is possessed? We do not think that it can be said to be so. The words "is not possessed of" must mean that the applicant has not actual control over it. Whether the husband has sufficient means to pay the debt is another question. But the plaintiff is not possessed of the dower. On this ground we hold that the Subordinate Judge's conclusion that the applicant was possessed of sufficient means of her own so as to enable her to pay the prescribed fee is not correct.

With regard to the first point we are of opinion that when a plaintiff sues in a representative character, such as a *mutwalli*, trustee or a *shebait*, unless it is shown that the plaintiff has in his possession property belonging to the *waqf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. If a person sues as executor with regard to the estate of a deceased person without having been in possession of any of the assets of the deceased he cannot be said not to be a pauper even if he has got sufficient private means of his own, but is not possessed of anything appertaining to the estate.

The decision of the Subordinate Judge on both the points cannot, in our opinion, be upheld. The Rule must, therefore, be made absolute and the petitioner should be allowed to sue as a pauper.

The petitioner is entitled to her costs as against the opposite party. Hearing-fee three gold *mohurs*.

Z. K. *Rule made absolute.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS No. 137 OF 1926.

December 7, 1926.

Present :—Mr. Justice Chari.

In the matter of THE ESTATE OF OOMER AHMED BROTHERS, INSOLVENTS

AND

JIVANRAM SANTALAL

Presidency Towns Insolvency Act (III of 1909), ss.

3, 75, 90—Provincial Insolvency Act (V of 1920), ss. 2, 3, 5 (2)—Civil Procedure Code (Act V of 1908), s. 24—High Court's power on Original Side to transfer insolvency case—Letters Patent (Rangoon High Court), cls. 11, 16—Power of High Court to transfer an insolvency case to its own file as a Court of Extraordinary Original Jurisdiction.

The Original Side of the High Court has no jurisdiction to transfer an insolvency case from a Court exercising jurisdiction under the Provincial Insolvency Act to another such Court or to itself. This power can be exercised by the High Court on its Appellate Side only. [p. 267, col. 2.]

Under cl. 16, Letters Patent of the Rangoon High Court, the High Court can, in respect of insolvency matters, exercise only such jurisdiction as is given by the Law of Insolvency prevailing in the Province of Burma. Therefore, the powers conferred by s. 5 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act cannot be exercised in such a way as to give the Original Side of the High Court jurisdiction from which it is expressly excluded by the terms of ss. 2 and 3 of the Act whether s. 5 is read with s. 24, Civil Procedure Code, or cl. 11 of the Letters Patent. [p. 268, col. 1.]

Mr. *Jeejeebhoy*, for the Petitioner.

Mr. *N. N. Sen*, for the Insolvents.

JUDGMENT.—The application in this case raises an important and interesting question of law.

A firm by the name of Oomer Ahmed Brothers was adjudged insolvent by the District Court of Amherst on a creditor's application. Another of the creditors, Jivanram Santalal, makes an application to this Court for a transfer of the insolvency case pending in the District Court of Amherst for disposal, under s. 24 of the Civil Procedure Code. The application does not say to what Court the petitioner seeks to have the insolvency case transferred but presumably what he wants is that the case should be transferred to the High Court for disposal by that Court in its Original Insolvency Jurisdiction.

When the case came on for hearing I drew the attention of the learned Advocate to the ruling in *In re Naginlal Maganlal Jaichand* (1). He then wanted to be allowed to argue the application before me as a Judge sitting on the Original Civil Side. I allowed him to do so; but, in my opinion, there is no legal difference in the position whether I dispose of the application as a Judge exercising Original Civil Jurisdiction, or as an Insolvency Judge.

Before dealing with the authorities of the other High Courts, I shall discuss two cases decided in this High Court.

(1) 91 Ind. Cas. 160; 49 B. 788; 27 Bom. L. R. 1207; A. I. R. 1925 Bom. 543.

In *T. S. Chettyar Firm and Two* v. *Yusuf Ismail Attiah*, Civil Miscellaneous Application No. 37 of 1925, an application was made to transfer an insolvency case pending in the District Court of Pakokku to the Rangoon High Court for disposal. The petition was filed in Mandalay, and the learned Judge sitting at Mandalay was of opinion that the application should be dealt with at Rangoon, as, if granted, the case would come before the Original Side at Rangoon. The papers were accordingly forwarded here, and the Deputy Registrar, being of opinion that the matter came under the Extraordinary Original Jurisdiction conferred on the Court by cl. 11 of the Letters Patent, thought that the case, following the usual practice, should be transferred to the Original Side for disposal. The learned Judge on the Appellate Side, to whom this note was sent, wrote "admitted" and then signed his name. He further added "let the case be transferred to the Original Side for disposal" and signed his name again.

The meaning of this entry is clear. What the learned Judge meant was that notice should issue to the respondent, and that the application should be transferred to the Original Side for hearing and disposal. But by an error on the part of the office this was treated as an order transferring the insolvency case itself to the Original Side for disposal. The case was accordingly withdrawn to this Court to be dealt with under the Original Insolvency Jurisdiction. This was a mistake, and the case cannot be treated as a precedent.

The next case is *In the matter of Abdul Karim Abdul Latiff*, Insolvency Case No. 133 of 1925, in which a similar application was made to this Court for the transfer of an insolvency case pending in the District Court of Tharrawaddy to the Original Side of the High Court in its Insolvency Jurisdiction. Mr. Justice Cunliffe, sitting as an Insolvency Judge, ordered the transfer, being of opinion that, under the provisions of s. 90 of the Presidency Towns Insolvency Act, and s. 5, cl. (2), of the Provincial Insolvency Act, read with s. 24 of the Civil Procedure Code, he had the power to do so, though Mr. Justice Taraporewala of the Bombay High Court, sitting as an Insolvency Judge, took a different view: *In re Naginlal Maganlal Jaichand* (1).

Section 90 of the Presidency Towns Insolvency Act enacts that "In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its Ordinary Original Jurisdiction."

The point for consideration is whether the wording "shall have the like powers" includes the power of transferring cases which come to the High Court under s. 24 of the Civil Procedure Code.

It will be noticed that s. 90 is enacted for the exercise of powers in respect of insolvencies within the town of Rangoon, and that s. 24 of the Civil Procedure Code enacts that the High Court may transfer any suit, appeal or other proceeding pending before it, for trial, to any subordinate competent Court, and withdraw any suit, appeal or other proceeding pending in any subordinate Court and itself try or dispose of the same, or transfer it to any other subordinate and competent Court for trial or disposal.

It has been held that the powers conferred on the High Court by s. 24 of the Civil Procedure Code so far, at all events, as transfer from one subordinate Court to another is concerned, must usually be exercised by the Appellate Side of the High Court. Section 75 of the Provincial Insolvency Act provides for appeals from a District Court exercising jurisdiction in insolvency to the High Court, that is the High Court in its Appellate Jurisdiction. It, therefore, follows that a District Court exercising Insolvency Jurisdiction is subordinate to the Appellate Side of the High Court, and not to a Judge of the High Court exercising jurisdiction on the Original Side. This was the view taken by Mr. Justice Marten in the case of *In re Maneckchand Virchand Patni* (2). The soundness of this view has been questioned but it seems to me that, whether a Judge of the High Court sitting on the Original Side, ordinarily exercising Insolvency Jurisdiction, has or has not the power to transfer cases under s. 24 of the Civil Procedure Code, the application is bound to fail for another and more fatal reason.

Before I discuss that aspect of the case, I shall dispose of the argument based on cl. 11 of the Letters Patent. Clause 11 of the Letters Patent enables the High Court to transfer any suit being or falling within the jurisdiction of any Court subject to its superintendence to its own file, and to try and determine the same as a Court of Extraordinary Original Civil Jurisdiction. The practice of this Court has been for the Judge sitting on the Original Side to dispose of applications made for transfer of cases under cl. 11 of the Letters Patent. Thus, the Original Side Judge has power to withdraw suits for trial before himself, but an insolvency proceeding is not a suit. He cannot withdraw such a proceeding to his Court unless s. 5 of the Provincial Insolvency Act, read with cl. 11 of the Letters Patent, enables him to do so. There is also a separate clause in the Letters Patent dealing with the Insolvency Jurisdiction of the Court. Clause 16 of the Letters Patent provides that "the Court for relief of insolvent debtors at Rangoon shall be held before one of the Judges of the High Court at Rangoon," and it proceeds as follows: "* * * *the said High Court, and any such Judge thereof shall have and exercise within the Province of Burma, such powers and authorities with respect to Original and Appellate Jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in the Province of Burma." This clause of the Letters Patent is not perhaps as clearly expressed as one might wish. It means that the High Court Judge, sitting for the relief of insolvent debtors, and the High Court exercising Appellate Jurisdiction in respect of insolvency matters, can exercise only such jurisdiction as is given by the Law of Insolvency prevailing in the Province of Burma.

We are thus thrown back on the Insolvency Acts to find out what those powers are.

Section 5, cl. (2), of the Provincial Insolvency Act, runs as follows :—

"Subject as aforesaid" (that is, to the other provisions of the Act), "High Courts and District Courts, in regard to proceedings under this Act in Courts subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits."

It is argued that, by virtue of this provision, the High Court has jurisdiction to exercise the powers vested in it by s. 24 of the Civil Procedure Code and transfer an insolvency proceeding in a District Court to itself or to some other District Court. It is also urged that this section, read with

(2) 75 Ind. Cas. 61; 47 B. 275; 24 Bom. L. R. 872; A. I. R. 1922 Bom. 390.

cl. 11 of the Letters Patent, enables the High Court to withdraw an insolvency proceeding pending in a subordinate Court to itself for trial as a Court of Extraordinary Original Civil Jurisdiction.

It is not necessary for me, in disposing of this matter, to consider whether, by virtue of this section, the High Court has power to transfer an insolvency case pending in one Court exercising jurisdiction under the Provincial Insolvency Act to another such Court. Assuming that I, as an Original Side Judge, have jurisdiction to make an order of transfer, and assuming further that s. 5, cl. (2), gives such a power, the present application is bound to fail for another reason, as I have mentioned above.

The jurisdiction under the Presidency Towns Insolvency Act is by s. 3 conferred on the High Courts of Judicature at Fort William, Madras, Bombay and Rangoon. The Provincial Insolvency Act, s. 3, cl. (1), provides that "The District Courts shall be the Courts having jurisdiction under this Act," and a "District Court" is defined in s. 2 as follows: "District Court means the principal Civil Court of Original Jurisdiction in any area outside the local limits for the time being of the Presidency towns and of the town of Rangoon." So that the Original Side Jurisdiction of this Court, which is exercised within the town of Rangoon, is expressly excluded from Courts having jurisdiction under the Provincial Insolvency Act. The provisions of s. 5 of the Provincial Insolvency Act are made subject to the other provisions of the Act and one of such provisions is the one which excludes the Original Side of the High Court from exercising jurisdiction under the Provincial Insolvency Act. Clause 16 of the Letters Patent shows clearly that the High Court can exercise only such jurisdiction as is conferred upon it by the Insolvency Acts. It follows, therefore, that the powers conferred by s. 5 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act, cannot be exercised in such a way as to give the Original Side of the High Court a jurisdiction from which it is expressly excluded by the terms of the Act whether that section is read with s. 24 of the Civil Procedure Code, or cl. 11 of the Letters Patent.

For this simple reason the application is bound to fail. I am fortified in this opinion by the judgment in *Srinivasa Aiyangar* v. *Official Assignee of Madras* (3) which was a converse of the present application. In that case a debtor was arrested within the jurisdiction of the Madras High Court and was imprisoned in the Civil Jail to which Original Side debtors are committed. This gave jurisdiction to the Original Insolvency Side of the Madras High Court to make an order of adjudication against him. He was, however, a trader apparently in the districts, and it was alleged that the arrest was a collusive arrest made for the purpose of giving the High Court jurisdiction, and an application was made to the Madras High Court to transfer the case from its own Insolvency Side to the District Court of Tanjore. The learned Judge on the Original Side made the order, but on appeal it was set aside. The learned Appellate Judges of the Madras High Court, held that the Tanjore Court, in view of the terms of s. 3 of the Presidency Towns Insolvency Act, was not competent to try and dispose of the insolvency proceeding, and that the jurisdiction conferred by the Presidency Towns Insolvency Act and the Provincial Insolvency Act are separate and distinct, as the provisions of the Acts themselves differ in several important respects.

The same reasoning will apply in this case, where it is sought to transfer an insolvency proceeding from the District Court to the Original Insolvency Side of the High Court.

For these reasons I dismiss this application with costs, two gold *mohurs*.

I may also add that, in my opinion, the application itself has no merit. The insolvent was adjudicated in Moulmein, not on his own application but on a creditor's application, and the present application is made to suit the convenience of other creditors.

R. L. *Application dismissed.*

(3) 21 Ind. Cas. 77; 38 M. 472; 14 M. L. T. 184; 25 M. L. J. 299; (1913) M. W. N. 1004; (1914) M. W. N. 45.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1447 OF 1922.

November 23, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Agha Haidar.

HARI SINGH—DEFENDANT—APPELLANT

versus

HARNAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Necessity—Debts due to alienee himself—Alienee's duty to prove necessity—High rate of interest—Necessity for borrowing at high rate—Contract Act (IX of 1872), s. 74—Interest from date of execution of deed in case of default—Penalty.

Where the alienee himself is the antecedent creditor it is not only incumbent on him to prove the existence of the prior debts due to him but also the necessity for those debts. [p. 269, col. 2.]

Devi Ditta v. *Saudagar Singh* (1), followed.

Where a mortgage carries a high rate of interest it is incumbent on the mortgagee not only to show that there was necessity for the debt but that there was also necessity to borrow money at the high rate of interest claimed by him. [p. 270, col. 1.]

Nawab Nazir Begam v. *Rao Raghunath* (2), applied.

Where a mortgage-deed provides that in case the money is paid by a particular date no interest would be charged but in case of default interest would be payable at a particular rate from the date of the execution of the bond, the provision as to interest must be considered penal within the meaning of s. 74 of the Contract Act. [*ibid.*]

First appeal from the decree of the Senior Subordinate Judge, Gurdaspur, dated the 30th March, 1922.

Messrs. *N. C. Mehra* and *Farrukh Hussain*, for the Appellant.

Messrs. *Muhammad Amin* and *B. A. Cooper*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the sons of the mortgagor for a declaration that the mortgage executed by their father Gurdit Singh, defendant No. 1, on the 26th of April, 1918, in favour of Hari Singh, defendant No. 2, was fictitious, without consideration and without legal necessity and, therefore, not binding upon their rights of inheritance as the property mortgaged was ancestral. These allegations were controverted by the contesting defendant, Hari Singh, who pleaded that the mortgage was for consideration and for valid necessity and that a part of the consideration went towards the discharge of prior mortgage-debts. The defendant also denied that the property was ancestral. This last plea was overruled by the Court below and in appeal no argument was addressed to us on this question. The mortgage-money mentioned and detailed in the bond was Rs. 6,870 and the Court below held that the mortgage was valid and binding upon the plaintiffs to the extent of Rs. 5,670 only.

The defendant has come up in appeal to this Court and has challenged the findings of the Court below in so far as they are against him. He argues that the Court below ought not to have disallowed the following items :—

(1) Rs. 80 due under a bond dated the 21st of January, 1914, executed by Gurdit Singh defendant No. 1 in favour of Hari Singh defendant-appellant, (Ex. D-2).	Allowed credit for in the mortgage bond, dated the 21st January, 1914, (Ex. D-3)	All these 3 items allowed credit for in the bond in suit dated the 26th April, 1918.
(2) Rs. 200 due under a bond, dated the 20th January, 1911, executed by Gurdit Singh in favour of the appellant Hari Singh.		
(3) Rs. 260 due under a bond, dated the 20th June, 1910, executed by Gurdit Singh in favour of Hari Singh appellant.		
(4) Stipulated rate of interest on Rs. 600, due under the bond, dated the 19th January, 1911, allowed credit for in Ex. D-3 and eventually in the bond in suit.		

As regards (1), (2) and (3). This part of the case would be governed by the law as laid down by a Full Bench of the Punjab Chief Court in the case of *Devi Ditta* v. *Saudagar Singh* (1). These items were due to the mortgagee himself under two prior mortgages in his own favour and in order to bind the plaintiffs' reversioners it is incumbent upon the mortgagee to prove that not only they were prior debts due to him but that there was necessity for those debts.

[Their Lordships on the evidence found that necessity for items Nos. 1 to 3 had not been established and proceeded :—]

As regards Item No. (4) no plea was taken in the grounds of appeal against the order of the Court reducing the stipulated rate of interest on Rs. 600 due under a mortgage-bond, dated the 19th January, 1911, but we

(1) 65 P. R. 1900; P. L. R. 1900, p. 322.

allowed Counsel for the appellant to argue this point. The terms of the mortgage-deed in suit provided that if the money was paid by *Jeth Sambat* 1968 no interest would be charged but in case of default interest at the rate of four-annas per rupee per harvest would be payable from the date of the execution of the bond in suit. The Court below has treated this provision as a penalty under s. 74 of the Indian Contract Act and has reduced the rate of interest to 2 per cent. per mensem. This reduction of interest can further be justified on another principle of law laid down by their Lordships of the Privy Council in *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2). In that case their Lordships have held that it was incumbent on those who support a mortgage executed by the manager of a joint Hindu family to show that not only there was necessity for the loan but that there was also necessity to borrow money at the high rate of interest claimed by the mortgagee. It is true that the case before their Lordships of the Privy Council was governed by the Law of Mitakshara but the principle enunciated therein applies to the present case. We are satisfied that the mortgagee Hari Singh has not been able to establish that there was any valid necessity for borrowing money at such a high rate of interest. We hold that the learned Judge of the Court below was justified in reducing the rate of interest to 2 per cent. per mensem. On these findings we confirm the decree of the Court below and dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(2) 50 Ind. Cas. 434; 41 A. 571; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 46 I. A. 145 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 964 OF 1924.

November 23, 1926.

Present:—Mr. Justice Iqbal Ahmad.

RAM SARUP RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHARITTER RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale—Registered instrument, absence of—Mutation, effect of—Estoppel—Pre-emption, decree for—Interest conveyed, extent of.

Mutation proceedings are not judicial proceedings in which title to, and proprietary rights in, immoveable property are determined. They are in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with the greater confidence that the revenue for it will be paid. [p. 271, col. 2; p. 272, col. 1.]

A and *B*, who were owners of a certain property, mortgaged it to *C*. Subsequently *A* sold the whole of the property to *D* by means of a registered sale-deed and thereafter made an application to the Revenue Authorities that the property should be mutated in the name of *D*. *B*, who was owner of half of the property and who had not joined in the sale in favour of *D*, also made an application to the Revenue Authorities intimating that he had no concern with the property, and that *D's* name may be entered in the revenue papers. Later on, *E* filed a suit for pre-emption in respect of the sale effected by *A* and obtained a decree. Finally *B* instituted a suit against *C*, *D* and *E* for redemption of the mortgage effected by *A* and himself in favour of *C* on the ground that the sale by *A* alone in favour of *D* was ineffectual to convey to *D B's* rights and interests in the property covered by the sale-deed and that, therefore, *E* could not under his decree for pre-emption acquire *B's* rights and interests in the mortgaged property:

Held, (1) that *B's* proprietary rights in the property could only pass to *D* by a registered instrument and that in the absence of such instrument, a mere mutation had not the effect of transferring *B's* rights in favour of *D*; [p. 271, col. 2.]

(2) that the only right and title that passed to *E* by virtue of the decree obtained by him in the pre-emption suit was the right and title conveyed to *D* by the sale-deed executed by *A* and that this was only the right and title of *A* himself in the property covered by the sale-deed; [p. 272, col. 1.]

(3) that, therefore, *B* being still owner of half the property was entitled to maintain a suit for redeeming the property. [*ibid.*]

Second appeal against the decree of the Additional Subordinate Judge, Ballia, dated the 8th March, 1924.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *A. P. Pande*, for the Respondents.

JUDGMENT.—Notwithstanding the able argument of Dr. M. L. Agarwala, I remain unconvinced that the decrees of the Courts below are wrong.

The suit giving rise to the present appeal was filed by the plaintiff-respondent, Charitter Rai, for the redemption of a mortgage dated the 28th of May, 1912, executed by Charitter Rai and his brother Nihora Rai, in respect of two plots of land, in favour of Subedar Rai, father of defendant No. 3. After the date of the said mortgage, it appears that Ram Sundar Rai, son of Nihora Rai, alone executed a sale-deed of the entire *zemindari* property including the plots in dispute in favour of defendant No. 4 on the 13th of May, 1921. Thereafter, on the 20th of May, 1921, Ram Sundar Rai

applied to the Revenue Court, that mutation of names be effected in favour of defendant No. 4 with respect to the property transferred to him by the sale-deed referred to above. Charitter Rai, who admittedly was the owner of half of the share in the property conveyed by the sale-deed, and who had not joined in executing the sale-deed, filed an application in the Revenue Court, on the 25th of July, 1921, intimating that he had no concern with the property and that the vendee's name be entered in the revenue papers. Thereafter, on the 12th of July, 1922, Ram Sarup Rai, defendant No. 1, filed a suit for pre-emption, with respect to the sale made by Ram Sundar Rai, and the suit was eventually decreed, and the pre-emptor, having complied with the terms of the decree, was substituted in place of the purchaser.

After all this, Charitter Rai brought the present suit for redemption of the mortgage noted above. His case was that the sale by Ram Sundar Rai alone was ineffectual to convey to the vendee his rights and interests in the property covered by the sale deed, and as such defendant No. 1 could not acquire his rights and interests in the mortgaged property. In this view he alleged that he had a subsisting right to redeem the mortgage made by him and Nihora Rai.

The defence to the suit was that Ram Sundar Rai was the manager of a joint Hindu family consisting of himself and Charitter Rai, and that the sale by him was with the consent of Charitter Rai, and as such Charitter Rai had no right to maintain the suit. It was further urged in defence that the plaintiff consented to the sale and as such the claim was barred by the principle of estoppel.

The trial Court held, that there was no evidence to substantiate the allegation of the defendants that the sale by Ram Sundar Rai was with the consent of Charitter Rai, plaintiff-respondent, and further it came to the conclusion that the petition filed in the Revenue Court purporting to be a petition of Charitter Rai was a forgery, and that that petition was never filed by Charitter Rai. On these findings that Court decreed the plaintiff's suit.

On appeal by some of the defendants, the lower Appellate Court has held, that the application dated the 25th of July, 1921, was a genuine document, and had been filed by Charitter Rai in the Revenue Court, but it has held that there was nothing to show that it was because of that petition, or because of certain other acts or omissions or declarations of Charitter Rai, that the defendants appellants changed their position for the worse, and as such the plaintiff-respondent was not estopped from maintaining the suit. It has further held that the allegation of the contesting defendants that Ram Sundar Rai had sold the property as a manager of the family for legal necessity remained entirely unsubstantiated. On these findings the lower Appellate Court affirmed the decree of the trial Court.

In appeal before me it is argued that the sale by Ram Sundar Rai of Charitter Rai's share was only voidable, and as Charitter Rai did give his consent by the petition referred to above, filed by him in the Revenue Court, a good title to Charitter Rai's share passed to the vendee and that title passed to defendant No. 1 by the decree in the pre-emption suit. I am unable to agree with this contention. The sale by Ram Sundar Rai could only convey to the vendee the rights and interests of Ram Sundar Rai in the property conveyed. It was absolutely ineffectual to in any way adversely affect the rights and interests of Charitter Rai in the property covered by the sale. The sale, so far as it concerned the share of Charitter Rai in the property transferred, was absolutely void, and notwithstanding the sale, Charitter Rai retained a title to his share. If the title to Charitter Rai's share remained with him, the petition filed by Charitter Rai in the Revenue Court, during the course of mutation proceedings, or the order of the Revenue Court directing mutation of names could not have the effect of determining that title. The proprietary rights of Charitter Rai could only pass to the vendee by a registered instrumant, and admittedly no such deed was ever passed by him. As has been recently pointed out by their Lordships of the Privy Council in the case of *Nirman Singh* v. *Lal Rudra Partab Singh* (1) mutation proceedings are not judicial proceedings in which the title to, and the proprietary rights in, immoveable property are determined but that "they are much more in the nature of fiscal enquiries instituted in the interest of the State for the purpose of ascertaining which of the

(1) 98 Ind. Cas. 1013; 3 O. W. N. 623; A. I. R. 1926 P. C. 100; (1926) M. W. N. 716; 48 A. 529; 44 C. L. J. 330; 28 Bom. L. R. 1409; 51 M. L. J. 836 (P. C.).

several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with the greater confidence that the revenue for it will be paid." Apart from all this, the only right and title that passed to the contesting defendant by the decree in the pre-emption suit was the right and title conveyed to the vendee by the sale-deed executed by Ram Sundar Rai and that was only the right and title of Ram Sundar Rai as to his share in the property covered by the sale-deed.

For the reasons given above, I hold that the Courts below were right in holding that the title to the property remained with Charitter Rai, and the plea of estoppel having failed, the plaintiff was entitled to the decree granted to him by the Courts below.

The result is that I dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No 15 OF 1924.

November 23, 1926.

Present:—Mr. Kinkhede, A. J. C.

MULCHAND AND ANOTHER—DEFENDANTS Nos. 3 AND 4—APPELLANTS

versus

RADHAKISAN AND OTHERS—PLAINTIFFS Nos. 1 TO 3 AND DEFENDANTS Nos. 1, 2 AND 5 TO 8—RESPONDENTS.

Mortgage—Subrogation, doctrine of—Purchaser of mortgaged property paying off prior encumbrance, whether can claim subrogation against puisne encumbrancer.

Before any person is entitled to claim the benefit of the doctrine of subrogation he must prove that he has *paid up* the mortgage-debt in respect of which he claims that benefit. [p. 275, col. 1.]

Subrogation cannot be permitted in a case where it would work injustice to the rights of those having equal or superior equities. [*ibid.*]

Where a mortgagor or owner of the equity of redemption or any encumbrancer redeems a prior charge which is his own debt or which by contract, express or implied, he is bound to discharge, he cannot keep such charge alive as against a puisne encumbrancer whose encumbrance he is also expressly or impliedly bound to discharge. [p. 276, col. 1.]

Where a purchaser of mortgaged property is bound, expressly or impliedly, under his contract of purchase to discharge the encumbrances to which the property is subject, and he discharges a prior encumbrance upon the property, he cannot, in answer to a suit by a puisne encumbrancer to enforce his encumbrance, avail himself of the doctrine of subrogation in respect of the prior encumbrance paid off by him. [p. 276, col. 2.]

Appeal from the decree of the Subordinate Judge, Khandwa, dated the 13th October, 1923, in Civil Suit No. 123 of 1922.

Sir *H. S. Gour* and Mr. *W. R. Puranik*, for the Appellants.

Mr. *V. R. Pandit*, R. B., for the Respondents.

JUDGMENT.—The appellants were defendants Nos. 3 and 4 in the Court below. They were impleaded as parties to the suit based upon a mortgage, dated the 20th March, 1911, (Ex. P-4) executed in favour of one Gulabchand the father of plaintiffs-respondents Nos. 1 to 3 by one Raghu son of Bhagu and his mother Jasoda for a consideration of Rs. 3,000 with a condition of foreclosure. Raghu died before this suit which was instituted on 28th August, 1922, leaving Sitia, defendant No. 1, minor son as his legal representative. Jasoda is defendant No. 2. They are respondents Nos. 4 and 5 in this appeal. Appellants-defendants Nos. 3 and 4's interest is described in the plaint as being that of subsequent purchasers of the mortgaged *malik makbuza* field as per sale-deed, dated the 2nd July, 1914, and that the defendant No. 3 is also described as a subsequent purchaser of the mortgaged houses as per sale-deed, dated the 8th June, 1914. Respondent No. 6 Harprasad was impleaded as defendant No. 5 in the lower Court in his capacity of a subsequent mortgagee of the mortgaged *malik makbuza* land as per mortgage-deed, dated the 13th June, 1914, (Ex. D-3). Respondent No. 7, Shamlal, who was impleaded as defendant No. 6 is the minor son of Ramchandra Kalal who had taken a subsequent mortgage, dated 4th March, 1914, of the houses covered by the mortgage in suit. Respondent No. 8, Shanker, was defendant No. 7 and was impleaded as subsequent purchaser of the mortgaged mango trees as per sale-deed, dated the 22nd May, 1914, and respondent No. 9 who was defendant No. 8 in the Court below was similarly impleaded as the purchaser of the mango trees as per sale-deed, dated the 9th May, 1914. The amount due to the plaintiffs on the basis of their mortgage, dated the 20th March, 1911, (Ex. P-4) was Rs. 10,987-6 at the date of suit. Plaintiffs asked for a decree for foreclosure of the mortgaged property as against all these defendants.

Sitia being a minor his mother Yenibai has put in a written statement denying all knowledge of the transaction in suit. Defendant No. 2 remained absent and the case proceeded *ex parte* against her. Defendant No. 4 denied the plaintiffs' mortgage and its consideration and valid attestation. He admitted that he and defendant No. 3 purchased the *malik makbuza* field in suit as per sale dated 2nd July, 1914, (Ex. D-1) and that the same was in their possession from the date of the said purchase. He, however, asserted that the deceased mortgagor Raghu had mortgaged the *malik makbuza* field to Ramchandra the deceased father of Shamlal under a mortgage-deed, dated 2nd July, 1908, (Ex. D 2) for Rs. 1,500, and that the same was payable on 28th November, 1908. That the said Ramchandra had also taken another mortgage, dated 4th March, 1914, (Ex. D-4) in respect of the houses covered by the mortgage in suit. He pleaded that after the purchase of the *malik makbuza* field by himself and defendant No. 3 they fully satisfied the mortgages in favour of Ramchandra and Harprasad by payment of Rs. 6,400 in redemption of the mortgage, dated 2nd July, 1908, (Ex. D-2) to Ramchandra and of Rs. 3,600 to Harprasad to redeem his mortgage, dated 13th June, 1914, (Ex. D-3); each of these mortgagees Ramchandra and Harprasad are said to have passed receipts dated 8th May, 1915, (Exs. D-5 and D 6) in favour of defendants Nos. 3 and 4 who are appellants before me. He, therefore, contended that he and defendant No. 3 were entitled to claim prior mortgagee rights over the plaintiffs and entitled to use the mortgage, dated 2nd July, 1908, as a shield against the plaintiffs' mortgage in case it be proved in the suit. A sum of Rs. 16,350 was claimed on the basis of the mortgage, dated 2nd July, 1908, and it was urged that the plaintiffs were not entitled to foreclose mortgaged property and acquire the possession over it even if they proved their mortgage unless they paid the amount due under the prior mortgage, dated 2nd July, 1908, (Ex. D-2). I am not concerned with the defence of defendants Nos. 7 and 8, but it is necessary to note the defence put in by defendant No. 6's guardian through Mr. Ghate Pleader. He denied the execution of the plaintiffs' mortgage, its consideration and valid attestation. He admitted that he held the mortgage-deed executed in his father's favour (Ex. D-4) in respect of a house. It was also alleged that it appeared that his father held another mortgage, dated 2nd July, 1908, to which reference was made in the mortgage-deed (Ex. D-4). He urged that a decree for the sale of the mortgaged property be passed (evidently in lieu of foreclosure decree) in case plaintiffs' mortgage be proved. It was also added that the house property mortgaged with him was covered by the mortgage sued upon. Mr. Ghate further added that defendant No. 6 did not then possess the mortgage-deed, dated 2nd July, 1908, and presumed that the mortgage was probably redeemed.

In reply to the pleas of defendant No. 3 which were adopted by defendant No. 4 and the defence made on behalf of defendant No. 6 plaintiffs through their Pleader affirmed the validity of their own transaction and the binding character thereof as against defendants who were subsequent transferees. They, however, denied the execution and valid attestation of the alleged mortgage, dated 2nd July, 1908, in favour of defendant No. 6's father and also its binding character on the ground that Raghu was a minor at the date of its execution. It was, therefore, alleged that the mortgage even if proved to have been executed by Raghu was void *ab initio*. The alleged payment of Rs. 6,400 was also denied and the receipt dated 8th May, 1915, (Ex. D-5) was characterised as a forged document. It was pleaded that defendants Nos. 3 and 4 did not acquire title to the mortgaged property by the alleged payment to Ramchandra and that they could not hold up the mortgage, dated 2nd July, 1908, as a shield against the plaintiffs' mortgage. Firstly, because it was a void transaction; and secondly, because defendants Nos. 3 and 4 as subsequent purchasers of the equity of redemption were bound to redeem all valid prior mortgages. The extent of mortgage-debt being Rs. 16,350 on the basis of the mortgage, dated 2nd July, 1908, was also denied.

Issues were framed out of which the following are material to this appeal.

* * * *

2. Whether Raghu had executed the mortgage-deed, dated 2nd July, 1908, in favour of Ramchandra father of defendant No. 6?

(a) Was it validly attested and for consideration?

(b) Whether Raghu was a minor on 2nd July, 1908, and so the alleged prior mortgage of that date was void?

3. Whether the defendants Nos. 3 and 4 paid the sum of Rs. 6,400 to Ramchandra on 8th May, 1915, and redeemed the mortgage, dated 2nd July, 1908. If so, whether the defendants Nos. 3 and 4 are entitled to hold the mortgage of 1908 as a shield against the plaintiffs' claim?

4. What amount is legally due on the mortgage, dated 2nd July, 1908?"

The lower Court held that the mortgage (Ex. D-2) was duly executed by Raghu for consideration; that plaintiffs failed to prove that Raghu was incompetent to execute the mortgage of 1908; that the receipt (Ex. D-5), dated 8th May, 1915, passed by Ramchandra was genuine, but that it evidenced a merely nominal transaction; that the appellants Mulchand and Onkar obtained the sale-deed burdened with the mortgage-debt owed to the plaintiffs; that it was not satisfactorily established that defendants Nos. 3 and 4 really paid Rs. 6,400 to Ramchandra as alleged by them for redeeming the prior mortgage. In this view the lower Court thought that plaintiffs could not be compelled to redeem the prior mortgage which the defendants Nos. 3 and 4 alleged they had discharged. That inasmuch as the defendants Nos. 3 and 4 purchased field worth about Rs. 12,000 for a price of Rs. 3,000 only, they must be deemed to have in pursuance of the obligation undertaken to satisfy the mortgages subsisting over the property discharged their own obligation as purchasers of the equity of redemption. Accordingly plaintiffs' claim for a foreclosure was decreed against all the defendants.

It is against this decree that the defendants Nos. 3 and 4 have preferred the present appeal. They have valued their relief in appeal at Rs. 6,400 being the amount which they alleged they paid to the prior mortgagee and which they claim from the plaintiffs-respondents. The learned Counsel who argued the appeal on behalf of the appellants on being asked to value the relief in appeal properly and pay Court-fee in respect thereof, confined the claim of Rs. 6,400 only and abandoned the claim for interest subsequent to 8th May, 1915, by way of set-off against the income of mortgaged fields in his possession. The prayer in the appeal is that the plaintiffs' claim be decreed subject to the rights of the appellants' prior mortgage which the plaintiffs should be compelled to redeem before they proceed to realise their own mortgage together with all costs of the suit. It will thus be seen that the decree as passed by the lower Court is sought to be modified by getting it declared that it is subject to the rights of the appellants under the prior mortgage and that the plaintiffs should not proceed to realise their own mortgage unless they first redeem the appellants'.

The only questions, therefore, to be considered in this appeal are the following:—

(1) Whether the appellants redeemed the prior mortgage (Ex. D-2) by payment of Rs. 6,400 to the deceased mortgagee Ramchandra and obtained receipt (Ex. D-5), dated 8th May, 1915, from him?

(2) If so whether they are assignees of the prior mortgagee and as such entitled to use the prior mortgage (Ex. D-2) as a shield against the present plaintiffs' mortgage (Ex. P-4)?

The learned Counsel for the appellant being fully conscious of the weakness of his evidence as to the alleged payment of Rs. 6,400 to Ramchandra, attempted to put that matter in the back ground by arguing that the real question was whether the discharge which his client purported to secure from the prior mortgagee as per Ex. D-5 operated as an assignment by the prior mortgagee in their favour especially as the prior mortgagee's legal representative was a party to the suit and desired that effect be given to the assignment, and that the question whether the assignment was for consideration or not was immaterial for the purposes of this case. He relied upon the observations of their Lordships of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Singh* (1). The argument as it stands appears very plausible, but if we examine the basis of it in the light of the pleadings and the evidence on record, its weakness is at once exposed in view of the circumstances under which either the purchase or the so-called redemption of the prior mortgage is said to have taken place. The argument that the assignor is a party to the suit and maintaining the transaction

(1) 35 C. 420 at p. 427; 7 C. L. J. 335; 12 C. W. N. 393; 18 M. L. J. 100; 5 A. L. J. 184; 14 Bur. L. R. 49; 3 M. L. T. 344; 10 Bom. L. R. 230; 35 I. A. 48 (P. C.).

asks that effect be given to it is wholly unsupported by the pleadings and the stand taken by or on behalf of defendant No. 6. We cannot forget that defendant No. 6 was impleaded in this suit in his capacity of a subsequent mortgagee interested in redeeming the mortgage in suit, and not as a holder of a prior mortgage, dated 2nd July, 1908, (Ex. D-2). Nor were defendants Nos. 3 and 4 impleaded in any capacity other than that of subsequent purchaser. Plaintiffs also would not recognise their character or of defendant No. 6 as that of a prior mortgagee in relation to their own.

The defendants Nos. 3 and 4 had made an application on 28th February, 1923, for the examination of Gangabai mother of defendant No. 6 on commission as a *pardanashin* lady and the plaintiffs' Pleader had no objection to the granting of the application, and the Court accordingly ordered on 5th April, 1923, a commission to issue for her examination. The commissioner's proceedings show that a day was fixed by him for the examination of the lady at the residence of the Pleader for defendants Nos. 3 and 4 who apparently had undertaken to produce the witness; but the witness was not produced, and it was given out that the witness would be produced in Court at Khanda if defendants at all wish to examine her as a witness. The commission was accordingly returned unexecuted on 12th June, 1923. Even though the day of hearing of defendants' evidence in the Court was fixed for 12th July, 1923, and they examined 4 witnesses on that day and the defendants Nos. 3 and 4 were examined at the next hearing dated 6th August, 1923, as D. W. No. 6 and D. W. No. 7 and the case was voluntarily closed by the parties on that date, no attempt was made to examine Gangabai in Court either as witness for defendants Nos. 3 and 4 or for defendant No. 6. There is thus absolutely nothing to show that defendant No. 6 supported the so called assignment of the prior mortgage in favour of the appellants and wished that the same be given effect to. The present case, therefore, cannot come within the principle of the Privy Council case above referred to. Moreover, the observations of their Lordships of the Privy Council strictly apply to a case of an inadequacy of consideration and not to absence of consideration which on the findings of the first Court appears to be the case here. I am not prepared to belittle the importance or the bearing which the question of actual payment to the prior mortgagee of the sum of Rs. 6,400, in full satisfaction of his mortgage has upon the question of the appellants' right to use that mortgage as a shield against the plaintiffs' mortgage.

In *Gurdeo Singh* v. *Chandrika Singh* (2) Mr. Justice Mookerjee quoted the following from *Ellishworth* v. *Lockwood* (3):

"Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is *payment* of the mortgage-debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage-debt *is paid*. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage-debt and mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operation of law." I have underlined the important words.

It, therefore, follows that before any person is entitled to the benefit of subrogation he must *pay up* the mortgage-debt. "The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract, express or implied, except in so far as the equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case, and on the principles of natural justice. While, therefore, the doctrine will be applied in general wherever any person other than a mere volunteer pays a debt on demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities": *Bisseswar Prosad* v. *Lala Sarnam Singh* (4). In *Surjiram Marwari* v. *Bar-*

(2) 1 Ind. Cas. 913; 36 C. 193 at p. 217; 5 C. L. J 611.

(3) (1870) 42 N. Y. 89

(4) 6 C. L. J. 134.

hamdeo Pershad (5) it was ruled by the Calcutta High Court that if a mortgagor or owner of the equity of redemption or any encumbrancer redeems a prior charge which is his own debt or which by contract, express or implied, he is bound to discharge, he cannot keep such charge alive as against a puisne encumbrancer whose encumbrance he is also expressly or impliedly bound to discharge. Jones in his Treatise on Mortgages (6th Edition, Vol. I, s. 876) thus formulates the test of the right of subrogation: "The test of the right of subrogation is found in answer to the inquiry whether the person who paid the mortgage-debt is the one whose duty it was to pay it first of all; if the debt was not primarily his, and he only occupied the position of a surety to the mortgagor, he is entitled to be subrogated to the position of the mortgagee when he has paid the debt; but if the debt is the debt of the person who paid it, or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation, but is simply a performance of his own obligation or covenant." These principles are well-founded on equity and justice and if applied to the case before me completely put the appellants out of Court. This is the view which was taken in *Har Shyam Chowdhury* v. *Shyam Lal Suhu* (6) and *Muhammad Sidiq* v. *Ghaus Muhammad* (7) where part of the consideration was left with the purchaser for the discharge of the prior encumbrances and the purchaser who satisfied the prior encumbrance but did not satisfy the second encumbrance was not allowed to set up the prior mortgage redeemed by him as a shield against the claim of the puisne mortgagee whom he was also bound to pay ; and also by this Court in *Bhagwant* v. *Beharilal* (Second Appeal No. 327-B of 1916).

The appellant, Mulchand, in his deposition as D. W. No. 6 had clearly admitted and his statement on this point is also borne out by other evidence on record that the field in question was worth Rs. 10,000 or Rs. 12,000. The consideration mentioned in the sale-deed, dated 2nd July, 1914, (Ex. D-1) is only Rs. 3,000. This clearly shows that the purchasers purchased property at a low value in order that there might be sufficient margin left in their hands to pay off the encumbrances to which it was then subject. If the property was admittedly worth Rs. 12,000 one cannot understand why the mortgagor would sell it only for Rs. 3,000 unless the intention of the parties to the sale was that the vendees should satisfy the encumbrances and the vendor should get what represented only the price of mere equity of redemption. In other words this circumstance affords clear indication of an implied agreement or undertaking to re-pay the encumbrances on the part of the vendees. The alleged payment or satisfaction of the prior encumbrance by the appellants would under such circumstances amount to the performance by them of their own obligation to pay the debts which, under the circumstances, above referred to they must have either undertaken or bound themselves to satisfy within the meaning of the rule enunciated above. In view of the admission by Mulchand as D. W. No. 6 that he was informed of the mortgages of Ramchandra, I cannot attach much importance to the omission of all express mention of the encumbrances which were subsisting at the time in the sale-deed (Ex. D-1) as against the mortgaged property. In the mortgage-deed in suit (Ex. P-4) we find the mortgagor falsely stating that the property was not previously encumbered, although, as a matter of fact, it was then under a prior mortgage dated 2nd July, 1908, as per Ex. D-2. Such omissions or assertions have no value, under such circumstances.

Even assuming, therefore, that the appellants paid Rs. 6,400 in full redemption of the prior mortgage (Ex. D-2) to Ramchandra, that payment does not entitle them to claim the benefit of the doctrine of subrogation as against the plaintiffs whom they have not yet paid. In this view of the case it is unnecessary for me to examine minutely the evidence both oral and documentary which the appellants have adduced in support of their plea of the alleged payment. That evidence has been discredited by the Judge who recorded it and I may say so for very good reasons. In view of the circumstance that Mulchand's mother was married by *pat* to Ramchandra and that he (Mulchand) lived and messed with Ramchandra and that he and Ramchandra's son Shamlal are holding the property of Ramchandra as joint owners, the

(5) 2 C. L. J. 288.
(6) 31 Ind. Cas. 22; 43 C. 69 at p. 72; 22 C. L. J. 227; 20 C. W. N. 601.
(7) 7 Ind. Cas. 200; 33 A. 101; 7 A. L. J. 914.

story of actual payment to Ramchandra at Ganeshram Mahajan's shop at Burhanpur with all the formalities, appears to be a pure invention. Then again the receipt (Ex. D-5) does not specify the amount said to have been paid to Ramchandra. Further the omission to get Ganeshram's *gumashta* Ramprasad, who was present at the shop at the time of the alleged payment, to attest the receipt in token of his having witnessed the payment and the passing of the receipt by Ramchandra also, goes a great way towards showing that the alleged payment, if any, was not made and the receipt was only nominal. The mere circumstance, therefore, that the document (Ex. D-2) comes from the custody of the appellants and that too without any endorsement of satisfaction does not establish their plea of satisfaction.

At this stage I may mention one significant fact which perusal of the record has brought to light. Defendants examined their witnesses Nos. 1 to 5 on 12th July, 1923. The oral evidence as it then stood was very very shaky and discrepant, and the story of the alleged payment of Rs. 6,400 to Ramchandra an old man of very advanced age must have struck everybody concerned as highly improbable. That day the Pleader who conducted the case on behalf of Shamlal defendant No. 6 purports to have made an application under his own signature requesting the Court to allow an amendment of his pleadings by permitting him to raise a new plea couched in the following words:—

"That in case the payment by defendants Nos. 3 and 4 of the mortgage-money to the father of this defendant due under the latter's mortgage, dated 2nd July, 1908, is not held proved for any reason, this defendant will stand as a prior mortgagee so far as the mortgaged *malik makbuza* field is concerned. In that case the plaintiffs, even if they prove their mortgage, will not be entitled to foreclose unless and until they redeem that mortgage."

This plea clearly shows that the evidence of the alleged payment was wholly insufficient and unconvincing. In the absence of any order allowing the amendment I infer that the Judge must have thought that this was nothing but a dodge and could not be allowed at the late stage of the case.

For all these reasons I think the decree of the lower Court as passed is correct and needs no variation at the instance of the appellants-defendants Nos. 3 and 4. Although defendant Shamlal was impleaded as a party to this appeal, he did not prefer any cross-objections. Apparently he was satisfied with the decree as passed and desired no variation in his own interest.

The appeal, therefore, fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

RANGOON HIGH COURT.

SPECIAL FIRST CIVIL APPEAL No. 13 OF 1926.

December 3, 1926.

Present:—Mr. Justice Pratt, Officiating Chief Justice, and Mr. Justice Cunliffe.

K. C. K. FATIMA BIBI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. K. K. MOHIDEEN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 28—Pro-note executed on behalf of firm—Personal liability of executants—Partnership—Adjudication of partner as insolvent—Liability of other partners on pro-note executed on behalf of firm but signed by all individually—Composition by insolvent partner, effect of.

Where a promissory note executed on behalf of a firm is signed by all the partners without any indication that they signed it as agents, all the partners are personally liable. [p. 278, cols. 1 & 2.]

The adjudication of a partner of a firm in his firm's name as insolvent and his composition with the creditors of the firm does not absolve the other partners who are not parties either to the insolvency proceedings or composition, of their personal liability under a promissory note executed on behalf of the firm but signed by all of them individually to the extent to which it remains unsatisfied. [p. 278, col. 2.]

Mr. *Doctor*, for the Appellants.

Mr. *Shunmugam*, for the Respondents.

JUDGMENT.—Plaintiffs sued K. A. Adam, M. K. Kader Mohideen and M. N. Mahomed Abubacker on a promissory note, which was admittedly signed by all the defendants personally.

The case against first defendant was dismissed on the ground that as managing partner of K. A. Adam & Co., he had become insolvent and made a composition with his creditors.

The Court further held that as the second and third defendants were partners of K. A. Adam & Co. as were alleged to be, when the note was executed by all three defendants for K. A. Adam & Co., the debt of the

firm was extinguished by the composition, and plaintiff could not proceed against the second and third defendants.

The suit was accordingly dismissed.

The present appeal is against the order dismissing the suit against second and third defendants.

As second and third defendants executed the promissory note and there was good consideration they are *prima facie* personally liable.

Defendants' case was that they executed the note in their representative capacity as agents of and on behalf of the Firm of K. A. Adam & Co., that the money was borrowed for the firm and they were not personally liable.

In the body of the note it is stated that the note is given by K. A. Adam & Co.

There is stamp in blue ink K. A. Adam & Co., and underneath the separate signatures of the three defendants. The reasoning of the learned Judge is obviously fallacious, since if the defendants Nos. 2 and 3 executed the note as partners of K. A. Adam & Co., they ought to have been parties in the insolvency proceeding, which they admittedly were not, in order to absolve them from further liability in a suit on the note. The composition in the insolvency proceedings with 1st defendant cannot, therefore, extinguish the liability of 2nd and 3rd defendants on the note. The case set up by the defendants in their written statement was not, however, that they were partners, but agents of K. A. Adam & Co. It is contended on their behalf in this appeal that by virtue of the statement in writing in the body of the promissory note that they borrowed as K. A. Adam & Co., they escape personal liability in spite of the provisions of s. 28 of the Negotiable Instruments Act.

Section 28 lays down that an agent who signs his name to a promissory note, bill of exchange or cheque without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable.

In the present instance there is nothing on the face of the note to indicate that defendants signed as agents of K. A. Adam & Co., and not as principals. The inference from the statement in the body of the note that it was given by K. A. Adam & Co., together with the fact that the three defendants signed separately beneath the stamp of the firm, would be that all three defendants were members of the Firm of K. A. Adam & Co., liable as such.

There is nothing on the note to show that they were not personally liable.

The adjudication of K. A. Adam as insolvent *qua* K. A. Adam & Co., and his composition with the creditors cannot, as already pointed out, absolve 2nd and 3rd defendants, who were not parties to the insolvency proceeding and composition, from their liability on the note to the extent to which it remains unsatisfied.

I would set aside the order dismissing the suit as against the 2nd and 3rd defendants. As a point of limitation has been taken the case must be remanded for disposal. Appellants will be allowed costs in this appeal. The usual certificate for refund of Court-fee will issue.

R. L. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2224 OF 1924.

November 26, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Graham.

Srimati GIRIBALA DASI AND ANOTHER —DEFENDANTS—APPELLANTS

versus

PROBHASH CHANDRA BATABYAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Possession—Possessory title to be maintained against trespassers.

Possession lawfully attained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against all comers except such as can plead a preferential title. [p. 280, col. 1.]

In a suit for confirmation of possession, therefore, where it is found that the plaintiff has title to a portion of the property in dispute and is in possession and that the defendant is a trespasser, the former is entitled to a decree. [p. 279, col. 2.]

Appeal against the decree of the Additional District Judge, Midnapur, dated the 19th of August, 1924, modifying that of the Munsif, Ghatal, dated the 22nd of March, 1924.

Babus *Amarendra Nath Bose* and *Jati Nath Ghosh*, for the Appellants.

Babus *Kshitish Ch. Chakravarti* and *Panchanon Ghosal*, for the Respondents.

JUDGMENT.

Mukerji, J.—The defendants are the appellants in this appeal. The suit out of which it arises was instituted by the plaintiffs for establishment of their title to a tank and its banks which bear Nos. 1621 and 1622 in the Settlement Map of village Ajabnagar. The plaintiffs claimed *nishkar* right in this property alleging that it is included in the Taidabad of Bhagirath Batabyal, and asked for declaration of title, confirmation of possession or in the alternative for recovery of possession and a declaration to the effect that the Record of Rights is wrong. In the Record of Rights, it may be stated here, the property is recorded in the names of the defendants. The defendants' case shortly stated was that the property is included in another *taidad* called Bocharam Batabyal's *taidad* and that in the ordinary course of succession they have acquired title to it and are in possession of it.

The Munsif made a decree declaring the plaintiffs' *nishkar* right to an undivided 2/15th share of the property in suit and confirmed their possession in respect of that share.

The defendants preferred an appeal and the plaintiffs a cross-appeal. The result of these was that the Subordinate Judge declared the plaintiffs' title to the entire 16-annas of the property as against the defendants, and confirmed their possession therein and declared the Record of Rights to be wrong.

Now the position seems to be this. The Munsif found that the genealogy upon which the plaintiffs relied was not complete and contained some false and unfounded statements, that they had not made their co sharers parties to the suit, and that they had succeeded in establishing their title only to the extent of a 2/15th share. The Subordinate Judge has held that the Record of Rights which stands in the defendants' favour has been amply rebutted by the plaintiffs' evidence, that the entry in the Record of Rights is wrong, that the defendants have no right to the property and that the plaintiffs have got title to and are in possession of it. As regards the extent of the plaintiffs' title, the Subordinate Judge was not satisfied that the plaintiffs have got no other co-sharer living, and though he found that the plaintiffs' title had been made out only to the extent of 2/15th, he was satisfied that the defendants were not plaintiffs' co-sharers. As he found the plaintiffs' evidence of possession to be satisfactory he decreed the suit as above stated, making a reservation that the plaintiffs' co-sharers, if any, will not be bound by his judgment.

The decision of the learned Judge has been challenged before us upon several grounds which ultimately resolve themselves into two, the first being that the plaintiffs' title should not have been declared, upon the findings of the learned Judge himself, to anything beyond the 2/15th share and the second being that if the first ground succeeds the plaintiffs' possession should be confirmed to the extent of that share only.

The first ground obviously must succeed as there is no point in making a declaration to the extent of 16 annas as against the defendants only which will not be operative as against the plaintiffs' co-sharers. This declaration is wholly unnecessary in view of the fact that the declaration as to the erroneous character of the entry in defendants' favour is being retained, and if this declaration is made it may lead to complications.

As regards the second ground I am of opinion that the decree confirming the plaintiffs' possession in the entire 16-annas of the tank need not be disturbed as the defendants have been found to be trespassers. The plaint discloses sufficient materials for a cause of action for a prayer for confirmation of possession. The finding of the learned Judge is that the plaintiffs have been all along in possession, and it is the prayer for confirmation of possession with which we are here concerned. It is unnecessary in the present case to enter upon a discussion of the question whether and under what circumstances a suit for recovery of possession may succeed as against a trespasser merely on the strength of previous possession for any period short of the statutory period of twelve years, a question which has led to considerable diversity of Judicial opinion so far as this Court is concerned beginning with the case of *Nisa Chand Gaita* v. *Kanchiram* (1) and ending with that *Naba Kishore Tilakdas* v. *Paro Bewa* (2). The present case, in my opinion, falls

(1) 26 C. 579; 3 C. W. N. 568; 13 Ind. Dec. (N. S.) 972.

(2) 74 Ind. Cas. 283; 50 C 23; A I R 1922 Cal 198.

well within the dictum of the Judicial Committee in the case of *Sundar* v. *Parbati* (3), in which their Lordships observed that possession lawfully attained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against all comers except such as could plead a preferential title. I am accordingly of opinion that the declaration as to confirmation of possession which the plaintiff has succeeded in getting in the Court of Appeal below should be allowed to stand.

The result is that this appeal succeeds only to this extent that the declaration as to plaintiffs' title to be bound in the decree of the learned Subordinate Judge will be expunged, and the rest of the said decree will stand. In view of the technical nature of the appellants' success, they will get no costs in this appeal and each party will bear their own costs therein.

Graham, J.—I agree.

Z. K. *Appeal allowed.*

(3) 16 I. A. 186; 12 A. 51; 5 Sar. P. C. J. 448; 6 Ind. Dec. (N. S.) 782 (P. C.).

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 123 OF 1925

April 26, 1926.

Present :—Mr. Justice Srinivasa Ayyangar.

THE MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LTD.—PLAINTIFF

versus

THE MUNICIPAL COUNCIL, CUDDAPPAH—DEFENDANT.

Railways Act (IX of 1890), s. 135—Madras District Municipalities Act (V of 1920), s. 81—Property tax—Notification by Governor-General in Council declaring Railway Company liable to house, land and water taxes—Levy of property tax, legality of—Interpretation of Statutes.

Under s. 135 (2) of the Railways Act a notification was issued by the Governor-General in Council declaring the Administration of the Madras and Southern Mahratta Railway Company liable to pay certain house, land and water taxes to the Cuddappah Municipal Council in accordance with s. 47 of the Madras District Municipalities Act of 1884. In 1920, the Madras District Municipalities Act was re-enacted and no tax called house, land or water tax was imposed thereunder but a new tax called property tax was substituted instead. There was no new notification issued by the Governor-General in Council after the new Act declaring the liability of the Railway Company to pay such tax:

Held, that it was not competent to the Municipal Council to levy the new property tax under the Act of 1920 from the Railway Company and that under s. 135 (1) of the Railways Act, the Railway Company was exempt from local taxes in the absence of a notification under cl. (2) of the section. [p. 282, cols. 1 & 2.]

When the Legislature has declared the liability of a person to a tax called by a particular name, that person is not liable to any tax which is called by the Legislature itself by a different name in re-enacting a Statute and it is not open to the Court to launch upon any inquiry with regard to the real or substantial identity of the two. [p. 283, col. 1.]

The house and land taxes imposed under s. 47 of the Madras District Municipalities Act of 1884, cannot be regarded as substantially or really identical with the property tax imposed under s. 81 of the Madras District Municipalities Act of 1920. [p. 284, col. 2.]

When dealing with enactments of the Legislature and notifications thereunder, the names under which the declaration of persons in respect of liability for taxation is made cannot be dismissed altogether. [p. 282, col. 2.]

Suit for refund of moneys collected by the defendant-Council from the plaintiff as property-tax.

Messrs *Mocket* and *R.N. Aiyangar*, for the Plaintiff.

Mr. *Sambasiva Rao*, for the Defendant.

JUDGMENT.—The Madras and Southern Mahratta Railway Company, Ltd., has instituted this action against the Municipal Council of Cuddapah for a declaration that certain levies as for assessments made by the defendant-Council were illegal and not leviable or recoverable by the Council against or from the plaintiff-Company, and that, on such a declaration, a decree should be passed for the refund to the plaintiff-Company of the sum of Rs. 2,079-11 which is stated to have been paid by the plaintiff-Company to the defendant-Council under protest. The suit was originally instituted in the District Munsif's Court of Cuddapah but was transferred by an order of this Court to the Original Side of this Court for trial and disposal. No question has been raised or argued in this case with regard to the right of the plaintiff-Company to recover the amount alleged to have been paid by it under protest to the defendant-Council, if, as a matter of fact, the Court should find that the defendant-Council was not entitled to levy the amount. It is conceded that the payments were made under protest and we may take it, under threat of coercive process by the defendant-Council.

The question that arises for determination before me is whether the defendant-Council was entitled to levy this amount under the existing law from the plaintiff-Company. It is a somewhat curious case and I cannot help regarding it as having been entirely due to what I consider to be very probably an oversight on the part of the authorities. However, as the question has arisen and has been argued, I have to

find whether in the present state of things, the defendant-Council was or was not legally entitled to levy the amount now claimed.

The position is this. There was a District Municipalities Act in the year 1884. Under s. 47 of that Act, power was given to the Municipal Council under cl. (*ii*) of that section to levy "a yearly tax on lands and buildings not exceeding 7 per centum on the annual value of such lands and buildings." So far as that District Municipalities Act was concerned, there were no special provisions with regard to the levy of taxes and assessments by the Council from any Railway Administrations. They are, therefore, treated like all other legal persons and like all other Companies. But under s. 135 of Imperial Act (IX of 1890), the Indian Railways Act, it is provided as follows:—

"Notwithstanding anything to the contrary in any enactment or in any agreement or award based on any enactment, the following rules shall regulate the levy of taxes in respect of Railways and from Railway Administrations in aid of the funds of the Local Authorities, namely—

"(1) A Railway Administration shall not be liable to pay any tax in aid of the funds of any Local Authority unless the Governor-General in Council has, by notification in the Official Gazette, declared the Railway Administration to be liable to pay the tax."

Clause 2 of that section provides for the obligation on the part of Railway Administrations to pay such taxes or, in lieu thereof, some amount that may be fixed by an officer to be appointed by the Governor-General in Council, and cl. (3) authorises the Governor-General in Council at any time to revoke or vary the notification under cl. (1). I do not refer to the other parts of that section, because they are not relevant for the present purpose. The effect, therefore, of this section of the Indian Railways Act is that in the first instance it grants immunity to all Railway Administrations from any kind of tax or assessment by any Local Authority and then authorises the Governor-General in Council to issue a notification declaring any Railway Administration to be liable to pay the tax. I take it that that clause means that the Governor-General in Council may by notification declare any Railway Administration to be liable to pay any such tax as may be determined or declared by that notification.

This Act came into force on the 1st May, 1890 and we find on the 12th, June, 1890 curiously enough a Notification No. 270 made by the Governor-General in Council under the provisions of this Act to the effect that every Railway Administration shall be "liable from and after the 1st May, 1890, to pay every tax which it was lawfully required by or on behalf of any Local Authority to pay in aid of the funds of such authority during the year ending on the 30th April, 1890." There was another notification by the Governor-General in Council No. 136, dated the 5th April, 1893, in which the liability of Railway Administrations for certain taxes was sought to be regulated. The next notification was on the 29th November, 1907, No. 9977 and was to the effect that "every Railway Administration in British India shall thereafter be liable to pay, in respect of property within any local area, every tax which may lawfully be imposed by any Local Authority, in aid of its funds, under any law for the time being in force." Then we come to the last notification under that section with which we are concerned, namely, Notification No. 230, dated the 24th August, 1911. It is to the following effect and I quote it *in extenso*, because there has been some discussion with regard to the wording of a portion of it :—

"In pursuance of s. 135 of the Indian Railways Act (IX of 1890) and in supersession of all previous notifications on the subject, the Governor-General in Council is pleased to declare that the Administration of the Madras and Southern Mahratta Railway shall be liable to pay, in aid of the funds of the Local Authorities set out in the Schedule hereto annexed, the taxes specified against each in the second column thereof."

and then there is a long Schedule and the Railway Administration is made liable under the terms of the Schedule to pay to the Municipal Council of Cuddappah, house, land and water taxes. This notification is expressly made in supersession of all previous notifications on the subject. Then in the year 1920, the District Municipalities Act was re-enacted and Act V of 1920 was passed. There has been no notification issued by the Governor-General in Council after this new District Municipal-

ties Act was passed by the Local Legislature at Madras.

The first contention on behalf of the plaintiff-Company was that as there has been no fresh notification by the Government of India after the passing of the new District Municipalities Act, the plaintiff, Railway Administration, is not liable to any extent in respect of any of the obligations to pay any taxes under this new Act. To this, it was replied on behalf of the defendant-Council, that so far as the District Municipalities Act was concerned, that did not exempt any Railway Administrations from liability to taxation and that such exemption was granted only by the Indian Railways Act. It was, therefore, contended that the Court should have regard only to the notifications issued by the Governor-General in Council under s. 135 of the Indian Railways Act for the purpose of determining whether or not any particular Railway Administration was liable to be taxed. If it was the District Municipalities Act that exempted Railway Administrations in the first instance from liability to taxation in any manner or degree and if the notification had been issued under the District Municipalities Act which has been repealed and no such notification had been issued under the new Act, no doubt, there might be some force in such a contention, but having regard to the fact that all the notifications were issued or purported to be issued only under s. 135 of the Indian Railways Act, I am satisfied that the mere fact of a new District Municipalities Act having been passed could not and does not affect the question.

But as I have already stated, in the notification of the 24th August, 1911, the plaintiff-Company was declared liable to house, land and water taxes. That notification was, as I have already said, expressly issued in supersession of all previous notifications on the subject. What has really caused the difficulty in this case or enabled the plaintiff-Company to raise the present contention is the fact that in the present District Municipalities Act (V of 1920) there is no tax which is called house or land or water tax. One may say that practically these taxes have been substituted by a new tax called "property tax." I may as well point out here that under the old Act, 7½ per cent. on the annual value was fixed by the Act as the maximum of the taxes leviable by the Municipality for house and land tax, with regard to the property tax under the present Act, there is no maximum fixed and apparently the Municipal Council, is at liberty to fix tax at any percentage it pleases, subject of course, to the restriction imposed on the Act itself with regard to sanction and so on.

The question, therefore, is whether having regard to the fact that under the last notification under s. 135 of the Indian Railways Act the plaintiff-Railway Administration has been declared to be liable to house and land tax, it should be declared to be liable also for the property tax under the present Act. To begin with, I have very serious doubts whether any subject declared liable for a tax called by a particular name, could also be held liable to a tax called by a different name under a new enactment, merely on the ground that, though called by a different name, the tax is substantially and identically the same. That was really the contention put forward on behalf of the defendant-Council. The learned Counsel who appeared for the defendant offered to show not only by references to Acts and Schedules and so on but also by calling oral evidence before me that the property tax now levied by the defendant-Council on the plaintiff-Administration was identically the same tax that was previously levied under the old Act as house and land tax. It seems to me that serious consequences will follow if it should be held that it is open to Courts of Law to enquire into the nature of the taxes, the incidence of taxation and so forth for the purpose of finding out the real identity between two kinds of levies. It is open to the Legislature to call a tax a property tax and it is possible that the provisions relating to what is called the property tax have nothing to do with property. Though this might not happen ordinarily, still there is no reason whatever why it should not be so. A tax might be called a property tax and be recoverable only in respect of particular kinds of property. When we are dealing with enactments of the Legislature and notifications thereunder, it is not proper to dismiss altogether the names under which the declaration of persons in respect of liability for taxation is made. We may take the converse case. Supposing the Railway Administration had been declared liable to pay house tax, and afterwards the Municipalities Act was amended and the so-called house tax was made leviable in

such a manner as to have nothing at all to do with houses. In such a case as that, I should have felt bound to declare that though the definition or incidence of house tax had been altered by the Legislature, still as, in the notification, the liability of the Railway Administration has been declared in respect of a tax called by a particular name and that name has not been altered, the Railway Administration would still be liable. In fact, the learned Counsel for the defendant said that such a result would necessarily follow. The question then is, whether if the name is altered, is it open to the Municipal Council to claim to show that though the name is altered, the two taxes are really and substantially the same? I think not. As I have already observed, it might lead to serious consequences if I should hold that such an enquiry is open to the Court. The Legislature for reasons of its own having declared the liability of the Railway Administration for a tax called by a particular name should not be held to have authorised the liability in respect of any levy or assessment named differently. The Governor-General in Council might have had their own reasons for making the notification in the terms in which they did. It would have been open to them in the notification to have stated that the Railway Administration should be liable not only for house and land tax but any tax that may be levied in respect thereof or in lieu thereof thereafter by any local bodies. No apt words have been used by the notification for such a purpose. I am, therefore, of the opinion that when the Legislature has declared the liability of a person to a tax called by a particular name, that person is not liable to any tax which is called by the Legislature itself by a different name and that it is not open to the Court to launch upon any enquiry with regard to the real or substantial identity of the two.

But assuming for purposes of argument that such an enquiry is open, what then is the result in this case? I take it that the object of the Legislature in granting immunity to all Railway Administrations in the first instance from all local taxation and vesting the power to declare liability to such taxation in the Governor-General in Council to be exercised by notifications published from time to time, is that local bodies should not be at liberty to treat Railway Administrations in the same manner as they treat citizens and that Railway Administrations should be liable to taxation by local bodies only in the manner and to the extent that the particular constituted authority may, after considering the question, declare them to be liable. That is, the manner and the measure of liability will have to be determined by the authority that is constituted by s. 135 of the Indian Railways Act.

The learned Counsel for the defendant contended in this connection that by the notification of the year 1907, all the Railway Administrations were declared liable to any taxation which local bodies were entitled to levy according to the law for the time being and that the notification of 1911 did not supersede or cancel the previous notification. Undoubtedly, if there were any general notification to the effect that all Railway Administrations are subject to all the taxes which Municipal Councils, according to law, are entitled to levy and if any notification subsequent thereto, without cancelling or revoking the previous notification, should merely set out special cases of such taxation, there would be some force in the contention. But the notification of 1911 is in terms in supersession of all previous notifications on the subject. The learned Counsel for the defendant contended that the expression "on the subject" did not refer to the subject of the liability of Railway Administrations to local taxation but merely to the particular purpose to which this notification was confined. It is impossible to accept such a contention. The reference is to s. 135 of the Indian Railways Act and the expression "on the subject" should only be construed as relating to the liability of Railway Administrations to taxation by local bodies.

It then becomes necessary to find whether even according to the contention on behalf of the defendant, the house and land tax under the old Act is really or substantially identical with the property tax as it is called under the new Act. Even in this respect, I am unable to agree with the contention on the part of the defendant. What is meant by substantially identical? It is conceded that it is differently styled in the two Acts. Next let us see the rate of taxation. Under the old Act, $7\frac{1}{2}$ per cent. on the annual value was the maximum fixed. Under the present Act, no such maximum fixed. Then, can this house and land tax under the old Act be regarded as substan-

tially identical with the new tax called the property tax? Again the property tax, as it is called, is stated to be a general tax and may include according to the provisions of s. 81 of Madras Act V of 1920, not only an unlimited tax in respect of buildings and lands but it is directed that it shall comprise a tax for general purposes and may also comprise other kinds of taxes set out in the sub-clauses of that section. The property tax, therefore, under this section is said to include not merely a tax on houses and lands but also a tax for general purposes and may also comprise a tax for other purposes specified therein. If the object of the Legislature in granting immunity to Railway Administrations in the first instance in respect of taxation by local bodies and vesting the power to subject them to such taxation in the Governor-General in Couucil by notifications duly promulgated from time to time, be that the Governor-General in Council should, from time to time, having regard to the nature of the taxation, the function of Railway Administrations, the benefit that may possibly be derived by Railway Administrations from the existence and working of these lecal bodies, determine what taxes these Railway Administrations are to be made liable and for and to what extent, then it follows that in respect of the property tax now sought to be levied by the defendant-Municipal Council, the Governor-General in Council has had no opportunity whatever to consider the propriety or otherwise of subjecting the Railway Administrations to such taxation and it, therefore, follows that in the absence of any such notification making the Railway Administrations liable, it cannot be regarded or held to be liable to pay the tax. No doubt, it may often happen that a particular tax to which the Railway Administration is declared to be liable may be increased or altered in its incidence by any amendment of the District Municipalities Act and that in such a case, as I have already observed, Railway Administrations might still be held liable to pay the tax with its new incidence. That is because of the use in the notification of a particular expression, by which expression even the new tax, as it may be called, is known, and by which it is covered. It is possible that in such cases, the authority constituted for the purpose of issuing the notification might have considered that it would be proper to subject Railway Administrations not only to the tax known by the particular name with its incidence then existing but to the same tax called by the same name whatever may be the incidence in any amendment of the Act. If the intention had been otherwise, different language might have been adopted in the notification. But so long as the tax is properly called by the name used in the notification and contained or set out in the Legislative enactment, the liability cannot be denied; but when the name has been altered, it is impossible to say that legal liability still subsisted because the tax sought to be levied is in substance the same as the old tax. I certainly refuse to regard as substantially identical the house and land tax under the Act of 1890 and the property tax under the Act of 1920. The rate is different and the incidence is different. Even if it be open to the defendant-Council to contend and seek to prove that the liability of the plaintiff-Railway Administration subsists in respect of the tax, because of the real or substantial identity of the two taxes, I cannot find in favour of such real or substantial identity and that, therefore, also the defendant-Council had no right to levy the tax that they did levy from the plaintiff-Administration.

It follows that the levy effected by the defendant-Council from the plaintiff-Company was illegal and unauthorised. On my intimating to the learned Counsel for the plaintiff that I was in favour of his contention, so far as this point was concerned, he intimated on behalf of the plaintiff-Company that he did not wish, in the circumstances, to press the other points now, because it is unnecessary to do in view of the fact that the decision on this point goes to the entire root of the liability of the plaintiff-Company to pay to the defendant-Council any tax whatsoever. It has, therefore, become unnecessary to try the other questions that have been raised on behalf of the plaintiff. But if my decision on this point should be reversed, it will be open to the plaintiff-Company to have the other matters heard and disposed of.

As I have already said, there was no argument to me with regard to the liability of the defendant-Council to re-pay the amount levied if the levy should be held to have been illegal or unauthorised. I, therefore, declare that the defendant-Council had no right to levy the property tax from

the plaintiff-Railway Administration and that, therefore, the amount levied by the defendant-Council and set out in the plaint is liable to be re-paid by the defendant-Council to the plaintiff-Company. There will, therefore, be a decree for the payment of the sum of Rs 2,079-11-0 by the defendant-Council to the plaintiff-Company. The said amount will carry interest at 6 per cent. per annum from the date of suit till payment.

The plaintiff has succeeded in the action. The question arises whether there are any sufficient grounds for my depriving the successful plaintiff of the costs of the action or for making an order for taxation of costs on any scale other than that adopted in this Court. If I should be satisfied that the order for transfer of the case was obtained on insufficient grounds or that it was not a proper case for transfer or there was any unusual hardship for the other party by reason of the transfer having been ordered, I should certainly have considered the desirability of making some other order as regards costs than the usual one. I have been asked by the learned Counsel that appeared for the defendant that the order for costs should be only for payment of costs on the scale on which the same would have been payable if the case had continued on the file of and disposed of by the District Munsif's Court of Cuddappah. A learned Judge of this Court has made the order for transfer and I have now heard the case, and having regard to the general importance of the case and the difficult nature of the questions raised, I cannot say that the order for transfer was not properly applied for. If, therefore, it should be conceded that the order for transfer was proper, then are there any reasons for depriving the successful plaintiff who has had to pay costs in this Court, of the costs for the ordinary scale? I see none whatever. The Legislature has really allowed such transfers in special cases and unless there are special circumstances, the costs allowed should be the costs of this Court. I, therefore, direct that the defendant will pay to the plaintiff taxed costs of this suit.

V. N. V. *Suit decreed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 212 OF 1926.

December 8, 1926.

Present:—Sir Guy Rutledge, Kt., Chief Justice, and Mr. Justice Brown.

S. M. HASHIM—APPELLANT

versus

J. A. MARTIN—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 42—Preliminary decree set aside in appeal—Sale under first Court's decree, validity of—Executing Court's duty to see whether decree sought to be executed subsists—Court to which decree is transferred for execution, powers of.

Though a Court executing a transferred decree has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree, yet it is the duty of the Court when facts are brought to its notice showing that the decree in respect of which execution is sought is no longer in existence, to ascertain whether in fact that is so and refuse to allow an execution sale to proceed until it is satisfied that the decree is still in existence. [p. 286, col. 1.]

Where an appeal is preferred the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed it is that decree and only that which can be made final between the parties. Where the Appellate Court has modified a preliminary decree in various respects so as to obliterate both the preliminary and the final decree passed by the trial Court, execution cannot be proceeded with under the decree of the trial Court. [p. 286, cols. 1 & 2.]

First appeal from the order of the District Judge, Hanthawaddy, in Civil Execution Case No. 9 of 1926.

Mr. *Ochme*, for the Appellant.

Mr. *Keith*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the District Court of Hanthawaddy refusing to stay the sale of certain property at Syriam belonging to the appellant.

Respondent obtained a preliminary mortgage-decree against the appellant and one of his sons in Civil Regular No. 632 of 1925. His son, who is a minor, appealed against that decree in Civil First Appeal No. 136 of 1925. Application was made to the Appellate Court for a stay of execution. The application was dismissed with the result that after the usual six months' period a final decree was passed and at the instance of the respondent the decree was transferred to the District Court of Hanthawaddy for execution by the sale of the mortgaged properties. The sale did not in fact take place until judgment was passed by the Appellate Court on the 8th June, 1926. The appeal was allowed and the decree was modified in certain material respects. The effect of this judgment was that both the preliminary decree and final

decree passed on the Original Side were obliterated by the decree of the Appellate Court, which in fact took the place of the preliminary decree and gave a further period of six months for redemption. Application was made to the District Court in these circumstances to stay the execution proceedings and on the 30th July, 1926, the learned Judge passed an order granting an *interim* stay of sale with notice to the respondent. On this the respondent's Advocate appeared and raised the objection that the District Court had no power to grant the stay which could only be done by the High Court. The learned Judge took this view, rejected the appellant's application for stay and the property was duly sold.

For the respondent reliance is placed upon the cases decided under s. 42 of the Civil Procedure Code which lays down that a Court executing a transferred decree has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree. This is quite true, but this does not help the respondent. In our opinion, it was the duty of the Court when the facts were brought to its notice showing that the decree in respect of which execution was sought was no longer in existence, to have ascertained whether in fact that was so and refused to allow the sale to proceed until it was satisfied that the decree was still in existence.

Another ground on which the respondent relies is that the appellant has not chosen the right remedy, which was proceedings to set aside the sale. We do not think that this objection is well-grounded. As we have already said, in our opinion, after the appellate judgment of the 28th June, the Original Side decree became cancelled. In this view we are fortified by the recent decision of their Lordships of the Privy Council in *Jowad Hussain* v. *Gendan Singh* (1) in which Lord Dunedin quotes with approval part of the decision of Mr. Justice Tudball: "When the Munsif passed the decree, it was open to the plaintiff or the defendant to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed it is that decree and only that which can be made final in the cause between the parties."

In these circumstances, we must allow the appeal and set aside the order refusing to stay the sale, and as a result we declare the sale null and void. We allow two gold *mohurs* costs.

R. L. *Appeal allowed.*
A. N. A.

(1) 98 Ind. Cas. 499; 53 I. A. 197; 24 A. L. J. 765; A. I. R. 1926 P. C. 93; (1926) M. W. N. 591; 44 C. L. J. 63; 3 O. W. N. 690; 24 L. W. 394; 7 P. L. T. 575; 31 C. W. N. 58; 51 M. L. J. 781; 28 Bom. L. R. 1395 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 412 OF 1924.

June 2, 1926.

Present:—Mr. Justice Cuming and Mr. Justice Page.

BHUPENDRA NARAYAN SINHA—DEFENDANT—APPELLANT

versus

CHANDRAMONI GUPTA—PLAINTIFF—RESPONDENT.

Probate and Administration Act (V of 1881), s. 89—Legal Representatives' Suits Act (XII of 1855)—Actio personalis moritur cum persona, *doctrine of, whether applicable to India—Suit by ward against legal representatives of guardian for negligence, maintainability of.*

In India the doctrine *actio personalis moritur cum persona* does not form part of the law. Claims by and against the representatives of a deceased person are regulated by s. 89 of the Probate and Administration Act and also by Legal Representatives' Suits Act of 1855, so far as the latter enactment is not inconsistent with the former. [p. 287, col. 2.]

Under s 89 of the Probate and Administration Act a suit can be maintained by a ward against the legal representatives of his deceased guardian for damage caused by the negligence of the guardian in allowing a claim under a promissory note to become time-barred. [p. 288, col. 1.]

Krishna Behari Sen v. *Corporation of Calcutta* (1), followed.

Rustomji Dorabji v. *Nurse* (2), *Motilal Satyanarayan* v. *Harnarayan Premsukh* (3) and *Punjab Singh* v. *Ramautar Singh* (4), commented upon.

Appeal against the decree of the District Judge, Murshidabad, dated the 7th September, 1923, modifying that of the Subordinate Judge, Murshidabad, dated the 10th May, 1922.

Babu *Sitaram Banerjee*, for the Appellant.

Dr. *Jadu Nath Kanjilal* and Babu *Purna Chandra Chandra*, for the Respondent.

JUDGMENT.

Page, J.—The suit out of which this

appeal arises was brought to recover damages for negligence. The father of the first defendant, Maharaja Ranjit Sinha, was the executor of the estate of the plaintiff's husband and the certificated guardian of her property. During the period in which he bore this relationship towards the plaintiff he lent out of the estate of the plaintiff's husband a sum of Rs. 2,000 upon the security of a promissory note. In substitution of that note a new promissory note was executed by the parties to the previous note for Rs. 2,500 on the 14th March, 1914. No steps were taken by the Maharaja to recover the amount of this promissory note which was payable on demand, the result being that on the 14th March, 1917, the cause of action upon the promissory note became barred by limitation. On the 3rd May, 1918, Maharaja died, and was succeeded by his son the first defendant. Between 1918 and 1920 when the plaintiff reached her majority the defendant No. 1 was her certificated guardian. On the 3rd May, 1921, the plaintiff instituted the present suit against the Maharaja's eldest son and his two brothers, as heirs of the Maharaja. The relief sought, however, was claimed against the first defendant as representing the estate of his father. The plaintiff in the suit claimed damages caused by the negligence of the Maharaja in permitting the cause of action upon the promissory note of 1914 to become time-barred. She also claimed interest. Under the promissory note interest was fixed at six per cent.

Both the lower Courts decreed the suit in favour of the plaintiff, but whereas the trial Court decreed the suit against the estate of the late Maharaja for the amount of the principal and proportionate costs and interest at the rate of 6 per cent. per annum up to the date of his death, the lower Appellate Court varied the decree by allowing additional interest at the same rate from the death of the Maharaja until the majority of the plaintiff in 1920.

On further appeal to the High Court the learned Vakil on behalf of the 1st defendant contended that the doctrine of *actio personalis moritur cum persona* applied to this cause of action, and inasmuch as the Maharaja's estate admittedly has not been benefited as the result of the tort, the cause of action against the Maharaja did not survive against his executors and administrators.

In our opinion, this contention is misconceived. In India the doctrine of *actio personalis moritur cum persona* does not form part of the law. Claims by and against the representatives of a deceased person are regulated by s. 89 of the Probate and Administration Act (V of 1881) and also by the Legal Representatives' Suits Act of 1855 so far as the latter enactment is not inconsistent with the former. It is, therefore, not necessary to refer to the English case-law in connection with the doctrine of *actio personalis moritur cum persona*. Under s. 89 of the Probate and Administration Act of 1881 it is provided that "all demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors and administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party and except also cases, where after the death of the party the relief sought could not be enjoyed, or the granting of it would be nugatory." In *Krishna Behari Sen* v. *Corporation of Calcutta* (1) the words "other personal injuries not causing the death of the party" were construed by Chief Justice Maclean, Mr. Justice Sale, and Mr. Justice Bodilly "to refer to physical injuries to the person which do not cause death." On the other hand, in *Rustomji Dorabji* v. *Nurse* (2), in *Motilal Satyanarayan* v. *Harnarayan Premsukh* (3) and in *Punjab Singh* v. *Ramautar Singh* (4) these words were construed to mean "wrongs to the person which do not necessarily cause damage to the estate of the person wronged." In *Rustomji Dorabji* v. *Nurse* (2) Sadasiva Ayyar, J., referring to the doctrine of *actio personalis moritur cum persona* observed that "the maxim has been always considered as an unfair and even barbarous maxim, especially when applied to a case where the injured party is denied redress because the wrong-doer died. I may add that it seems to me to be based upon no principle of justice, equity, or good conscience, and that the technical Common Law rules as to forms of action and the distinction

(1) 31 C. 993; 8 C. W. N. 745.

(2) 62 Ind. Cas. 260; 44 M. 357 at p. 369; 40 M. L. J. 173; (1921) M. W. N. 121; 29 M. L. T. 121; 14 L. W. 200 (F. B.).

(3) 73 Ind. Cas. 365; 47 B. 716; 25 Bom. L. R. 435; A. I. R. 1923 Bom. 408.

(4) 52 Ind. Cas. 348; 4 P. L. J. 676; (1920) Pat. 52.

between real and personal actions might have had much to do with its survival in modern days." We agree with these observations. Having regard to the language used we do not think that the Legislature intended to perpetuate in this country a doctrine so archaic and unjust, and with all due respect to the learned Judges who have taken a different view we think that the construction which has been placed upon the section by the Calcutta High Court is clearly correct. Whichever construction, however, is adopted the cause of action for negligence in the circumstances proved in this case is clearly within the general rule laid down in s. 89. For these reasons, therefore, this contention on behalf of the appellant fails.

As regards the question of interest, in our opinion, the additional interest allowed by the lower Appellate Court which was claimed against the defendant No. 1 for breach of duty as the plaintiff's certificated guardian was not part of the cause of action in this suit which is brought against the defendant as representing the estate of the Maharaja, and, therefore, could not be recovered. The decree below will be varied to the extent that the additional interest claimed under the cross-objection between the death of the Maharaja and the date of the institution of the suit will be disallowed, but the principal sum will bear interest at six per cent. per annum from the date of the suit until realization.

The cross-objection by the respondent has in part succeeded, and in part failed.

The appellant will bear the respondent's costs both of the appeal in which substantially he has failed, and also of the cross-objection.

Cuming, J.—I agree.

R. L. *Decree varied.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 2267 OF 1925.

November 24, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

ALI BAHADUR BEG AND ANOTHER—PETITIONERS—APPELLANTS

versus

RAFI-ULLAH *alias* KHALIL AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 10—Mortgage-suit—Preliminary decree—Death of judgment-debtor—Legal representatives not brought on record—Abatement.

Where after the passing of a preliminary decree in a mortgage suit the judgment-debtor dies and his legal representatives are not brought upon the record within the period prescribed, the suit abates under r. 4 of O. XXII of the Civil Procedure Code. Rule 10 of the Order has no application in such a case.

Execution Second Appeal from a decree of the Subordinate Judge, Shahjahanpur, dated the 31st August, 1925.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *Mushtag Ahmad*, for the Respondents.

JUDGMENT.—The question arising for decision in this second appeal is whether the suit has abated as no application was made for substitution within the time prescribed after the death of the judgment-debtor. A preliminary decree for sale in this mortgage suit was dated the 13th of May, 1920. The judgment-debtor died in July, 1920, and admittedly no application for substitution was made prior to the application for final decree on 12th of May, 1923. It has been argued that in a case of this kind O. XXII, r. 4 does not apply because of the use of the words "right to sue," and r. 10 is more applicable to this case. This view is based upon a decision of the Nagpur Court to which we have been referred reported in *Tularam* v. *Tukaram* (1). But we do not find ourselves in agreement with the reasoning in that decision. In our opinion the law has been more correctly laid down by the Madras High Court in *Lakshmi Achi* v. *Subbarama Aiyar* (2) and in a later ruling reported in *Dakoju Subbarayudu* v. *Musti Rama Dasu* (3). *Mutatis mutandis* the observations of the learned Judges in that case are applicable to the one before us. They pointed out that r. 10 can only apply when an application under r. 3, here r. 4, is barred. In that case every condition required by r. 3 was present and here every condition required by r. 4 is present. The judgment-debtor died after the passing of the preliminary decree and the right to sue which includes the right to continue the suit survived. The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 64 Ind. Cas. 307; 17 N. L. R. 81.

(2) 29 Ind. Cas. 142; 39 M. 488; 2 L. W. 403; 28 M. L. J. 491; (1915) M. W. N. 327; 17 M. L. T. 385.

(3) 68 Ind. Cas. 942; 15 L. W. 309; 42 M. L. J. 301; 30 M. L. T. 202; (1922) M. W. N. 375; 45 M. 872; A. I. R. 1923 Mad. 237.

CALCUTTA HIGH COURT.
FULL BENCH.

FULL BENCH REFERENCE No. 3 OF 1925 IN APPEALS FROM APPELLATE DECREES Nos. 1174, 1180, ETC. OF 1923.

May 18, 1926.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, Justice Sir N. R. Chatterjea, Kt., Sir George Claus Rankin, Kt., Justice Sir Suhrawardy, Kt., and Mr. Justice Panton.

HARIDAS MAJUMDAR—APPELLANT

versus

GOLAM MAHIUDDIN FARUQI—RESPONDENT.

Practice—Second appeal—Reference to Full Bench—Full Bench of opinion that question referred does not arise—Procedure—Remand for disposal by Division Bench.

When the reference is in a second appeal and the question, which has been referred to the Full Bench is decided by the Full Bench, then the Full Bench disposes of the second appeal. But, when the Full Bench considers that the point which has been referred does not arise, the matter is referred to the Division Bench for disposal. [p 290, col. 2.]

Appeal against the decrees of the Special Judge, Tippera, dated the 17th August, 1922, affirming those of the Assistant Settlement Officer, Tippera, dated the 25th September, 1920.

FACTS.—The appeals which gave rise to the Reference arose out of applications made by the landlords for settlement of fair and equitable rents under the provisions of s. 105 of the Bengal Tenancy Act, The claim was based on additional rent for excess area and enhancement for the rise in prices of staple food crops. The applications having been granted in both the Courts below, the defendants preferred these appeals.

The appeals were decided by the Referring Judges into three groups and the questions referred related to the third group. The material portion of the Order of Reference is given below:—

ORDER OF REFERENCE TO A FULL BENCH.

The grounds urged in the third group of appeals are three in number. The first two grounds are the same as in the first group, and for the reasons which have been given when dealing with that group we are unable to entertain them as well-founded. There remains a third ground which has been urged in these appeals. That ground is to the effect that the plaintiff is not a 16-annas landlord but only a co-sharer landlord so far as these cases are concerned, and therefore, the applications are not maintainable. There is a strong body of authorities in which it has been held that by reason of the provisions of s. 188 of the Bengal Tenancy Act, an application under s. 105 of the Act is maintainable only at the instance of the entire body of landlords [*Maharaj Kumar Krishna Das Law* v. *Girja Nath Roy Sardar* (1), *Behari Lal Mallik* v. *Priya Nath Sardar* (2)] though a contrary view has sometimes also been taken [*e.g.*, *Dhananjoy Manjhi* v. *Upendra Nath Deb Sarbadhikary* (3)], on the ground that a suit to assess rent is consistent with and arises out of the general and the land revenue system of the country and, therefore, s. 188 of the Bengal Tenancy Act is no bar to such a suit by a co-sharer landlord. In the case of *Jogendra Narain Singha* v. *Mohammad Ismail Chaudhary* (4) it was held that if the application for settlement of rent was filed by all the joint landlords, the withdrawal of one of them does not render the proceedings invalid so as to defeat the application of the other joint landlords. In the present case, however, it seems to be undisputed that the plaintiff has been collecting his share of the rents separately and that this has been going on for a sufficient length of time to justify the inference that there is the relationship of landlord and tenant as between the parties in respect of a separate tenancy and as the word 'holding' does not occur in s. 105, but the word 'land' is used, there is apparently no bar to the maintainability of the suit on that ground. In the case of *Safaruddi* v. *Fazul Hak* (5) D. Chatterji, J., held that when a co-sharer landlord has obtained a separate *kabuliyat* in respect of his undivided share, he alone is entitled to make an application under s. 105. The execution of a *kabuliyat*, however, is not an essential requisite for the creation of the relationship and such relationship may also be inferred from separate collection for a number of years or from other circumstances. *There is a clear conflict of judicial opinion on the question as to whether a co-sharer landlord, who collects his share of the rent separately from the other co-sharers, is a joint landlard within the meaning of s. 188 of the Bengal Tenancy Act.* In several

(1) 3 Ind Cas. 472; 10 C. L. J. 458.
(2) 28 Ind. Cas. 508; 21 C. L. J. 305.
(3) 46 Ind. Cas. 428; 22 C. W. N. 685.
(4) 86 Ind. Cas. 1035; 52 C. 139; A. I. R. 1925 Cal, 637.
(5) 30 Ind. Cas. 414; 21 C. L. J. 592.

cases it has been held that, where the tenant has agreed to allow one of several co-sharer landlords to deal with him as his own tenant without reference to the rights of the other co-sharer landlords, the effect is to create a separate tenancy under such fractional co-sharer, and the provisions of s. 188 are inapplicable [*Panchanan Banerji* v. *Raj Kumar Guha* (6), *Govind Chandra Pal* v. *Hamidulla Bhuian* (7)]. A contrary view has been taken in the cases of *Gopal Chundur Das* v. *Umesh Narain Chowdhry* (8), *Hari Charan Bose* v. *Runjit Singh* (9) and *Baidya Nath De Sirkar* v. *Ilim* (10). In a number of other cases decided by this Court it has been laid down that the cancellation or determination of the original tenancy is not to be presumed from the mere fact of separate payment of rent to one or more of the co-sharers. The authorities bearing upon those questions are numerous and conflicting. We are of opinion that this conflict should be set at rest and it should be authoritatively laid down—

(*i*) as to whether a co-sharer collecting his own share of the rent separately from the other co-sharer or co-sharers, is a joint landlord within the meaning of s. 188 of the Bengal Tenancy Act.

(*ii*) and whether such a co-sharer is entitled to make an application under s. 105 of the Act.

We accordingly refer these cases to the Full Bench under the provisions of r. 1, Ch. VII of the High Court Rules. As the question arises in second appeals, *the whole cases are referred to the Full Bench* with an expression of our opinion on the other two points raised in them as stated above.

Mr. *Atul Chandra Gupta*, and Babu *Bhagirath Chandra Das*, for the Appellant.

Babu *Surendra Nath Guha*, Assistant Government Pleader, for the Respondent.

JUDGMENT OF THE FULL BENCH.

Sanderson, C. J.—This is a reference by two of my learned brothers in certain second appeals.

The appeals were divided by the learned Judges into three groups, and it was the third group of appeals, to which the questions, which were referred, related.

(6) 19 C. 610; 9 Ind. Dec. (N. S.) 849.
(7) 7 C. W. N. 670.
(8) 17 C. 695; 8 Ind. Dec. (N. S.) 1004.
(9) 25 C. 917*n*; 1 C. W. N. 521; 13 Ind. Dec. (N. S.) 598*n*.
(10) 25 C. 917; 2 C. W. N. 44; 13 Ind. Dec. (N. S.) 597.

The questions were as follows: (*i*) Whether a co-sharer collecting his own shares of the rent separately from the other co-sharer or co-sharers is a joint landlord within the meaning of s. 188 of the Bengal Tenancy Act, and (*ii*) whether such a co-sharer is entitled to make an application under s. 105 of the Act.

The proceedings were initiated by the landlord under s. 105 of the Bengal Tenancy Act and it appears from the judgment of the Assistant Settlement Officer that it was an admitted fact that the shares of the entire *taluk* passed into the hands of the plaintiff's predecessor gradually by sale.

The judgment of the learned Special Judge of Tippera with regard to this point was as follows:—

"The plaintiff is 16-annas proprietor of a *patni taluk* in which the tenancies are situated and claimed enhancement of rent under s. 30 (*b*) and additional rent under s. 52." In another part of his judgment the learned Judge said as follows:—"I have observed that the plaintiff is now 16-annas proprietor but he has been so only since 1312 *B. S.*"

The learned Vakil, who appeared for the respondent, drew our attention to these passages in the two judgments and argued that the point involved in the two questions which had been referred to the Full Bench did not arise.

In my judgment, as far as the present proceedings are concerned, this Court is bound by the above mentioned findings as to the position of the respondent and it must, therefore, be taken that the respondent was not a co-sharer but that he was the owner of the *patni taluk* to the extent of 16-annas.

It appears that there must have been some misunderstanding, when the matter was before my learned brothers, constituting the Division Bench, for I am of opinion that the questions which have been referred do not arise.

When the reference is in a second appeal and the question, which has been referred to the Full Bench, is decided by the Full Bench, then the Full Bench disposes of the second appeal. But it appears to be the practice that when the Full Bench considers that the point which has been referred does not arise, the matter is referred to the Division Bench for disposal.

For these reasons, in my judgment, these

appeals must be remanded to the Division Bench for disposal.

Chatterjea, J.—I agree.

Rankin, J.—I agree.

Suhrawardy, J.—I agree.

Panton, J.—I agree.

A. N. A. *Appeals remanded.*

MADRAS HIGH COURT.

REFERRED CASE No. 9 OF 1925.

January 12, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

THE COMMISSIONER OF INCOME TAX, MADRAS—REFERRING OFFICER

versus

MOTHEY GANGA RAJU AND OTHERS —ASSESSEES.

Income Tax Act (XI of 1922), s. 66—Statement of case to High Court—Several assessees—Separate assessment of tax—Same questions involved—Joint application to Commissioner on single fee, whether sufficient —Time for filing application—Commissioner or Court, whether can extend time.

Different persons who have been separately assessed to income-tax must file separate applications and pay separate fees for the purposes of stating cases to the High Court under s. 66 of the Income Tax Act. A single combined application by all of them on one fee is not competent even though a common question arises in all of them. [p. 292, col. 2.]

Where four assessees who were separately assessed to income-tax applied on one single application accompanied by a fee of Rs. 100 for stating a case to the High Court and the Commissioner directed them to put in four separate applications with 4 sets of fees or to amend the applications by confining it to one single assessee, but by the time they made their election, the period of one month prescribed by s. 66 (2) had expired:

Held, (1) that the original application was defective and there was no proper application before the Commissioner for taking action in the case of any one of the applicants. [*ibid.*]

(2) that there was no power in the Commissioner or in the Court to extend the period prescribed by the section. [*ibid.*]

Case stated, under s. 66 (2) of Act XI of 1922, by the Commissioner of Income Tax, Madras, in his letter No. 394 of 1924, dated 26th March, 1925, for the decision of the High Court on the following questions:—

(1) Whether four separate applications and deposits are necessary in this case for requiring the Commissioner to take action under s. 66 (2) of the Act.

(2) If the answer to the question (1) is in the affirmative, whether there was no proper application before the Commissioner for his taking action in the case of any one of the applicants.

(3) Whether there is any question of extending the period in this case and whether the Commissioner has no discretion in the matter.

(4) Whether s. 34 of the Act covers a case where the Assessing Officer and the Commissioner in appeal held after full investigation that a certain income was not taxable in the hands of a particular individual but was to be included in the taxable income of a partnership of which he was a partner and it was subsequently held in proceedings relating to the partnership (to which the original assessee was not a party) that the partnership was not taxable on this amount and whether such assessment does not amount to an indirect review of the Commissioner's original proceedings not warranted by the Act.

(5) Where after dissolution of partnership interest for the capital of the business upto the date of dissolution was paid to retiring partners by another partner who took over the business whether the partner who took over the business is not taxable on the amount of such interest under note 5 (*b*) (III) of the r. 19 printed at page 54 of the Manual and s. 26 of the Act and whether the fact that the payment could not be made till after dissolution makes it any-the-less a payment to a partner.

(6) Whether it is permissible to review considered proceedings of the Commissioner on the strength of other proceedings to which the original assessee was not a party.

(7) Whether the ruling of the Commissioner, that the share of profits of a joint concern transferred to an individual at partition would not be income in his hands, does not govern the present case and whether the circumstances adverted to in para. 4 of the proceedings assuming them to be correct would render the said ruling inapplicable.

Mr. *T. R. Ramachandra Iyer*, for First Assessee.

Mr. *M. Patanjali Sastri*, for the Referring Officer.

JUDGMENT.

Coutts Trotter, C. J.—On the direction of the learned Judge several separate questions have been formed for our determination. In our opinion the answers to the first three dispose of the whole matter and preclude us from going into the others. The first question is whether

four applications are necessary in this case for taking action under s. 66 (2) of the Act. That is the section which says that the Income Tax Commissioner is to state a case when a proper application is made accompanied by the proper fee which is Rs. 100, as matters stand. These applicants were four persons. They had once been an undivided family and, had they remained so, different considerations might arise, but they had in fact become separated and they were separately assessed. Nevertheless, an attempt was made to have a case stated regarding them all on a single fee of Rs. 100. That, of course, was an impossible attitude to take up and as they were divided the result was that it was an application by four people each of whom, as my learned brother put it, can be deemed to have paid one fourth of the prescribed fee. I have no sympathy with the applicants because they were expressly told or their Vakil was expressly told the position by a letter from Mr. Strathie, the Commissioner, dated 13th February, 1924. He points out "only one sum of Rs. 100 is deposited. There were ,however, separate assessments and four appellate orders. Under s 66 (2) each assessee must put in a separate application and each must deposit the prescribed fee of Rs.100. I cannot, therefore, act on the present application." Then he goes on: "If you wish me to deal with all the cases, will you please send four separate applications and an additional Rs. 300? If, however, you are willing that only one case should be dealt with and if you tell me with which case you wish me to proceed, I shall treat the Rs. 100 as having been received from that individual." The applicants could have put the whole matter right by accepting one of those two alternatives. Instead of that the Vakil sends an answer saying that as all the questions were common to the four applicants, a reference in one will necessarily cover the case of all. Then he says he writes to his client. He must have known time was passing and in the result the time had elapsed before he communicated with his client, and ascertained his decision as to which of the two alternatives he would accept. Thereupon Mr. Strathie wrote the letter on the 19th February in which he says that the time is gone for his reply, that the reply was in every case evasive (as indeed it was) and he declined to take any further action in the matter. Thereupon, penitent too late, the Vakil writes a letter at once requesting that the Rs. 100 sent with the application should be treated as deposited on behalf of Mr. M. Narasimha Rao and that a reference may be made in his case leaving the other people over. That is the position and our answer to the question must be that the application as originally sent was defective and that the fee that accompanied even if the application was in order was insufficient. It is not competent for four separately assessed persons to combine their applications for a case stated of this sort in one document. But, even assuming that they may be as an instance where the points to be raised were the same, it is obvious that, as they were separately assessed, their cases must be separately stated and they must pay a separate fee of Rs. 100 for each assessment under the Act.

Then, the next question is if the answer to question (1) is in the affirmative as it has now been answered in the affirmative whether there was no proper application before the Commissioner for his taking action in the case of one of the applicants. The answer is no. He had offered to do that and his offer was not accepted.

The third question is whether there was any power to extend the period in this case or whether the Commissioner had no discretion in the matter. The answer is that the Statute fixes a time and it would be an obviously undesirable burden on the Income Tax Commissioner to put upon him the consideration of questions as to whether he should exercise discretion in the direction of leniency in one case and not in another. The Statute is express and there is no provision in it for any official or even for the Court to extend the time. Therefore, as our answers to the first three questions are what I have outlined the remaining questions which, I suppose, raise the merits we are unable to deal with. Rupees 150 will be allowed for costs of Government.

Krishnan, J.—I agree.

Beasley, J.—I agree.

V. N. V.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1512 OF 1923.

May 5, 1926.

Present:—Justice Sir William Ewart Greaves, Kt., and Mr. Justice Mukerji.

ASRAFANNESSA KHATUN AND ANOTHER —DEFENDANTS—APPELLANTS

versus

HEM CHANDRA CHAUDHURY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 102, 106, scope of—Res judicata—*Suit for correction of entry —Subsequent suit for possession in Civil Court—Person impleaded party during pendency of suit—Date of institution of suit against him.*

A decision in a suit under s. 106, Bengal Tenancy Act, for correction of the entry of names of owners of a *taluq* does not operate as *res judicata* in a subsequent civil suit for possession between the same parties. [p. 294, col. 1.]

Where a person is impleaded a party to a suit during its pendency, the suit against such a party can be considered to have been instituted only on the date when he is made a party. [p. 294, col. 2.]

Appeal against a decree of the Subordinate Judge, Second Court, Pabna, dated the 15th February, 1923, affirming that of the Munsif, Second Court, Serajganj, dated the 28th March, 1922.

Dr. *Dwarka Nath Mitter* and Moulvi *Syed Nasim Ali*, for the Appellants.

Babus *Jogesh Chunder Roy*, *Ramani Mohan Chatterjee* and *Rebati Mohan Chatterjee*, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for declaration of the plaintiff's title to and recovery of possession in respect of certain shares in a *taluk* bearing *Towzi* No. 328 of the Mymensingh Collectorate. The plaintiff's name was recorded in the finally published Record of Rights as the owner of 8 *gandas* 3 *karas*, and 5 *dantis*. The defendant No. 1 in the present suit thereupon instituted a suit under s. 106 of the Bengal Tenancy Act for a correction to be made in the entry of the names of the owners of the *taluk* and alleged that she had 14-annas and odd share therein and in the said suit she made one Jowhar Ali who is defendant No. 2 in the present suit, *pro forma* defendant, alleging that the said Jowhar Ali had 1-anna odd *gandas* share in the said *taluk*. The defendant No. 1 was successful in the said proceedings. The plaintiff thereupon has instituted the present suit. In the suit as originally framed there were besides the prayers for declaration of title and recovery of possession a prayer for setting aside the order of the Revenue Officer made in the proceeding under s. 106 of the Bengal Tenancy Act and also a prayer for an order for recording the plaintiff's name as owner in respect of the said 8 *gandas* and odd share. These two latter prayers, however, were withdrawn and the suit was decreed by the Court of first instance in giving the plaintiff declaration of his title to the said share and a decree for *khas* possession in respect of the same. That decision has been affirmed on appeal by the learned Subordinate Judge. The defendants then have preferred this appeal.

Two grounds have been urged in support of this appeal. The first ground is to the effect that the decision in the suit under section 106 of the Bengal Tenancy Act operates as *res judicata* in respect of the plaintiff's claim in the present suit. This contention, however, is against a series of decisions of this Court amongst which reference may be made to the cases of *Padmalav* v. *Lukmi Rani* (1), *Kali Sundari Debya* v. *Girija Sankar Sanyal* (2), *Ram Chandra* v. *Nanda Nandananda Deb* (3) and *Pran Krishna Saha* v. *Trailakya Nath Choudhuri* (4). It has been urged on behalf of the appellants that although there are these decisions of this Court upon the point in question the earliest decision upon which the later ones proceed, namely, the case of *Padmalav* v. *Lukmi Rani* (1) related to the provisions of Ch. X of the Bengal Tenancy Act prior to the amendment in 1907. The argument in substance is that now that the Revenue Officers have much wider powers under the provisions of that Chapter and inasmuch as in framing the record under s. 102 of the Bengal Tenancy Act the Revenue Officer has to Record under clause (*dd*) of that section the name of each proprietor in the local area or estate it necessarily follows that the Revenue Officer has got to consider and determine the question of title as between rival proprietors. I am of opinion that notwithstanding the introduction of clause (*dd*) in s. 102 of the Bengal Tenancy Act, the rulings to which reference has been made must be regarded as laying down the law correctly. Section 104, cl. (4) of the Act lays down that

(1) 12 C. W. N. 8.
(2) 11 Ind. Cas. 184; 15 C. W. N. 974.
(3) 20 Ind. Cas. 298; 19 C. L. J. 197; 18 C. W. N 938.
(4) 27 Ind. Cas. 883; 19 C. W. N. 911.

the survey shall be made and the Record of Rights prepared in accordance with rules made in this behalf by the Local Government, and it stands to reason that an entry made in accordance with the rules by the Revenue Officer cannot be altered or corrected in a suit under s. 106 of the Bengal Tenancy Act. Rule 49, cl. (4) says that the application under s. 101, sub-s. 2 (*a*) made by a proprietor shall not be admitted unless the name of the applicant and the extent of his interest are registered under the Land Registration Act of 1876. Rule 58 says that the petition recording the ownership of land or the ownership of any interest in land shall be decided by the Revenue Officer on the basis of actual possession. What the Revenue Officer has to go upon primarily is the question of possession, and in making an entry in the record of the name of each proprietor in the local area or the estate under clause (*dd*) of s. 102 the Revenue Officer has to do the same. A party who is not in possession cannot seek to recover possession in a suit under s. 106 of the Act. The alteration in the law, therefore, has not, in my opinion, affected in any way the authority of the decision in the case of *Padmalav* v. *Lukmi Rani* (1) to which I have referred and the reasons upon which the said decision is founded still hold good. The first contention urged on behalf of the appellants, therefore, fails.

The next contention urged on behalf of the appellants in substance amounts to this. The plaintiff in his plaint stated that he had been dispossessed by reason of the entries that have been made in accordance with the order passed in the suit under s. 106 of the Bengal Tenancy Act. The defendants in their written statements alleged that they were in possession for a period long over 12 years and that the plaintiff's rights had been barred. There was a decree for partition amongst the co-sharers on the 24th March, 1909. The suit was instituted against the defendant No. 1 on the 17th January, 1921, but the defendant No. 2 was not made a party to the suit till the 1st December, 1921. The learned Subordinate Judge in disposing of the question as to whether the suit was barred by limitation or not held that it was not barred, inasmuch as the partition decree was dated the 24th March, 1909, and the suit was filed on the 13th January, 1921. The learned Subordinate Judge appears to have overlooked the fact that the defendant No. 2 was not made a party till the 1st December, 1921. The institution of the suit on the 13th January, 1921, cannot possibly be taken to have affected the defendant No. 2 against whom the suit must not be treated as having been instituted till the date on which he was made a party. The question of limitation so far as the defendant No. 2 is concerned, therefore, does not seem to have been properly considered by the Subordinate Judge.

In this view of the matter I set aside the decree passed by the learned Subordinate Judge and send the case back to his Court in order that he may determine the question of limitation taking into consideration the fact that defendant No. 2 was made a party to the suit on the 1st December, 1921, and having regard to all the other facts and circumstances of the case.

This is the only question which now remains for his determination.

The costs will abide the result.

Greaves, J.—I agree.

R L. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 963 OF 1924.

November 24, 1925.

Present:—Mr. Justice Iqbal Ahmad.

SAMI NATH SINGH AND ANOTHER —DEFENDANTS—APPELLANTS

versus

THAKUR PRASAD RAI AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—Lis pendens—*Mortgage suit—Termination of* lis—*Transfer after preliminary decree, effect of—Possession of transferee whether adverse to mortgagee—Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession.*

In mortgage suits *lis pendens* continues until a final decree is made and the mortgagee or the auction-purchaser as the case may be, is placed in possession. [p. 295, col. 2.]

Parsotam Narain v. *Chheda Lal* (1), followed.

Hargu Lal Singh v. *Gobind Rai* (2), distinguished.

A person claiming under a transfer during the pendency of a mortgage suit cannot prescribe a title against the mortgagee by adverse possession until the latter becomes entitled to actual possession by virtue of his purchase in execution of his mortgage decree. [p. 296, cols. 1 & 2.]

Second appeal against a decree of the District Judge, Gorakhpur, dated the 7th of March, 1924.

Mr. *Shiva Prasad Sinha*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This in a defendants' appeal and arises out of a suit for possession of a 10-*gandas zemindari* share in village Chhatunan.

There is no controversy about the facts. Parkash Rai, the father of defendant No. 1, mortgaged a 12-*gandas* share to the plaintiff who on the basis of that mortgage obtained a preliminary decree for sale on the 9th of December, 1910. To that decree only defendant No. 1 was a party. After the passing of the preliminary decree, *viz.*, on the 20th of July, 1911, defendant No. 1 sold a 10-*gandas* share, out of the 12-*gandas* share mortgaged to Sukh Deo Pal, defendant No. 2. Thereafter on the 10th of February, 1912, the plaintiff-respondent obtained a final decree on the basis of the preliminary decree of the year 1910, as against defendant No. 1 and he did not implead in those proceedings Sukh Deo Pal. On the 23th of April, 1913, after the final decree had been obtained by the plaintiff, Sukh Deo Pal, transferred the 10-*gandas* share purchased by him to defendants Nos. 3 to 5. The final decree for sale obtained by the plaintiff was put into execution and the entire mortgaged property was put to sale and purchased by the plaintiff on the 29th of August, 1919, and formal delivery of possession was made over to the plaintiff on the 1st of November, 1919. Having got formal delivery of possession, the plaintiff applied to the Revenue Court for mutation of names as against the shares purchased by him, but his application, *qua* the 10-*gandas* share in the hands of defendants Nos. 3 to 5, was rejected on the objection of the said defendants; hence the plaintiff filed the suit giving rise to this appeal for possession of that share.

The defence to the suit was that Sukh Deo Pal, the vendee under the sale-deed of the 20th of July, 1911, was a necessary party to the mortgage-suit, and the plaintiff not having impleaded him, the final decree and the purchase made by the plaintiff did not entitle the plaintiff to a decree for possession as against defendants Nos. 3 to 5 who were the successors-in-title of Sukh Deo Pal, defendant No. 2. It was further urged in the lower Appellate Court that the suit was time-barred.

The pleas taken in defence were overruled by the trial Court and the plaintiff's suit was decreed and the decree of the trial Court has been affirmed on appeal by the lower Appellate Court.

In appeal before me the decree of the lower Appellate Court is assailed on two grounds. It is urged that notwithstanding the passing of the preliminary decree on the 9th of December, 1910, the mortgage suit continued down to the date of the passing of the final decree, and that it was incumbent on the plaintiff to implead Sukh Deo Pal in that suit, and his omission to do so renders the final decree not binding on Sukh Deo Pal. It is then urged that if Sukh Deo Pal is not bound by the final decree neither he nor defendants Nos. 3 to 5 can be bound by the purchase made by the plaintiff in execution of that decree. I am unable to agree with this contention. In mortgage suits *lis pendens* continues till a final decree is made and the mortgagee or the auction-purchaser, as the case may be, is placed in possession.

This was the view taken by this Court in the case of *Parsotam Narain* v. *Chheda Lal* (1). The purchase made by Sukh Deo Pal could not, in view of the provisions of s. 52 of the Transfer of Property Act, adversely affect the rights of the plaintiff under the decree in the mortgage-suit. By that decree the plaintiff had a right to put to sale the equity of redemption. This right of the plaintiff, notwithstanding the transfer *pendente lite* by defendant No. 1 remained intact. By executing the final decree for sale and purchasing the property, the plaintiff acquired a complete title to the equity of redemption and Sukh Deo Pal cannot be allowed to ignore the rights acquired by the plaintiff by the purchase in execution of the final decree. The learned Counsel for the appellants has placed reliance on the case of *Hargu Lal Singh* v. *Gobind Rai* (2). That case, in my opinion, has no application to the present case. In that case, the persons whom the plaintiff in the mortgage suit failed to implead, were the persons to whom a portion of the mortgaged property had been transferred by the mortgagor before the date of the institution of the suit for sale. Obviously, those transferees having acquired an interest in the equity of redemption prior to the institu-

(1) 29 A. 76; 3 A. L. J. 675; A. W. N. (1906) 283.
(2) 19 A. 541; A. W. N. (1897) 154; 9 Ind. Dec. (N. S.) 350.

tion of the suit, were entitled to have an opportunity of redeeming the mortgage, and this opportunity not having been given to them by the plaintiff of that suit, it was held by this Court that they were unaffected by the decree to which they were no party. In this case the same cannot be said about the right of Sukh Deo Pal, inasmuch as, as observed above, his rights were affected by the principle enunciated in s. 52 of the Transfer of Property Act. Then it is argued by the learned Counsel for the appellants that adverse possession as against the plaintiff-respondent commenced to run from the 20th of July, 1911, on which date defendant No. 1 transferred the share in dispute to Sukh Deo Pal, and the present suit, not having been filed within 12 years from that date, is time-barred. In my opinion, there is no force in this argument. The plaintiff became entitled to possession of the property after the purchase made by him, that is, in 1919, and as against the mortgagor, he will have 12 years for a suit for possession from the date of the formal delivery of possession to him, that is, from the 1st of November, 1919, The present suit was filed much within 12 years of the last mentioned date, *viz*, on the 21st of July, 1923. The right given to the plaintiff-respondent by the final decree for sale was the right to sell the equity of redemption, and if so permitted by the execution Court, to purchase it himself. This right could not, in view of the provisions of s. 52 of the Transfer of Property Act, be adversely affected by a transfer during the pendency of the mortgage suit. But it is urged that formal delivery of possession is not sufficient to interrupt the adverse possession as against the persons who are not parties to the proceedings in which such possession is made over, and in support of this proposition reliance is placed on the case of *Radha Krishna Chanderji* v. *Ram Bahadur* (3). In the present case obviously the plaintiff-respondent could not be entitled to possession of the property up to the 29th of August, 1919, and as such it is difficult to understand, how the defendants could prescribe a title to the property by adverse possession as against the plaintiff who was not till the date last mentioned entitled to actual possession of the property. The possession of the defendants was in pursuance of a transfer *pendente lite* and that possession must yield to the rights of the plaintiff as ultimately worked out under the final decree for sale.

For the reasons given above, in my opinion, the judgments of the Courts below are right and ought to be affirmed. Accordingly I dismiss the appeal with costs including in this Court fees on the higher scale.

A. N. A. *Appeal dismissed.*

(3) 43 Ind. Cas. 268; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 34 M. L. J. 97; 7 L. W. 149; 22 C. W. N. 330; 27 C. L. J. 191; (1918) M. W. N. 163; 20 Bom. L. R. 502 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 801 OF 1924.

July 14, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

NASIB ALI—DEFENDANT—APPELLANT

versus

Munshi WAJED ALI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Gift, essentials of—Deed of gift, whether compulsorily registrable—Transfer of Property Act (IV of 1882), s. 123—Registration Act (XVI of 1908), ss. 17, 49.

Section 123, Transfer of Property Act, is not applicable to gifts by Muhammadans [p. 297, col. 1.]

Essentials of a gift under Muhammadan Law are a declaration of *hiba*, an acceptance, express or implied, of the gift by the donee and delivery of possession of the property, the subject-matter of the gift according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift and if a gift is made by writing without delivery of possession, it is invalid in law. [p. 297, cols. 1 & 2.]

A deed of gift executed by a Muhammadan is not an instrument effecting, creating or making the gift but a mere piece of evidence and does not, therefore, require registration, [p. 297, col. 2; p. 298, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, Sylhet, dated the 8th January, 1924, reversing that of the Munsif, Hailakandi, dated the 3rd April, 1923.

Babu *Hemendra Kumar Das*, for the Appellant.

Babu *Satyendra Kishore Ghose*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The plaintiff respondent brought the present suit for *khas* possession basing his title upon a gift by the admitted owner of the property Etim

Meah in favour of the plaintiff's vendors. The defendant denied the gift and claimed title under purchase from some of the heirs of Etim. The trial Court on the evidence found that the gift was not proved and dismissed the plaintiff's suit. On appeal the learned Subordinate Judge found upon the evidence on the record that the oral gift coupled with delivery of possession as alleged by the plaintiff was satisfactorily proved and made a decree in his favour. This gift was made by Etim Miah on the eve of his departure for Mecca where he subsequently died. The donees were the dauguter's sons of Etim. They were fatherless and were brought up from their childhood by him. Etim had a son to inherit his properties; and before he left for Mecca he made a gift of some of his properties in favour of his grandsons. About that time Etim also executed a deed of gift in favour of his grandsons, *viz.*, on the day before his departure; but for some reason or other it was not registered. The learned Subordinate Judge is of opinion that the gift was complete as soon as there was delivery of possession by Etim and that the unregistered deed of gift should be left out of consideration as it could not be received in evidence under s. 49 of the Registration Act. I think that the view taken by the lower Appellate Court is substantially correct and in perfect accord with the Muhammadan Law.

It is argued before us on behalf of the appellant that the deed of gift not being registered under the Registration Act is not admissible in evidence and no other evidence of the fact of the gift can be admitted under s. 92 of the Evidence Act. This argument is based upon the fallacious assumption that the gift was created by the deed. Under s. 123 of the Transfer of Property Act a gift must be made by an attested, registered instrument. But that section is not applicable to Muhammadans. That being so, the law that we have to follow in the present case is the Muhammadan Law. The essentials of a gift under the Muhammadan Law are a declaration of *hiba* by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact, no writing is necessary to validate a gift; and if a gift is made by a written statement without delivery of possession, it is invalid in law. See the case of *Sadik Husain Khan* v. *Hashim Ali Khan* (1). The position under the Muhammadan Law is this—that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a Muhammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence. The law with regard to the gift being complete by declaration and delivery of possession is so clear that in a case before their Lordships of the Judicial Committee [*Kamar-un-nissa Bibi* v. *Hussaini Bibi* (2)] where a gift was said to have been made in lieu of dower their Lordships held that the requisite forms having been observed it was not necessary to enquire whether there was any consideration for the gift or whether there was any dower due. The case of *Karam Ilahi* v. *Sharf-ud din* (3) is similar in principle to the present case. There also a deed relating to the gift was executed. The learned Judges held that if the gift was valid under the Muhammadan Law it was none-the less valid because there was a deed of gift which owing to some defect was invalid under s. 123, Transfer of Property Act, and could not be used in evidence.

The next question that calls for consideration is whether a document like the present one executed by a Muhammadan donor after he had made a gift to show that he had made it in favour of the donee is compulsorily registrable under the Registration Act. Under s. 17 of the Registration Act an instrument of gift must be

(1) 36 Ind. Cas. 104; 43 I. A. 212; 38 A. 627; 25 C. L. J. 363; 31 M. L. J. 607; 14 A. L. J. 1248; 19 O. C. 192; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 57[illegible]; 21 M. L. T. 40; 1 P. L. W. 157; 4 O. L. J. 22; 6 L. W. 378; 10 Bur. L. T. 140 (P. C.).

(2) 3 A. 266; 3 Suth. P. C. J. 804; 4 Ind. Jur. 538; 4 Sar. P. C. J. 185; 2 Ind. Dec. (N. S.) 46 (P. C.).

(3) 35 Ind. Cas. 14; 38 A. 212; 14 A. L. J. 119.

registered. By the expression 'instrument of gift of immoveable property' I understand an instrument or deed which creates, makes or completes the gift thereby transferring the ownership of the property from the executant to the person in whose favour it is executed. In order to affect the immoveable property, the document must be a document of transfer; and if it is a document of transfer it must be registered under the provisions of the Registration Act. The present document does not affect immoveable property. It does not transfer the immoveable property from the donor to the donee. It only affords evidence of the fact that the donor has observed the formalities under the Muhammadan Law in making the gift to the donee. I am prepared to go so far as to hold that a document like the present one is not compulsorily registrable under the Registration Act, or the Registration Act does not apply to a so-called deed of gift executed by a Muhammadan. But for purposes of the present case, it is not necessary to go so far because I hold that this document is only a piece of evidence, and conceding that it should have been registered, the effect of its non-registration is to make it inadmissible in evidence under s. 49 of the Registration Act. Apart from this piece of evidence the lower Court has found upon oral evidence on the record that a valid gift was made by Etim in favour of his grandsons Monohor and Habijali—the plaintiff's vendors. This being the principal issue in the case and it being decided against the appellant, the appeal must fail. It is argued that some other issues were raised at the trial in the first Court but they have not been decided by the lower Appellate Court. Though these issues were decided against the appellant by the trial Court there was no cross-appeal and the judgment does not show that they were raised in the lower Appellate Court.

The appeal is dismissed with costs.

Graham, J.—I agree.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1294 OF 1926.

December 11, 1926.

Present :—Mr. Justice Zafar Ali.

Raja ATTA ULLAH KHAN—JUDGMENT-DEBTOR—APPELLANT

versus

BALA MAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 51 (d), O. XXI, r. 63, O. XL, r. 1, O. XLIII, r. 1 (s)—Execution proceedings—Attachment—Objection—Suit by objector successful—Executing Court, duty of, to remove attachment—Receiver—Order appointing Receiver in execution proceedings—Appeal by objector, maintainability of.

Order XL, r. 1 of the Civil Procedure Code is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings it cannot be said that it does not fall within its purview. A person affected by such an order has a right of appeal under O. XLIII, r. 1 (*s*) of the Civil Procedure Code. [p. 299, col. 1.]

Where an objector to an attachment in execution proceedings succeeds in obtaining a decree declaring that the property attached is not liable to attachment, the executing Court cannot, on the application of the decree-holder, in view of the possibility of an appeal proving successful, order the objector to furnish security for keeping accounts of the income and for the restitution thereof or appoint a Receiver where he fails to furnish such security. [p. 298, col. 2; p. 299, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Amritsar, dated the 19th March, 1926.

Mr. *Niaz Muhammad*, for the Appellant.

Mr. *D. C. Ralli*, for the Respondent.

JUDGMENT.—It is obvious that where an objection to the attachment of a property is disallowed but the objector succeeds in obtaining a decree declaring that the property is not liable to attachment, the executing Court has no power to proceed against that property in opposition to that decree. In the present case the objector sued successfully for a declaration that the property was *wakf* and was not liable to attachment and the decree passed in his favour by the trial Court was confirmed on appeal by a Division Bench of this Court. The judgment creditor then applied to the executing Court for the appointment of a Receiver to collect the income from that property representing that, he having appealed to the Privy Council against the decree of the High Court, his interests should be safeguarded keeping in view the possibility of his appeal proving successful. Thereupon, the executing Court ordered the objector to

furnish security for keeping proper account of the income and for restitution thereof. As he failed to furnish it the Court appointed a Receiver of the property.

The objector appears in this Court with an appeal against either order and it is urged on his behalf that the Court below had no jurisdiction to pass these orders. Mr. Ralli who appears for the judgment-creditor, raises a preliminary objection that the objector not being a party to the suit in which the decree under execution was passed, he is not competent to appeal against the orders and that his remedy is to institute a suit. He further contends that the order appointing a Receiver was made under s. 51, cl. (*d*) of the Civil Procedure Code, and not under O. XL, r. 1 of that Code. These contentions appear to be untenable. Order XL, r. 1, is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings it cannot be said that it does not fall within the purview of O. XL, r. 1, and that the person affected by it has no right of appeal under O. XLIII, r. 1 (*s*). This view is supported by decisions in *Agabeg* v. *Sundari* (1) and *Ramswarup* v. *Raghunandan* (2). I, therefore overrule the preliminary objection.

On the merits Mr. Ralli concedes that the executing Court had no power to proceed against the property which had been declared to be not liable to attachment. I, therefore, accept the appeal and set aside both the orders. The respondents will pay the appellants' costs in this Court as well as in the Court below.

R. L. *Appeal accepted.*

(1) 48 Ind. Cas. 133; 3 P. L. J. 573.
(2) 78 Ind. Cas. 1031; A. I. R. 1924 Nag. 165.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 65 OF 1926.

November 9, 1926.

Present:—Sir George Claus Rankin, Kt., Chief Justice and Justice Sir Charu Chunder Ghose, Kt.

FIRM BHICAN CHAND CHARORIA—APPELLANT

versus

FIRM G. AND M. FOGT—RESPONDENTS.

Arbitration—Bengal Chamber of Commerce Rules, rr. 13, 14—Reference to Chamber—Arbitrator's duty to afford opportunity to adduce evidence of market rate.

Although there may be occasions in which it is incumbent on the Bengal Chamber of Commerce to give parties suitable opportunities of adducing evidence, yet each case has to be judged on the merits of its particular facts. *Prima facie*, it is not necessary for the arbitrators to hear oral evidence about market rates which are as a rule well within their own knowledge and within the special experience for which arbitrators are selected. [p. 300, col. 2.]

Appeal against the order of Mr. Justice Buckland, dated the 23rd March, 1926.

Messrs. *N. N. Sircar* and *R. N. Sircar*, for the Appellants.

Messrs. *Langford James* and *Ameer Ali*, for the Respondents.

JUDGMENT.

C.C.Ghose, J.—This is an appeal from a judgment of Mr. Justice Buckland whereby he refused to set aside an award of the Bengal Chamber of Commerce.

The facts, shortly stated, are as follows: On the 30th of April, 1925, a contract was entered into between the appellant firm and the respondent firm whereby the appellant firm agreed to sell and the respondent firm agreed to buy 15,003½ maunds bales of Kishengunj jute, delivery to be given by August or September 1925. No delivery having been effected by the end of September 1925, the appellant firm asked on the 3rd October, 1925, for an extension of time for delivery up to the 31st October, 1925. The respondent firm refused to agree to the extension asked for, but they stated that they were prepared to allow an extension of time up to the 10th of October, 1925. The appellant firm did not see their way to accept the extension of time up to the 10th of October, 1925, but it appears that on the 5th of October, 1925, the respondent firm expressed their willingness to grant an extension of time for delivery up to the 31st of October, 1925. The appellant firm, however, stated on the 9th of October, 1925, that in the events which had happened they were not then keen on getting an extension of time.

On the 15th of October, the respondents made out their bill and forwarded the same to the appellant firm. That bill was for a sum of Rs. 35,437-8 and it was made on the footing of the difference in the price of the goods contracted for between the contract rate and the market-rate on the 15th of October, 1925. The appellant firm did not pay the amount of the bill with the result that the respondent firm applied to the Bengal Chamber of Commerce for arbitration in terms of the arbitration clause

contained in the contract. The matter then came before the Bengal Chamber of Commerce and on the 2nd of February, 1926, the Tribunal of Arbitration of the Bengal Chamber of Commerce made their award whereby they awarded the whole of the amount claimed by the respondent firm, *i. e.*, Rs. 35,437-8 to the respondents with interest thereon and costs.

The appellants thereafter applied to Mr. Justice Buckland for an order for setting aside the award and the contention that was urged before the learned Judge was that, having regard to the nature of the case, the appellants should have been allowed an opportunity of adducing evidence before the said Tribunal of Arbitration of the Bengal Chamber of Commerce.

In order to appreciate the precise significance of this contention, it is necessary to see what the appellants put forward before the Bengal Chamber of Commerce in their statement of case. That statement was in reply to statement of case sent in by the respondents. The respondents in their statement made it perfectly clear that their bill had been made out on the footing of the difference in price of the goods between the contract rate and the market rate on 15th of October, 1925, and that in their view the 15th of October, 1925, was the due date for ascertainment of damages in the events which had happened. The appellant firm in their statement of case to the Bengal Chamber of Commerce by way of reply stated as follows:

"We contend that the Buyers have not suffered any damages and we ask for an opportunity to place evidence on the basis of the 30th September 1925, after the Buyers have submitted a revised statement of their alleged claim. The claim for Rs. 35,437-8 propounded on an imaginary and fictitious basis is wholly untenable and absurd on the face of it and the arbitrators, we humbly submit, will find no difficulty in rejecting the claim. For, assuming for a moment that there was an extension up to 31st October, no claim can be put forward on the basis of the 15th October as the alleged due date of delivery of which was never the due date according to the case of both parties."

In these circumstances the learned Judge had to consider whether, having regard to the rules of the Bengal Chamber of Commerce, it was incumbent upon the Tribunal for Arbitration of the Bengal Chamber of Commerce to give the appellants an opportunity of adducing oral evidence.

No doubt, from time to time there have been cases where it has been held that there must arise occasions when having regard to the facts involved it is incumbent on the Bengal Chamber of Commerce to give parties suitable opportunities of adducing evidence. (See, for instance, the case of *David Sasoon* v. *Karnidass*, dated the 9th August, 1921). But, as indicated above, each case must depend on its own facts and in this case the appellants had, in my opinion, abundant opportunities of stating in their case to the Bengal Chamber of Commerce what the market rate was on the 15th of October or on any other date and also the evidence in support of such rate and also of showing that the rate claimed by the respondents was a rate which, having regard to the state of the market on the date mentioned above, could not be allowed. This opportunity the appellants failed to seize and, in these circumstances, bearing in mind the nature of the case and holding as I do that this was not one of those cases where it would be incumbent on the Bengal Chamber of Commerce to hold a formal trial, I think the learned Judge was entirely right in holding that there had been no misconduct whatsoever on the part of the arbitrators and that there were no circumstances which would justify the Court to set aside the award.

The appeal is dismissed with costs.

Rankin, C. J.—I agree.

It appears to me that the nature of the arbitration before the Bengal Chamber of Commerce is such that one is quite safe in saying that *prima facie* it is not necessary for the arbitrators to hear oral evidence about market rates which are as a rule well within their own knowledge and within the special experience for which arbitrators are selected. That proposition is sufficient, in my judgment, to decide this question.

I agree that this appeal must be dismissed with costs.

R. L. *Appeal dismissed.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 429 OF 1925.

June 28, 1926.

Present:—Mr. Justice Duckworth.

KAUK SIKE—APPELLANT

versus

ONG HOCK SEIN AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 97, 98—Decree for possession of land—Executing Court's power to order demolition of house standing on land.

The executing Court has power to remove any person who refuses to vacate the land and to deliver actual possession to the decree-holder but where a decree for possession of land is silent as to the house standing on it, it cannot direct that the building should be pulled down, that being a matter for the decree-holder to consider, after he has obtained possession.

Radha Gobind Shaha v. *Brijendro Coomar Roy Chowdhry* (1), followed.

Second appeal from the District Court, Pyapon, in Civil Miscellaneous Appeal No. 100 of 1925.

Mr. *Surridge*, for the Appellant.

Mr. *U Ze Ya*, for the Respondents.

JUDGMENT.—The facts appear to be as follows:—

The respondents obtained a decree in Civil Regular Suit No. 131 of 1924, against the appellant for possession of the same land on which the latter occupied a house, but the decree was silent as to the said house.

In execution, the respondents applied for his ejection and for possession of the land. A delivery order was issued, and possession was given to the respondents, but the appellant though duly informed of the order, refused to leave the house. Application was then made to the executing Court for action against the appellant under s. 74 and O. XXI, rr. 97 and 98, Civil Procedure Code. Eventually the execution Court ordered the appellant to dismantle the house within 30 days of the order, failing which he would be committed to the Civil Jail for further obstruction.

On appeal by the appellant to the District Court, the learned Additional Judge of the District Court confirmed that order.

In this Court, on second appeal, it is urged that it was not within the province of the executing Court to order the debtor to dismantle buildings on the land as to which the decree was silent, even when ordering the debtor to give up possession of the said land in terms of the decree. Reliance is placed on the case of *Radha Gobind Shaha* v. *Brijendro Coomar Roy Chowdhry* (1). It was there held that in similar circumstances, where the decree is for *khas*, or actual, possession, the Court has power to remove any person, who refuses to vacate the land, and to deliver actual possession to the decree-holder, but that it is hardly within the province of the Court, executing the decree, to direct that the building should be pulled down, that being a matter for the decree-holder to consider, after he has obtained possession. At the same time the learned Judges in that case allowed the debtor two months' time within which, if he pleased, he might vacate the land, and carry away the materials of his buildings.

In the present case, appellant has been steadily obstructing the respondents since June 1925, and is still apparently in possession of his house. There is no necessity, therefore, to give him any further time in which he must himself vacate the premises. In the case adverted to above it does not appear that there had been such determined obstruction.

Since I can trace no other case bearing on the subject I shall accept the principles laid down in the ruling quoted, and will hold that in such cases, it is not within the province of an executing Court to order the demolition of a building as to which the decree is silent; to this extent I consider that the lower Courts were wrong.

I modify the order of the lower Court by directing that the appellant do vacate the building on the land as soon as this order is communicated to him, and that he be granted two months from this date, within which, if he so pleases, he may dismantle the building, and remove its materials. I make, however, no order as to costs of this appeal.

R. L. *Order modified.*

(1) 18 W. R 526.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1994 OF 1926.

December 22, 1926.

Present:—Mr. Justice Zafar Ali.

NABI BAKHSH—PLAINTIFF—APPELLANT

versus

NUR-UD-DIN AND ANOTHER—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 100.

O. XVII, r. 1—'Sufficient reason' for not producing evidence, whether question of law—Second appeal.

The question whether or not a party had sufficient cause for not producing its evidence on a particular date is a question of fact and cannot be agitated in second appeal.

Lachmeswar Singh v. *Manowar Hossein* (5) and *Moni Lal Bandopadhya* v. *Khiroda Dasi* (6), distinguished.

Second appeal from the decree of the Additional Judge, Lahore, dated the 23rd April, 1926, affirming that of the Subordinate Judge, Fourth class, Lahore, dated the 22nd February, 1926.

Mr. *Aziz Ahmad*, for Pandit *Sheo Narain*, R. B., for the Appellant.

Mr. *Shambu Lal Puri*, for the Respondents.

JUDGMENT.—The plaintiff-appellant attended the Court below with his witnesses on the 17th of November, 1925, and again on the 12th January, 1926, but the case was adjourned each time. On the third date of hearing, *i. e.*, on the 22nd February, 1926, the plaintiff failed to produce any witnesses and, therefore, his suit was dismissed under sub-r. 3 added to r. 1 of O. XVII of the Civil Procedure Code by the Lahore High Court. His appeal against that order having been dismissed by the District Judge, he appears in this Court in second appeal.

Counsel for the respondents raises a preliminary objection that this second appeal is not competent because the question whether the plaintiff had sufficient cause for not producing evidence on the date in question is a question of fact, and as that question has been decided against the plaintiff by two Courts, it cannot be made a ground for second appeal. Mulla's comment on O. XVII, r. 1 is that "What is sufficient cause is a question of fact in each case." In *Parsottam Das* v. *Kesho Saran* (1) it was held that "the question of granting or refusing an adjournment on the ground that a party is not ready with evidence which he desires to produce, is one essentially for the discretion of the Court concerned, a discretion to be exercised judicially upon a fair consideration of the opportunities the party in question has had of getting his evidence ready in time and the reasons given by him for having failed to do so," and that "it is impossible for a Court of second appeal to interfere with the exercise of such discretion." In *Asa Ram* v. *Budhu Mal* (2) it was held that "no second appeal lies as to the exercise of discretion by a lower Court under s. 5 of the Limitation Act" and *Tulsa Kunwar* v. *Gajraj Singh* (3) and *Hamid Ali* v. *Gaya din* (4) were cited and followed.

Counsel for the appellant argues that in this particular case the question whether the plaintiff had sufficient cause for not producing evidence is a matter of inference and can, therefore, be raised in second appeal, but the rulings relied upon by him, *viz.*, *Lachmeswar Singh* v. *Manowar Hossein* (5) and *Moni Lal Bandopadhya* v. *Khiroda Dasi* (6) are distinguishable and are not in point. I am, therefore, of opinion that the preliminary objection must prevail and that no second appeal lies.

This appeal is accordingly dismissed with costs.

R. L. *Appeal dismissed.*

(1) 24 Ind. Cas. 206.

(2) 35 Ind. Cas. 67; 43 P. W. R. 1916; 88 P. R. 1916; 132 P. L. R. 1916.

(3) 25 A. 71; A. W. N. (1902) 203.

(4) 26 A. 327; A. W. N. (1904) 23.

(5) 19 C. 253; 19 I. A. 48; 6 Sar. P. C. J. 133; 10 Ind. Dec. (N. S.) 614 (P. C).

(6) 20 C. 740; 10 Ind. Dec. (N. S.) 499.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 222 OF 1924.

May 6, 1926.

Present:—Justice Sir William Ewart Greaves, KT., and Mr. Justice Mukerji.

Mahanta BHAGABAN DAS, *Shebait* OF RAGHURAM DEB THAKUR—DEFENDANT—APPELLANT

versus

BISWESWAR NATH SHAHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 5—Construction of document—Document purporting to create tenancy containing clauses more appropriate to raiyati interest—Interest created, nature of—Transfer of Property Act (IV of 1882), ss. 6, 41—Non-permanent tenure created before Bengal Tenancy Act but after Transfer of Property Act came into force, transferability of—Acquiescence and estoppel, doctrine of—Transfer of tenancy—Transferor's name allowed to continue in landlord's sherista—*Acquiescence.*

Where a document purports to create a tenancy in respect of certain land, there is a presumption that the interest created is that of a tenure-holder even though the document contains some clauses which are more consistent with the creation of a *raiyati* interest than with the creation of a tenure and that presumption continues until it is rebutted by evidence to the contrary. [p. 304, col. 1]

A tenancy created after the passing of the Transfer of Property Act and before the Bengal Tenancy Act came into force is transferable even if it be a

non-permanent tenancy by virtue of the provisions of s. 6 of the Transfer of Property Act. [p. 305, cols. 1 & 2.]

Hiramoti Dassya v. *Annoda Prosad Ghosh* (1), dissented from.

The principle laid down in s. 41, Transfer of Property Act, relates to a case where one stands by and acquiesces in something that is being done by another and if in consequence of such acquiescence some injury is caused to some third party, it is not open to the person so acquiescing to say that what was done by that other person was not authorised by him. [p. 305, col. 2.]

The mere fact that a transferee from a tenant refrains from instituting a suit for a declaration to get his name recorded in the landlord's *sherista* cannot be taken as an acquiescence on his part or allowing the transferor to represent him in the landlord's *sherista*. [p. 306, col. 1.]

Ali Mahamud v. *Aftabuddin Bhuya* (2), distinguished.

Chamatkarini Dasi v. *Triguna Nath Sardar* (3), followed.

Appeal against the decree of the District Judge, Birbhum, dated the 24th September, 1923, modifying that of the Subordinate Judge, Birbhum, dated the 29th June, 1921.

Mr. *Gunada Charan Sen* and Babu *Prasanta Bhusan Gupta*, for the Appellants.

Babu *Radhika Ranjan Guha*, for the Respondents.

JUDGMENT.

Mukerji, J.—The facts which led to this litigation are these: The defendant No. 1 is the *putnidar*. On the 24th May, 1884, one Kalu Majhi executed in favour of the defendant No. 1 a *kabuliyat* by which a *sarasari jama* was sought to be created in respect of 275 *bighas* of land. Out of these 275 *bighas* 160 *bighas* were cultivated land for which a rental of Rs. 74 was fixed. The remaining 115 *bighas* were waste land for which no rent was assessed and it was provided in the document that the rent would be assessed therefor when the land would be brought under cultivation. On the 1st December, 1888, Kalu sold this tenancy in respect of the 160 *bighas* to one Bishu Majhi and one Kanai Dhangor. Bishu and Kanai were recognized by the defendant No. 1 as transferees in respect of the said 160 *bighas* and they thereafter sold to the plaintiff's father Giridhari the said tenancy by a conveyance dated the 4th May, 1894. On the 16th February, 1895, Giridhari got a conveyance from Kalu in respect of the remaining 115 *bighas*. Giridhari, however, was not recognized by the defendant No. 1 who went on instituting suits for rent against the heirs of Bishu and Kanai, and Giridhari appears to have satisfied the decrees so obtained by depositing the decretal amounts in Court. On the 20th September, 1910, the defendant No. 1 obtained a decree for arrears of rent against the heirs of a Bishu and Kanai for a certain period and in execution of that decree he purchased the tenancy interest on the 20th January, 1911, and took possession of the tenancy on the 28th January, 1911. The plaintiffs who are two out of the three sons of Giridhari applied for setting aside the sale also made an application resisting the delivery of possession to the decree-holder defendant No. 1. Those proceedings ended in favour of the defendant No. 1 on the 5th January, 1914. In the meantime that is to say, in July, 1911, the name of the defendant No. 1 was recorded in the settlement proceedings as holder of this tenancy interest. The plaintiffs, thereafter, instituted the present suit out of which this appeal arises for declaration of their title to and for recovery of possession of $\frac{2}{3}$rds share of the suit land. The third son of Giridhari was impleaded in the suit as defendant No. 10. The defendants Nos. 2 and 3 are the sons of Bishu, defendant No. 4 the son of Kanai and defendants Nos. 5 to 10 are the purchasers of the interest of the said defendant No. 10. The suit has been decreed by the Courts below though upon different grounds. The learned Munsif held that the tenancy created by the document of the 24th May, 1884, was a permanent tenure which was transferable and that, therefore, the decree obtained by defendant No. 1 against the sons of Bishu and Kanai and the sale held in pursuance of that decree were not binding on the plaintiffs. On appeal the learned District Judge held that the tenure was not a permanent one but it was transferable and accordingly the plaintiffs were not bound by the decree and the sale to which I have referred. The defendant No. 1 has thereupon preferred this appeal.

Three grounds have been urged on behalf of the defendant No. 1 in this appeal. The first ground is to the effect that upon a proper construction of the *kabuliyat* of the 24th May, 1884, it should have been held that the interest created thereby was not a tenure but a *raiyati* holding. The *kabuliyat* in question has been placed before us and the terms of the document have been brought to our notice and it has been urged that having regard to certain provisions in

the document to which I shall presently refer, it was the intention of the parties that an occupancy *raiyati* holding and not a tenure was to be created thereby. The document recited that it was a *sarasari kabuliyat*, and Kalu, the executant of the document, is described therein as being a person whose occupation was cultivation. The document further provided that if any *patit* land in addition to the land which had already been brought under cultivation was cultivated, rent would have to be paid therefor separately. It went on to state that, if any market, *hat*, etc., were established on the land, the landlord would be entitled to make settlements about them separately, and if any portion of the land was acquired for public purposes the landlord would get the price therefor. It further provided that the tenant would enjoy the fruits of the trees on the land paying *falkar* and would be liable to pay further compensation if he did damage to the trees, etc. It further stated that, if the entire rent for any particular years was not paid by the end of the year and at the time of the *Chaitra kist*, the landlord would be entitled to make a fresh settlement of the *jama*. It stated also that the tenancy that was created was to be heritable. No period was fixed for the lease and the amount of rent fixed was, as I have stated, Rs.74 for 160 *bighas* and it was stipulated that, when fresh land would be cultivated, assessment of rent would be made in respect of the same. Some of the clauses contained in this document, no doubt, are clauses which would be more consistent with the creation of a *raiyati* interest than with the creation of a tenure; for instance, the clause relating to the payment of *falkar*, the clause relating to the compensation for lands to be acquired for public purposes and so on. But it is not unusual to find such clauses even in documents which are expressly executed for the purpose of creating the interest of a tenure-holder. The document purported to create a tenancy in respect of 275 *bighas* of land. That itself raises a presumption that the interest created was that of a tenure-holder and that presumption continues until it is rebutted by evidence to the contrary. The learned District Judge has referred to certain other facts and circumstances in his judgment and upon which he has relied for coming to the conclusion that the interest created was that of a tenure-holder and not of a *raiyat*. These facts are that Kalu himself held a few *bighas* out of 275 *bighas* of land and the rest was in the possession of other tenants. He has referred to a number of documents from which he has inferred that Kalu had tenants under him with regard to a portion of this land. He has referred to certain rent-decrees obtained by Kalu against his under-tenants. He has referred also to the fact that Bishu and Kanai used to live at a distance of 14 or 16 miles from the place where the lands are situate and that, therefore, they could not have themselves cultivated the land. The document apart from the attending circumstances may perhaps be equally consistent with the theory that an occupancy holding was being created unless reliance was placed upon the presumption which arises by reason of the area being 275 *bighas*. But these circumstances to which the learned Judge has referred may legitimately be referred to for the purpose of arriving at a definite conclusion, and I am of opinion that the learned Judge upon a consideration of all these facts and circumstances was right in holding that the interest created was that of a tenure-holder and not that of a *raiyat*. The appellant contends in the first place that, the fact that, notwithstanding the transfer, suits for realization of rent were being instituted against the original tenants Bishu and Kanai who had been recognized by him, and the fact that, in the record the name of the appellant was entered as the holder of these lands, should be taken into consideration and from these facts it should be held that the presumption which arises under s. 5 of the Bengal Tenancy Act has been rebutted. It should be remembered, however, that according to the plaintiffs' case the entry was made without any notice to them and the fact that the transfer was not recognized by the defendant cannot be taken to be a fact in his favour in the present suit.

The second contention urged on behalf of the appellant is that if the tenure was not a permanent one then the onus is on the plaintiffs to prove that it was transferable. In support of this contention reference has been made in the first place to the provisions of s. 11 of the Bengal Tenancy Act, which states that every permanent tenure shall subject to the provisions of this Act be capable of being transferred and bequeathed in the same manner and to the same extent as other immoveable pro-

perty. The appellant's argument is that because there is no provision in the Bengal Tenancy Act to the effect that a non-permanent tenure would be transferable, whereas there is a clear provision that a permanent tenure is transferable it should be held that the person who alleges that a non permanent tenure is transferable must prove it; and in support of this contention reliance has also been placed upon a passage to be found in the judgment of this Court in the case of *Hiramoti Dassya* v. *Annoda Prosad Ghosh* (1). The passage runs thus: "It is noticeable that s. 11 of the Bengal Tenancy Act enacts that every permanent tenure shall, subject to the provisions of the Act, be capable of being transferred: Nothing, however, is said about non-permanent tenures. If it had been also intended to make them transferable we might have expected the Legislature to have said so." The case in *Hiramoti Dassya* v. *Annoda Prasad Ghosh* (1) was a case in which the question arose as to the transferability or otherwise of a non-permanent tenure which had been created before the passing of the Transfer of Property Act. The learned Judges first of all held that the tenancy having been created before the Transfer of Property Act came into operation, the said Act was not applicable to the case, and thereafter they made the observations to which I have referred. These observations are in the nature of an *obiter dictum* and with great respect to the learned Judges who made them I am of opinion that even if they are correct they cannot be said to apply to a case like the present where admittedly upon the pleadings of the parties the tenancy was created after the passing of the Transfer of Property Act and before the Bengal Tenancy Act came into operation. In the present case it should be remembered that the tenancy was created by a *kabuliyat* of the 24th May, 1884. An attempt was made here on behalf of the appellant to show that the tenancy existed from before 1882. But that was not the position that was taken by him in any of the Courts below, and I am of opinion that he should not be allowed to take up that position at so late a stage of the case. If the tenancy was created after the Transfer of Property Act came into operation and before the Bengal Tenancy Act came into existence, then under s. 6 of the Transfer of Property Act the tenancy would be transferable if in point of fact there is no provision either in that Act or in any other Act restricting the transfer thereof. Section 117 of the Transfer of Property Act provides only that the operation of the Chapter in which that section occurs does not extend to leases for agricultural purposes. Section 6 of the Transfer of Property Act lays down that property of any kind may be transferred except as otherwise provided by that Act or by any other law for the time being in force, and cl. (*i*) of that section says that "nothing in this section shall be deemed to authorize a tenant having untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards to assign his interest as such tenant, farmer or lessee." It is clear from this that unless there is some special provision in the Bengal Tenancy Act or in some other Act which prohibits the transfer of a non-permanent tenure the general provisions contained in s. 6 as to the transferability of tenures will hold good. In the present case I am of opinion that it having been found that the interest created by the document of 1884 was a non-permanent tenure, the said tenancy is a transferable one.

The next argument of the appellant is to the effect that as the plaintiffs had allowed themselves to be represented in the *sherista* of defendant No. 1 through Bishu and Kanai, it was not open to them to allege that they are not bound by the decree and the sale to which I have referred. Reliance has been placed in support of this argument upon the principle contained in s. 41 of the Transfer of Property Act. That principle, however, relates to a case where one stands by and acquiesces in something that is being done by another, and if in consequence of such acquiescence some injury is caused to some third party, it is provided by that section that it is not open to the person so acquiescing to say that what was done by that other person was not authorized by him. Reference has been made to certain decisions of this Court as supporting this contention of the appellant. The case which is most relied upon for the purposes of this contention is that of *Ali Mahamud* v. *Aftabuddin Bhuya* (2). It

(1) 7 C. L. J. 553.

(2) 34 Ind. Cas. 251; 20 C. W. N. 355.

will be seen that in that case there was a finding by the Subordinate Judge to the effect that a certain tenant and his heir had "allowed" another person to represent them as tenants in the *sherista* of the landlord. In the present case it cannot be said for a moment that the plaintiff or Giridhari the transferee ever allowed their vendors to represent them in the *sherista* of the landlord. Suits for rent were being instituted against the said vendors in spite of the fact of the said transfer and decretal amounts were being deposited by the transferee when the decrees were obtained. There is no question of acquiescence or of allowing somebody else to represent the transferee in the *sherista* of the landlord in the present case As has been observed in a decision of this Court in the case of *Chamatkarini Dasi* v. *Triguna Nath Sardar* (3) the question whether there has been such representation or not is a question of fact, and the mere fact that the transferee refrained from instituting a suit for a declaration to get his name recorded in the defendants' *sherista* which seems to be the only course left to the transferee to adopt in the circumstances of this case cannot be taken as an acquiescence on his part or allowing of the transferors to represent him in the landlord's *sherista*. I am, therefore, of opinion that the principle to which reference has been made in connection with this contention has no application to the facts of this case.

These are all the contentions that have been urged on behalf of the appellant. As they fail the appeal must be dismissed with costs.

Greaves, J.—I agree.

R. L. *Appeal dismissed.*

(3) 19 Ind. Cas. 989; 17 C. W. N. 833.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 398 OF 1924.

October 25, 1926.

Present:—Mr. Justice Waller.

VAYSA RAYAR—PLAINTIFF—APPELLANT

versus

SUBBARAYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Omission to notice material circumstances—Misdirection on important point—Interference—Remand.

Where an Appellate Court has failed to notice material circumstances and the evidence in the case and has misdirected itself on an important point, the High Court can interfere in the second appeal and direct the case to be re-heard.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Ramnad at Madure, in A. S. No. 152 of 1921, preferred against that of the Court of the Principal District Munsif, Srivalliputtur, in O. S. No. 814 of 1919.

Mr. *C. S. Venkatachari*, for the Appellant.

Mr. *Watrap S. Subramania Iyer*, for the Respondents.

JUDGMENT.—The question in this case is whether the property in suit belonged to the plaintiff, in whose name the sale-deed stood, or whether it had been purchased by the defendant's father *benami* in the name of the plaintiff. The District Munsif found against the theory of *benami*. The Subordinate Judge in a highly unsatisfactory judgment reversed this decision. I think that the appeal should be re-heard. The District Munsif in para. 14 of his judgment summed up all the salient features of the case. Hardly a single point that he made in favour of the plaintiff has been noticed or met by the Subordinate Judge. In a matter of this kind the question of motive is important. Two motives were set up on behalf of the defendants. The District Munsif has pointed out quite correctly that they were absurd. The Subordinate Judge has not touched on the question of motive at all. The District Munsif pointed out that it had not been proved that defendant's father provided the money. That was correct, and it was for the defendants to show that it was so paid. As I understand the Subordinate Judge, he thought that it was for the plaintiff to show that he had funds in the hands of the defendant's father. The evidence was that he had—*vide* Ex. IV-*a* and it was clearly for the defendants to show that the money referred to in Ex. IV-*a* belonged to their father and to explain why, if it did not belong to the plaintiff, a misleading entry was made in the accounts. The Subordinate Judge has omitted to notice material circumstances and the evidence in the case and has misdirected himself on the last point above referred to. I set aside his judgment and remand the appeal for disposal according to law. Costs to be costs in the re-hearing.

V. N. V. *Order set aside.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 133 OF 1926.

September 8, 1926.

Present :—Justice Sir Benjamin Herbert Heald, KT., and Mr. Justice Chari.

ENG BAN HWAT & Co.—PLAINTIFFS—APPELLANTS

versus

LATIFF HAZI SHARIFF HAJEE NOOR MAHOMED—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 107—Right of re-sale—Passing of property—Contract denied from beginning—Damages.

The right of re-sale may be the result either of a statutory provision or of agreement between the parties. The statutory right conferred by s. 107 of the Contract Act can only be exercised if the property in the goods has passed to the buyer. [p. 307, col. 2.]

Buldeo Doss v. *Howe* (1), followed.

Where a contract for sale of goods is repudiated by a party before the property in the goods sold has passed to the buyer, right of re-sale cannot be invoked by the other party and the measure of damages claimable is the difference between the market rate and the agreed rate. [p. 307, col. 2; p. 308, col. 1.]

First appeal against the decree of the Original Side, High Court, Rangoon, in Civil Regular No. 303 of 1925.

Mr. *S. N. Sen*, for the Appellants.

JUDGMENT.—In the suit out of which this appeal arises the plaintiff sued to recover a sum of Rs. 3,308 being difference between the contract price of 2,000 bags of boiled "Milcher" rice which the defendant had agreed to buy from the plaintiff and price fetched by the sale of the rice which, according to the plaintiff, was sold by public auction at the defendant's risk. The defendant denied the contract and claimed that he instructed his broker to buy 200 tons of boiled "Milcher" rice of the Prawn mark of Eng Hong Bee's mill and not the plaintiff's rice which is known in the market as "Milcher" rice of the "fish" mark.

The learned Judge of the Original Side held that the contract was entered into as claimed by the plaintiff and found on that point against the defendant but as regards the question of damage the learned Judge was of opinion that as there was a demand for boiled rice in the month of May during which, according to the contract, the rice ought to have been delivered to the defendant and as it was the duty of the plaintiff to minimise damages as much as possible the plaintiff ought not to have sold the rice which he had milled by public auction. He held, therefore, that the plaintiff was only entitled to damages on the basis of the difference between the market price in the month of May and the contract price. He held that difference to be Rs. 12-8 per 100 baskets and gave the plaintiff, on that basis, a decree for Rs. 750. The defendant has not appealed but the plaintiff appeals to this Court against this decree and claims that he is entitled to the sum of Rs. 3,308 as claimed in the plaint.

The right of re sale may be the result either of a statutory provision or of agreement between the parties. The statutory provision is contained in s. 107 of the Indian Contract Act and it is clear from the terms of that section that it can only be exercised if the property in the goods has passed to the buyer, [*Buldeo Doss* v *Howe*(1)]. The learned Advocate for the appellant argues that in this case the property in the rice had passed to the buyer. We, however, do not think so. Neither s. 83 nor s. 87 of the Contract Act is applicable because before the plaintiff started milling he tendered a milling notice which the defendant refused to accept. On the 23rd of May, 1925, the plaintiff's Advocate sent a notice to the defendant's saying that in spite of the tendering of the milling notice the defendent had not sent gunnies for the boiled rice, and enquiring whether the defendant intended to take delivery of the rice. It would seem, therefore, that there had been no appropriation of the goods by the seller. The property in the goods not having passed, there was no lien on the goods in favour of the seller which would enable him to re-sell the rice in accordance with the provisions of s. 107 of the Contract Act. As regards the contract itself, in the bought and sold notes there are two clauses which are relevant. Clause II provides that if the buyer fails to appear to take delivery *ex* hopper the sellers have the option of cancelling the contract and claiming from the buyer the difference between the contract and market price on the day the rice was to have been milled. As the defendant repudiated the contract from the very beginning that was the obvious remedy of the plaintiff. The succeeding clause, however, provides that the sellers have the option of disposing of the rice by private or public sale for buyer's account should they fail "either to deposit margin as above within two days of the presentation of the bill." This clause must be read

(1) 6 C. 61 at p. 68; 6 C. L. R. 582; 3 Ind. Dec. (N. S.) 42.

with the previous clause and, in our opinion, it gives a right of re-sale only when the buyer, having agreed to milling of the rice on his behalf, fails after the rice had been milled to pay its price within two days of the presentation of the bill. We are of opinion that the conclusion arrived at by the learned Judge that the plaintiff is entitled only to damages calculated on the difference between the contract price and the market price is correct.

The other findings have not been challenged and we, therefore, dismiss this appeal under O. XLI, r. 11 of the Civil Proceedure Code.

R. L. *Appeal dismissed.*

A. N. A.

OUDH CHIEF COURT.

EXECUTION OF DECREE APPEAL NO. 53 OF 1926.

February 4, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

RAM LAL—DECREE-HOLDER—APPELLANT

versus

UDIT NARAIN SINGH—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182, cl. (5) —Oral application for execution—Prayer for issue of warrant of attachment of property—Step-in-aid of execution—Application not strictly necessary, whether in accordance with law—Meaning of Art. 182, cl. (5).

An oral application by a decree-holder to the executing Court that a warrant of attachment should issue against the property of the judgment-debtor is an application made in accordance with law to the proper Court to take a step in aid of execution, and fulfils the conditions laid down in Art. 182, cl. (5) of the First Schedule of the Limitation Act. In considering the meaning of the 5th clause of Art. 182 a Court should look very closely at the words used in the clause and should be loath to look at anything else. [p. 308, col. 2]

An applicatian which is not strictly necessary may still be an application in accordance with law within the meaning of Art. 182 of the Limitation Act. [p. 309, col. 1.]

Appeal against the decree of the First Subordinate Judge, Bahraich, in Civil Miscellaneous Appeal No. 5 of 1926, dated the 24th August, 1926, confirming that of the Munsif, Qaiserganj at Bahraich, dated the 13th May, 1926.

Mr. *S. N. Ray*, for the Appellant.

Mr. *Radha Krishna*, for the Respondent.

JUDGMENT.—It is necessary to state the following facts only in order to explain the question before the Court in this appeal. Ram Lal had obtained a decree for possession of immoveable property, costs and damages against Mahesh Bakhsh Singh. He obtained possession over the immoveable property. Mahesh Bakhsh Singh died. On the 16th March 1922, Ram Lal applied to the Court in charge of executing the decree to substitute the names of Udit Narain and Sat Chandi Singh, sons of Mahesh Bakhsh Singh, as judgment-debtors, and to attach and bring to sale certain property of Mahesh Bakhsh Singh in their possession in satisfaction of the amount due for damages and costs. Notices were issued to Udit Narain Singh and Sat Chandi Singh, but no orders were passed upon the application. On the 8th August, 1925, the names of Udit Narain Singh and Sat Chandi Singh were brought upon the record as judgment-debtors in place of the name of Mahesh Bakhsh Singh, but no further order was passed. The decree-holder then put in an oral application that a warrant of attachment should issue against the property. If this application be considered as an application made in accordance with law to the proper Court to take a step-in-aid of execution the present application to execute the decree is not time-barred but if this application be not considered such an application the present application is time-barred. In order to decide the point it is necessary to consider whether the application fulfils the conditions laid down in Art. 182, cl. (5) of the First Schedule of Act IX of 1908. It was an oral application, but it was clearly an application in accordance with law. It was made to the proper Court. It asked the Court to do what it had not done already, that is to say, to issue a warrant of attachment and sale of certain property in order that the decretal amount might be satisfied from the sale-proceeds. It thus asked the Court to aid the decree-holder in executing his decree, and it asked the Court to do this in a particular way by taking a certain step. The Courts below have, however, held that this application does not fall within these conditions and they have dismissed the present application as time-barred. In our opinion in considering the meaning of the 5th clause of Art. 182 a Court should look very closely at the words used in the clause and should be loath to look at anything else. We see no justification for saying that an application, which need not necessarily have been made, is not an application in accordance with law, or for imposing conditions which the

Statute has not imposed. In our opinion, it cannot be suggested that this application was other than in accordance with law. We do not even find that it was an unnecessary application. There is, however, nothing in the section which would justify the conclusion that an application which is not strictly necessary is an application which is not in accordance with law. We, therefore, consider that this application fulfilled the necessary conditions; and in these circumstances the present application was within time. We, therefore, allow this appeal and hold that the application of the 7th August, 1925, for execution was within time. The judgment-debtors will pay their own costs and those of the decree-holder in all Courts.

G. H. *Appeal allowed.*
A. N. A.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 91 OF 1925.

July 23, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Cammiade.

Syed MAHOMED MALIHA AND OTHERS —DEFENDANTS—APPELLANTS

versus

Chowdhury MAHOMED ISMAIL KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 96, 151, 152, O. XLVII, r. 1—Decree—Amendment of decree in accordance with judgment—Procedure—Arithmetical or clerical error, how to be judged and corrected—Extrinsic evidence, admissibility of—Legal practitioners—Professional ettiquette - Pleader's appearance as Counsel after acting as Commissioner.

A decree which has been drawn up in accordance with the judgment, unless the judgment is amended or set aside, cannot be amended or set aside by an indirect attack. [p. 313, col. 2.]

Only arithmetical or clerical errors in the judgment can be corrected under s. 151 or s. 152 of the Civil Procedure Code. Any other error can be set right either by way of appeal or review. [p. 313, col. 1.]

In order to consider whether there is any arithmetical or clerical error in the judgment, apart from what is contained in the judgment itself no other evidence should be taken as to the matter on which the Court based its judgment. [p 311, col. 2.]

A pleader who has acted as a Commissioner in a case should not accept a brief from a party at a subsequent stage of the same suit. [p. 311, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, First Court, Bakargunj, dated the 10th June, 1923.

Dr. *Sarat Chandra Basak*, Babus *Mukund Behary Mullick* and *Dhirendra Krishna Roy*, for the Appellants.

Dr. *Dwarka Nath Mitter*, Babus *Surendra Nath Guha*, *Abinash Chandra Guha* and *Bhupendra Nath Das*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants and it arises out of a suit for partition. The judgment in the trial Court was delivered on June 27, 1916. The defendants had no ground of complaint against the decree which was drawn up in accordance with it. Their grievance is against the decree which was prepared by amending the decree as originally made on March 24, 1925. The circumstances which gave rise to the appeal are somewhat novel in our experience.

There is no dispute as regards the shares of the parties. The plaintiff is entitled to two-thirds share and the defendants are entitled to one-third share of the property. Two Commissioners were appointed to effect a partition. Each of them appeared, previous to their being appointed as Commissioners, as Pleader for one of the parties. These Commissioners made a report and after making elaborate enquiry they made a division of the properties in dispute. Their final report is dated the 17th June, 1916. The properties consisted of superior rights in certain *mouzas* and also tenures comprised within those *mouzas* and the joint properties were placed by the Commissioners in five schedules. A, B and C consisted of the superior interest in the *mahals*. Schedule A was left joint by consent of parties. Schedule B was allotted to the plaintiff and schedule C to the defendants. Schedules D and E consisted of tenures. Schedule D was allotted to the plaintiff and it was arranged by consent of parties that plaintiff would grant a lease of the tenures to the defendants. Schedule E was allotted to the defendants and it was similarly arranged by consent of parties that the defendants would execute a lease in favour of the plaintiff for those properties. The scheme prepared by the Commissioners has been stated in detail at page 30 of the paper-book in the Commissioners' report.

The question that will arise for our decision in this appeal is with reference to the rent that is payable by one party to the other with reference to the lands in schedules D and E. What was done by the Commissioners was that they set off the rent payable

by the plaintiff to the defendant and they directed that the excess of the rent payable by the defendant to the plaintiff should be the only amount which the defendant should pay to the plaintiff. They fixed the amount at Rs. 413-11-4 after taking into account the rents payable on account of various items by the plaintiff to the defendants and by the defendants to the plaintiff and setting one off against the other. The matter then came before the Subordinate Judge who by his judgment, dated the 27th June, 1916, modified the report of the Commissioners as regards the amount of rent payable by the defendants to the plaintiff. The Subordinate Judge made certain calculations and came to the conclusion that the rent payable by the defendants to the plaintiff should be Rs. 129-2-0 in one *kist* in the month of *Falgoon*. With this variation he affrmed the report of the Commissioners and directed that final decree should be prepared according to his judgment—the report and the maps of the Commissioners were to be made part of the decree. A decree was drawn up in accordance with the direction of the Subordinate Judge and it was signed by the Subordinate Judge on the 31st July, 1916. We are informed that from that date the defendants went on paying the rent fixed by the Subordinate Judge at the rate of Rs. 129-2-0 to the plaintiff. Then about 3½ years subsequent to the judgment of the Subordinate Judge on the 19th January, 1920, the plaintiff put in an application for amendment of the decree purporting to make the application under ss. 151 and 152 of the Civil Procedure Code. The Subordinate Judge then in office thereupon called for a report from his clerk who was in charge of the duty of preparing decrees. The clerk made two reports stating that the Commissioners had made certain errors, and that is the matter which we shall have to consider. In the opinion of the clerk the error that the Commissioners had made in their report, which had subsequently been acted upon by the Subordinate Judge in his judgment, was that they had put down the rent realizable with regard to certain properties according to the Record of Rights prepared with regard to those properties But in setting down the rent realizable for those properties they had made a mistake. The plea of the defendants was that the Commissioners did not set down the rent according to what was recorded in the Record of Rights. Their plea was that the plaintiff himself had submitted to the Commissioners a *khatian* showing what were the actual realizations of the different *mahals* and of various other properties in question and the Commissioners had either adopted the rents as given in those *khatians* or they came to their own conclusion as to the rents which should be considered payable with regard to certain properties. This last has reference to the question as to the amount of rent payable for lands for which rent in kind is actually realized. The Subordinate Judge who, it may be stated in passing, was a different Subordinate Judge from the Subordinate Judge who passed judgment in the case, held that the Commissioners were the agents of the Court and that he had the power to correct those mistakes. He came to the conclusion that there were the mistakes as pointed out by the clerk whom he asked to make a report. Apparently, the clerk prepared his report from the schedule attached to the petition filed by the plaintiff for amendment of the decree because in one instance we find that a certain error appeared in the same shape in the petition as in the report of the clerk. However that may be, the order was made by the Subordinate Judge that the decree should be amended as reported by the clerk. The report of the clerk in the first instance was that the amount which the Subordinate Judge had decreed to be payable as rent by the defendants to the plaintiff should be increased from Rs. 129-2-0 to Rs. 346-13-6. Then the clerk made a further report and in that report he stated that the amount should be increased further and in place of Rs. 129-2-0 as decreed by the Subordinate Judge the amount should be Rs. 372. From this order of the Subordinate Judge accepting the report of the clerk the defendants moved this Court and some of our difficulties have been caused by the attitude the parties took at the hearing of the Rule in this Court. One should have thought that the defendants might have taken the plea that the judgment of the Subordinate Judge was not based upon any arithmetical or clerical error, and the decree was in accordance with the judgment. If there was any mistake in the judgment it could only be amended by way of review or appeal. But unfortunately, it seems, for certain unexplained reason, that was not the at-

titude that was taken on behalf of the defendants. It seems, on the other hand, their case also was that there had been some errors in calculating the price of paddy and rice agreed upon by the parties. But it is apparent that the contention of the defendants was that the Commissioners proceeded upon the *khatian* and that of the plaintiff was that they did so upon the Settlement Record. The order of this Court was, as we understand it, that if there was any clerical error in the decree that might be amended and if it was more than a clerical error that was not a question of amendment of the decree. Whatever that may be, by the ordering portion of the judgment the case was sent down to the lower Court for the purpose of considering whether the report of the Commissioners and the partition proceedings were based upon the Settlement Record, or upon the *khatian* agreed to between the parties and then to dispose of the application according to law. The case went back accordingly to the lower Court and the matter was heard by a Third Subordinate Judge, Mr. Rajendra Lal Sadhu, and judgment delivered on the 22nd February, 1922. It must be here stated that no amendment of the decree was actually made under the previous order of the Subordinate Judge dated the 6th of December, 1920. Before the Third Subordinate Judge oral evidence was adduced by both parties as to how the Commissioners proceeded to make their report whether basing it upon the Record of Rights or upon the *khatian* as presented before them by the plaintiff. The Subordinate Judge says that it was not safe to decide the question on the oral evidence, but there were materials on the record to come to a correct conclusion. Here it must be stated that one of the Commissioners who was originally a Pleader for the plaintiff was dead at the time. The other Commissioner who was a Pleader for the defendants was alive and the regrettable thing is this, that he considered that it was not inconsistent with his position which he took as a Commissioner to appear for the defendants as a Pleader at the hearing of the matter before the Subordinate Judge. If evidence was admissible at all as regards the procedure adopted by the Commissioners he would be a witness and the best witness with regard to the matter. But most unfortunately the Pleader did not realize his position that he had acted in the matter in a *quasi*-judicial character, and he could not properly act as an Advocate in the case. But, however, it seems that the Subordinate Judge himself did not point out the impropriety of the conduct of the Pleader and he allowed him to appear as a Pleader in the case, and that gentleman pointed out to the Subordinate Judge that long before the hearing in one of the reports by the two Commissioners they had stated that they did not remember a certain matter as to what procedure they had adopted, and it was not likely that he would remember anything as to what was done in 1916, at the time when the matter was taken up before the Subordinate Judge in 1922. The learned Advocate for the appellants asked us to call that gentleman as a witness before us; even if we were inclined to do so it would be useless, as what he did not remember in 1922, he could not possibly remember in 1926, and it would not be reasonable to ask him to remember things which happened ten years ago. That, however, is not a matter we need consider now.

The next thing is that the Subordinate Judge on certain grounds held that the Commissioners proceeded upon the Record of Rights. The first observation that we must make with regard to the procedure adopted in this case is that we cannot approve of the procedure that evidence should be taken as regards the question as to the matter on which a Court of Law based its judgment in order to consider whether there is any arithmetical or clerical error in the judgment, apart from what is contained in the judgment itself. Here it must be stated that it does not appear either in the report of the Commissioners or in the judgment of the Subordinate Judge of June, 1916, that the rent-roll was given in accordance with what was recorded in the Record of Rights. It is contended by the appellants that Mr. Sadhu was in error in holding that the Commissioners took the rents from the Record of Rights. The Subordinate Judge at page 385 of his judgment takes one item, No. 426, and says that the rent according to the *khatian* (Ex. A-15) was given at Rs. 176-9-4. But according to Ex. A (19) the total rent of that item is Rs. 160-14 which is in accordance with the Record of Rights and the Commissioners took that amount from the record. It is argued by the learned Advocate for the appellants that the Subordinate Judge

is in error in coming to his conclusion on that basis. It is pointed out to us that in Ex. A (15) at pages 17 to 20 of the second part of the paper-book, in the remarks, column it was stated that the tenure lies within five villages, Sathikhola, Guakhola, Majhgram, Paschim Cheramuddi and Goalkhati. The rent according to *khatian* is Rs. 176-9-4 and according to the Record of Rights (given in column 6 of the paper) Rs. 160-15-0. At page 30 of same book in Ex. A (19) the rent is shown as distributed in different items in different villages, that is, Kalidasia, Sathikhola, Majhgram, Guakhola and Paschim Cheramuddi. Adding the items the total rent amounts to Rs. 160-14-10. In the remarks' column it is stated that this property lies within *Mouza* Cheramuddi, Goalkathi and others. Goalkathi, it will be remembered, is also mentioned in Ex. A (15). In Ex. A (19) rent payable for part of the tenure with regard to *Mouza* Goalkhati has not been taken into account because that *mouza* was allotted to the defendants. It cannot, therefore, be said that in dealing with the tenure No. 426 the Commissioners took into account the rent as given in the Record of Rights and not as given in the *khatian*. It has also been shown to us by taking another item from Ex. A (17). No. 435, that the Commissioners did not take into account the rent as given in the Record of Rights. At page 17 of Part II of the paper book, the rent of that property according to the *khatian* was taken as Rs. 54-8-0. According to the Record of Rights it was Rs. 44-8-9 and it will be seen by reference to page 34 of the same part that the rent was shown in the last column to be Rs. 54-8-6, that is the amount as was stated in the *khatian*; and this figure was taken as the figure for the rent which was to be divided, in proportion as will be seen by reference to pages 30 and 34 of Part II of the paper-book and to page 52 of Part I. We accept the contention of the appellants as correct.

The Subordinate Judge has next stated that from the report it appears that the Commissioners referred to the *dags* and areas of the Settlement Records. That is no doubt true. But that does not establish that the rent was also taken from the Settlement Record. It seems to us to be reasonable that when the plaintiff himself prepared and produced certain papers from his own office showing what was the actual realisation from each of the properties and also showing what was the rent recorded in the Settlement Records he wanted the Commissioners to proceed upon the basis that what was actually realized from each of the properties should be taken into account in making the partition. This is an aspect of the case which has not at all been considered by the Subordinate Judge. It passes our comprehension as to why this paper was prepared by the plaintiff showing the actual *jama*, what was unrealized, then showing in another column what was the rent recorded in the Record of Rights and again showing what was the actual realization and so forth if there was no desire of its being acted upon. We have no doubt whatsoever that the Commissioners proceeded to make the partition with reference to the actual amounts realized or realizable as shown in the *khatians* which the plaintiff has himself prepared. It will also appear from the report of the Commissioners dated the 17th June, 1916, that they did not take the rent payable in the *khatians* with regard to every item because it shows that they took the quantity of paddy realized to be actually less than what was mentioned in the *khatians* in certain items. They have also made alterations as regards price of the paddy and so forth. The obvious inference, it seems to us from these proceedings, is that although the Record of Rights might have been before the Commissioners, which, however, is not on the record as it ought to have been if it was taken in evidence by the Commissioners, that they did not proceed entirely with reference either to the Record of Rights or to the *khatians*. Then it appears as we have already stated that the plaintiff prepared these *khatians* and produced them before the Commissioners evidently with the object that the actual rent realized should be taken from those papers. The plaintiff actually took the rent as fixed by the Subordinate Judge after consideration of the report in his judgment of June, 1916, for about four years and after a lapse of that period he professed to have discovered that the decree had been erroneously drawn up. This procedure suggests to us that the plaintiff was advised by some person whose business it is to make profit out of the litigation of others to take the course he has taken and owing to the unfortunate way the proceedings have dragged on the adviser has got his reward.

Then another thing happened, which we should not omit in mentioning, that after the judgment of Mr. Rajendra Lal Sadhu, the Third Subordinate Judge who had dealt with this matter on the 22nd February, 1922, there was another application before a Fourth Subordinate Judge and his decision is dated the 10th of April, 1923. The application before him was by both the parties. Defendants, of course, wanted to get rid of the effect of the decision of Mr. Sadhu and the plaintiff wanted something more and by the decision of Mr. Upendra Nath Biswas in 1923 the plaintiff got something more, because there was some inconsistency in the judgment of Mr. Sadhu under which he directed that the rent payable by the defendants to the plaintiff which was fixed by the original judgment to be Rs. 129-2-0 should be increased to Rs. 252-11-8, while at the end of his judgment he said that the decree should be amended as indicated in the report of the execution clerk which was made in 1920. Mr. Biswas by his order corrected this anomaly agreeing with the rest of the judgment of Mr. Sadhu, and increased the amount of rent payable to the defendants to Rs. 372. The plaintiff appeals from the decree as amended by that order. The intermediate order of the other Subordinate Judges were not given effect to but the decree was amended on the 24th March, 1925, under the orders of Mr. Biswas. In our opinion, the grounds on which the Subordinate Judges other than the Subordinate Judge who delivered judgment in the suit held that there was an error in the decree cannot be sustained. The view taken by them that the Commissioners had distributed the rent of the tenures with reference to the Record of Rights is baseless. Moreover, the report of the Commissioners was considered and modified as regards the amount of rent payable by the defendants, by the Subordinate Judge in his judgment of June, 1916. There was no arithmetical or clerical error in the judgment of the Subordinate Judge which might have been corrected under s. 151 or s. 152 of the Civil Procedure Code. If there was any error, that error ought to have been corrected on appeal; or if there was any error apparent on the face of the record there might have been an application for review of judgment under O. XLVII, r. 1 of the Civil Procedure Code. The Subordinate Judge after consideration of the facts came to the conclusion that the rent payable by the defendants was Rs. 129-2-0. The decree as originally drawn up was quite in accordance with the judgment and there was nothing wrong in it. Without the judgment being amended or set aside that decree could not have been amended or set aside by an indirect attack. On behalf of the respondent it was urged that we might amend the judgment under those sections of the Civil Procedure Code, because some wrong has been done to his client. There is nothing in the judgment which comes within the purview of s. 151 or s. 152 of the Civil Procedure Code. The proper remedy, as already indicated, was by way of review or appeal against that judgment if there was anything wrong in it

The result, therefore, is that this appeal is allowed and the decree as amended must be set aside and it should be brought in accordance with the judgment delivered on the 27th June, 1916. The only alteration that seems necessary to be made is that those lines which have been struck off in the decree as originally framed in red ink should be restored and it must be set forth that the defendants would be liable to pay Rs. 129-2-0 as rent to the plaintiff.

The appellants are entitled to their costs in this Court and in the lower Court. We assess the hearing-fee at five hundred rupees.

R. L. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 296 OF 1926.
October 28, 1926.

Present:—Mr. Justice Addison.

HUKAM CHAND—DEFENDANT—PETITIONER

versus

JOWALA SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. IX, r. 13—Application to set aside ex parte *decree —Dismissal for default — Restoration — 'Sufficient cause'—Refusal to restore—Material irregularity—Revision*

An application to set aside an order dismissing in default an application for setting aside an *ex parte* decree is competent and a Court acts with material irregularity in the exercise of its jurisdiction if it dismisses the

application for restoration on the ground that such an application is not maintainable.

Ganesh Prasad v. *Bhagelu Ram* (2) and *Abdul Rahman Shah* v. *Shahana* (3), followed.

On the day fixed for the hearing of an application to set aside an *ex parte* decree the petitioner did not appear as it was not a day fixed for evidence and as he was living at a very distant place. His Counsel had deputed his *Munshi* to watch and inform him when the case was called. The Counsel arrived two minutes after the application had been dismissed in default:

Held, that there was sufficient cause for setting aside the order dismissing the restoration application in default and that an order refusing to set aside that order of dismissal was materially irregular and could be set aside in revision

Petition for revision of the order of the Subordinate Judge, First Class, Rawalpindi, dated the 16th December, 1925.

Mr. *M. S. Bhagat*, for the Petitioner.

Sardar *Man Singh* and Mr. *B. D. Qureshi*, for the Respondent.

JUDGMENT.—On the 4th of April, 1925, both a summons and a registered letter were sent to the defendant to appear on the 30th of April, 1925, in answer to the plaintiff's suit. The report on the summons was that he was not served as he was away for 20 days and it was not known when he would return. The registered letter was marked "Refused." On this the Presiding Judge ordered substituted service under O. V, r. 20 of the Civil Procedure Code and passed a decree *ex parte* in favour of the plaintiff against the defendant on the 22nd of May, 1925. On the 23rd of August, 1925, the defendant applied to set aside the *ex parte* decree against him, alleging that he had only come to know of it the day before. Notice was ordered to issue on this application to the decree-holder for the 10th October. On that date the petition was dismissed in default. On the same day, namely, the 10th of October, 1925, an application was made to set aside the order of dismissal in default regarding the first petition. The Subordinate Judge refused to do so and against his decision this revision petition has been admitted.

The only statement on the record was that of the petitioner's Counsel to the effect that he had ordered his *Munshi* to stay in the verandah of the Court and to inform him whenever the application was called. Accordingly, he was called at once by his *Munshi* and arrived in Court to find the original petition dismissed in default a few minutes after this was done. The Subordinate Judge, however, considered on the strength of *Pitambar Lal* v. *Dodee Singh* (1) that the second application must be treated as an original application to set aside the *ex parte* decree and, that being the case, it was clearly time-barred. That seems to have been his principal reason for dismissing the second petition though he has also said that the Counsel's absence was no ground for setting aside an *ex parte* decree.

It is clear that what happened was that the Counsel was two minutes late, that the petitioner did not come that day, as it was not a day fixed for evidence, on account of the fact that he was then living in Gurdaspur, which is a long distance from Rawalpindi. There thus was sufficient cause for setting aside the order dismissing the first application in default and the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in refusing to set aside that order. Further, it was held in *Ganesh Prasad* v. *Bhagelu Ram* (2) and in *Abdul Rahman Shah* v. *Shahana* (3) that an application to set aside an order dismissing in default a previous application does lie and that it is not necessary to treat the second application as an original application to set aside the *ex parte* decree. For this reason also the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in holding that the second application could only be looked upon as an original application.

I accept this petition for revision and, setting aside the order of the Court below dated the 16th December, 1925, hereby set aside the order of dismissal in default with regard to the first petition, dated the 23rd August, 1925, and direct that it be restored to the pending file. The Subordinate Judge will now proceed to a decision whether the first application to set aside the *ex parte* decree should be granted or not. The parties will bear their own costs here.

R. L. *Petition accepted.*

A. N. A.

(1) 78 Ind. Cas. 358; 46 A. 319; 22 A. L. J. 191; A. I. R. 1924 All. 503; L R. 5 A 226 Civ.

(2) 89 Ind. Cas. 350; 47 A. 878; L. R. 6 A. 412 Civ.; 23 A L. J. 817; A. I. R. 1925 All. 773.

(3) 58 Ind Cas. 748; 1 Lah. 339; 82 P. W. R. 1920; 1 Lah. L. J. 188.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1001 OF 1924.

December 2, 1926.

Present:—Mr. Justice Iqbal Ahmad.

JAWAHIR GIR—DEFENDANT—APPELLANT

versus

JAGARNATH PRASAD—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit for damages for wrongfully cutting and appropriating tree, whether of Small Cause nature—Second appeal—Unnecessary prayer for declaration, effect of—Parti *land—Sale of tree by sub-tenant—Purchaser's rights—Possessory title.*

The mere addition of a prayer for a declaration cannot prevent a suit from being of the nature cognizable by a Court of Small Causes provided it is really a suit of that nature. [p. 315, col. 2.]

Ramachendraiyar v. *Noorulla Sahib* (2), followed.

Although the sale of a tree standing on *parti* land by a sub-tenant is of no avail as against the *zemindar*, yet the purchaser acquires a possessory title to the tree, and is, therefore, entitled to recover damages from a person who wrongfully cuts and misappropriates the tree. [*ibid.*]

Gobind Prasad v. *Mohan Lal* (1), followed.

A possessory title is good against the entire world except the true owner. [p. 316 col. 1.]

[The question whether a suit for damages for wrongfully cutting away and misappropriating a tree falls within Art. 35 (*ii*) of Sch. II of the Provincial Small Cause Courts Act considered but not decided.]

Second appeal against the decree of the District Judge, Benares, dated the 14th of March, 1924.

Messrs. *P. L. Banerji* and *Gadadhar Prasad*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—This is a defendant's appeal and arises out of a suit for a declaration, that a certain mango tree, that had been cut by the defendant, belonged to the plaintiff and for recovery of Rs. 30 on account of damages for the mango tree so cut.

The plaintiff's case was that on the 21st of September, 1920, he purchased the tree in question from two persons Ganga and Khurbur, who owned that tree, and as such the defendant had no right to misappropriate the timber thereof.

The defence to the suit was that the tree in dispute belonged to the defendant, and that in any case the vendors of the plaintiff had not a transferable right in the tree and the sale by them was absolutely void, and that the sale in favour of the plaintiff was fictitious and without consideration.

The trial Court held that the sale in favour of the plaintiff was for consideration and that the defendant's allegation that the tree belonged to him and not to the vendors of the plaintiff was not correct. It further held that inasmuch as the vendors of the plaintiff were mere sub-tenants in the village and the tree in dispute was on a *parti* land the vendors of the plaintiff had no right to sell the tree, but relying on the case of *Gobind Prasad* v. *Mohan Lal* (1) that Court held that even though the sale in the plaintiff's favour was of no avail as against the *zemindar*, the plaintiff had a possessory title to the tree and this entitled the plaintiff to a decree against the defendant.

The lower Appellate Court has affirmed the findings arrived at by the trial Court and has held that the plaintiff's allegation, that Ganga and Khurbur were the owners of the tree in dispute, was proved, and on that finding has, for the reasons assigned by the trial Court, affirmed the decree of that Court.

Against the decree of the lower Appellate Court this second appeal has been filed by the defendant. A preliminary objection, is taken to the hearing of the appeal, by the learned Counsel for the respondent, on the ground that the suit being of a nature cognizable by a Court of Small Causes, and the value of the subject matter of the suit being less than Rs. 500 a second appeal does not lie in this Court. The learned Counsel for the appellant has argued that the suit was of a nature that was excluded from the cognizance of a Court of Small Causes, and has placed reliance on Art. 35 (*ii*) of the Second Schedule to the Provincial Small Cause Courts Act. Before dealing with the preliminary objection taken by the learned Counsel for the respondent, I must point out that the mere fact that a declaratory relief was sought by the plaintiff would not make the decree of the lower Appellate Court appealable to this Court, if the relief for damages, which the plaintiff claimed, could have been obtained by him without asking for a declaration. The mere addition of a prayer for a declaration cannot prevent the suit from being of the nature cognizable by a Court of Small Causes provided it was a suit of that nature. This was the view taken in the case of *Ramachendraiyar* v. *Noorulla Sahib* (2). In the present case there can be no room for doubt, that the plaintiff, on proving the

(1) 24 A. 157.

(2) 30 M. 101; 1 M. L. T. 314; 16 M. L. J. 477 (F B).

facts set out in the plaint, could have been given a decree for damages claimed by him, even if a declaration of his title was not sought for by him in the plaint.

On the question whether or not a suit of the present nature is cognizable by a Court of Small Causes, there is a divergence of judicial opinion in this Court. It has been held by a learned Judge of this Court in the case of *Kunwar Pal* v. *Madan Mohan* (3) that a case like the present does not come within Art. 35 (*ii*) of the Second Schedule to the Small Cause Courts Act and is cognizable by a Court of Small Causes. Whereas it has been held in the case of *Dukhi* v. *Dhanni Misir* (4) by another learned Judge of this Court that a case like the present does come within the Article mentioned above and is exempt from the jurisdiction of the Court of Small Causes. I may also point out that it has been consistently held by the Calcutta High Court that a suit like the present is not cognizable by a Court of Small Causes: *vide Ram Prasad Pramanik* v. *Sricharan Mandal* (5), *Helaluddi Molla* v. *Abdul Gafur Molla* (6) and *Lalu Sardar* v. *Chedali Mrioha* (7). In this state of conflict of judicial opinion, I would not have decided this case without sending it before a larger Bench, if I were satisfied that this appeal cannot be disposed of without a determination of the point of law involved in the preliminary objection.

It appears to me that on the findings arrived at by the Courts below the decrees of those Courts are perfectly correct. It may be that the vendors of the plaintiff had not a transferable right in the tree sold to the plaintiff but the transfer could only be assailed by the *zemindar*. On the findings of the lower Appellate Court, the plaintiff was in peaceful possession of the tree in dispute and had thus a possessory title which was good against the entire world except against the true owner. The defendant has been found not to be the owner of the tree and as such the case comes within the principle of law in the case of *Gobind Prasad* v. *Mohan Lal* (1).

(3) 71 Ind. Cas. 645; 21 A. L. J. 213; A. I. R. 1923. All. 428.

(4) 73 Ind. Cas. 956; 21 A. L. J. 357; A. I. R. 1923 All. 543.

(5) 41 Ind. Cas. 276; 21 C. W. N. 1109; 27 C. L. J. 594.

(6) 41 Ind. Cas. 936.

(7) 45 Ind. Cas. 15.

The defendant not having a shadow of right to the tree is liable to answer the claim of the plaintiff for damage.

The result is that I dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1079 OF 1924.

December 3, 1926.

Present:—Mr. Justice Ashworth.

RAM LAL KOERI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PANCHU AHIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property of joint family—Revenue registry in the name of some members—Compromise decree against these members, whether binding on family—Manager, power of, to confess judgment.

Where a person is entered in the revenue papers as representing himself and others of his family he can be sued, in a suit calling in question that entry, as representative of these other members. [p. 317, col. 1.]

It is competent for the persons representing a family in the village *khewat* to confess judgment in a suit brought against the family on the ground that it had no interest in the land. [p. 317, col. 2.]

A compromise decree passed against a manager or representative of a joint Hindu family is binding on the other members of the family in the absence of fraud or collusion. [*ibid.*]

Jagan Nath v. *Mannu Lal* (1), followed.

Second appeal against the decree of the Additional Subordinate Judge, Azamgarh, dated the 25th February, 1924.

Mr. *N. Upadhia*, for the Appellants.

Mr. *Harnandan Prasad*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs-appellants for an injunction against the defendants interfering with the plaintiffs' rights as occupancy tenants in plots Nos. 824, 825 and 728 in a certain village and for possession in case the Court held that they were out of possession.

The plaintiffs' case was this. In the Settlement of 1307 *Fasli* (1900 A. D.) the predecessors-in-interest of the defendants along with other persons had been incorrectly entered as occupancy tenants where as really the predecessors-in interest of the plaintiffs were the occupancy tenants: that in 1910 the plaintiffs (or their predecessors-

in-interest) sued one Sunahi and Jaggu along with other persons for a declaration that the entry in the Settlement Papers was wrong: that the suit was compromised and that in execution of a decree based on the compromise the plaintiffs or their predecessors-in-interest were given possession against the said Jaggu, Sunahi and other persons. No immediate action was taken for correction of the revenue papers but in 1922 the plaintiffs applied for correction of the papers. The application though granted at first was thrown out in appeal. Hence this suit.

The suit was decreed by the Munsif who gave the decree both for injunction and for possession. In first appeal, however, the Additional Subordinate Judge of Azamgarh has dismissed the suit in respect of two of the numbers, 824 and 728. The plaintiffs consequently appeal.

The reason for dismissal of the suit by the Additional Subordinate Judge is that he found that the defendants-respondents were not bound by the compromise of 1910, inasmuch as, although the defendants are either sons or nephews of persons who were parties to the compromise and subsequent proceedings, yet their father or uncle, as the case may be, was not entitled to give up the defendants' rights in the holding in the absence of sufficient cause being shown by the plaintiffs, and the Court held that there was no evidence to prove that the compromise was necessary.

There can be no question that if the compromise decree was passed against these relations of the defendants as representing their respective families it would bind the other members of the family provided that the compromise itself was executed by these persons on behalf of their families. It is said, however, that the burden of proving this latter fact was on the plaintiffs. It appears from this case that Juggu, Sunahi and Sarab Sukh were sued in the former suit of 1910 because their names alone were entered in the revenue papers. It appears reasonable to hold that where a person is entered in the papers as representing himself and others of his family he can be sued, in a suit calling in question that entry, as representative of these other members.

In *Jagan Nath* v. *Mannu Lal* (1) it was held that it was competent to the father of a joint Hindu family in his capacity as managing member of the family to refer to arbitration. In the same way I hold that it is competent for the persons representing a family in the village *khewat* to confess judgment in a suit brought against the family on the ground that it had no interest in the land. The same ruling is authority for holding that the manager or representative's acts are binding on the other members of the family in the absence of proof of fraud or collusion. I hold that the defendants were bound by the compromise decree in the absence of proof of fraud or collusion on the part of the members of the family who were parties to that decree.

It has been urged also as an answer to this appeal that the lower Appellate Court was wrong in holding that the suit against the defendants was not barred by limitation. The argument is that the compromise decree was only executed by symbolical possession being given to the plaintiffs and not by delivery of actual possession. This, it is said, is plain from the fact that in the previous suit the then plaintiffs contended that the then defendants were sub-tenants. This plea, however, ignores the terms of the compromise. The compromise of 1910 provided for the then plaintiffs getting possession. We can only presume that the then defendants were not only prepared to acknowledge the title of the then plaintiffs as occupancy tenants but were prepared to vacate the holding in their favour. The defendants themselves had not admitted up to the date of that compromise that they were sub-tenants and I see no reason for importing any such allegation into the terms of the compromise merely because the plaintiffs had made it in their plaint. I hold that the plaintiffs were given actual possession and consequently no limitation could bar their present suit.

For the above reasons I allow this appeal with costs and restore the decree of the trial Court. The plaintiffs will get their costs also in the lower Appellate Court.

A. N. A. *Appeal allowed.*

(1) 16 A. 231; A. W. N. (1894) 60; 8 Ind. Dec. (N. S.) 150.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 706 OF 1924.

June 18, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Cammiade.

HAR KUMAR DE—PLAINTIFF—APPELLANT

versus

JAGAT BANDHU DE—DEFENDANT—RESPONDENT.

Wrongful injunction—Suit for damages, maintainability of.

Although as a general rule an action does not lie for damages against a person for bringing a civil action, however malicious and unfounded it may be, yet a suit can be maintained for damages for wrongfully obtaining a temporary injunction. [p. 318, col. 2.]

Mohini Mohan Misser v. *Surendra Narain Singh* (1), commented upon.

Joykalee Dasee v. *Representative of Chandmalla* (5), *Raj Chunder Roy* v. *Shama Soondari Debi* (6) and *Bhushan Chandra Pal* v. *Narendra Nath Koor* (7), relied on.

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 1st December, 1923, reversing that of the Munsif, Patia, dated the 27th February, 1922.

Babu *Narendra Kumar Das*, for the Appellant.

Babu *Chandrasekhar Sen*, for the Respondent.

JUDGMENT.

Ghose, J.—This appeal raises a short question, but with regard to which there seems to be a good deal of controversy.

The plaintiff brought the suit for damages against the defendant for obtaining an order of temporary injunction wrongfully on insufficient grounds by reason of which the plaintiff had suffered damages, inasmuch as he had to pay compensation to a third person on account of breach of a contract for erecting a hut. The defendant had brought a suit for possession of a certain property and, in the course of the suit, he had obtained a temporary injunction restraining the present plaintiff from going on with the building operation on the disputed land. The suit was decided in favour of the present plaintiff and thereupon the injunction was dissolved.

It is unnecessary for me to state in detail all the facts alleged, having regard to the order that we propose to make in this case.

The trial Court passed a decree in favour of the plaintiff. On appeal by the defendant, the suit has been dismissed by the Subordinate Judge on the ground that such a suit as this is not maintainable. He relied on the authority of the case of *Mohini Mohan Misser* v. *Surendra Narain Singh* (1) for holding that the present action for damages is not maintainable.

The plaintiff appeals against that decision and the point that has been argued before us is that, according to the authorities of this Court, such a suit is maintainable. We have now to consider the question with reference to the cases that have been decided in this Court. There cannot be any doubt whatever that as a general rule an action does not lie for damages against a person for bringing a civil action, however malicious and unfounded it may be. The reason is this, that the defendant is amply compensated in the costs awarded by the Court and the Court has the authority to mould its decree for costs according to the circumstances of the case.

The question is whether under the present circumstances a separate suit for damages lies or not. At the outset I must refer to the case of *Norendra Nath Koer* v. *Bhusan Chandra Pal* (2) which came for consideration before a Full Bench of this Court. But it was held that the question referred to the Full Bench did not arise for decision in that case. In delivering the judgment of the Court, Mookerjee, Acting Chief Justice, made the following observation: "There are two sets of decisions in the reports: In one set it is laid down that a person, who unlawfully interferes with the exercise of the property rights of another, commits an act in the nature of trespass to property, and is liable for damages in an action for trespass. In the other series of cases it is laid down that no suit lies for damages against a defendant for maliciously and without reasonable and probable cause instituting a civil action. As an illustration of the former class, reference may be made to the case of *Bhut Nath Pal Mistry* v. *Chandra Benode Pal Chowdhury* (3). As an illustration of the latter class, reference may be made to the cases of *Bishun Singh* v. *Wyatt* (4) and *Mohini Mohan Misser* v. *Surendra Narain Singh* (1)." The learned Vakil for the appellant relies upon the case of *Bhut Nath Pal Mistry* v. *Chandra Benode Pal*

(1) 26 Ind. Cas. 296; 42 C. 550; 21 C. L. J. 68; 18 C. W. N. 1189.
(2) 57 Ind. Cas. 375; 31 C. L. J. 495 (F. B.)
(3) 16 Ind. Cas. 443; 16 C. L. J. 34.
(4) 11 Ind. Cas. 729; 16 C. W. N. 540; 14 C. L. J. 515.

Chowdhury (3), cited above, as directly in his favour. I do not find anything distinguishing the present case from that case. In that case it was held that because the defendant had obtained a temporary injunction in a previous suit for possession of property restraining the plaintiff from carrying on a building operation, the plaintiff was entitled to damages, as the act was in the nature of trespass to property. The case of *Bishun Singh* v. *Wyatt* (4), referred to above, also supports the contention of the appellant. In that case Mookerjee, J., in delivering the judgment of the Court, is reported to have observed (at page 520*): "The broad proposition formulated by the learned Vakil for the appellant that the suit as framed is not maintainable cannot consequently be supported, and the statement that the institution of an ordinary civil action, however unfounded, vexatious and malicious it may be, is not a good cause of action must be qualified when there has been arrest of person or seizure of property." The learned Judge then referred to the provisions of the Civil Procedure Code of 1882, which are now embodied in s. 95 of the present Code, and lower down he referred to a number of cases in this Court which I have examined and found as supporting the proposition that a suit like the present one is maintainable. It is unnecessary for me to enumerate the cases over again. But I may observe that there is the high authority of Sir Barnes Peacock, C. J., in the case of *Joykalee Dasee* v. *Representative of Chandmalla* (5) in favour of this proposition. The learned Chief Justice observed at page 135 † that: "If a plaintiff brings a suit or makes an application, maliciously or without probable or reasonable cause, to a Court of competent jurisdiction, to seize property of another person as the property of his judgment-debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle, a person may be liable to damages for applying for an injunction upon grounds which he knows to be insufficient." In the case of *Raj Chunder Roy* v. *Shama Soondari Debi* (6) where a suit was brought to recover damages for injuries caused by an arrest in accordance with a decree of a competent Court, White, J., in giving the judgment of the Court, states the special circumstances under which such a suit is maintainable. One of the grounds is that the injury sustained is something other than an injury which has been or might have been compensated by an award of costs of the suit, *e.g.*, that he has suffered from collateral wrong. It is unnecessary for me to cite other cases on the question. I may only refer to the last case of *Bhushan Chandra Pal* v. *Narendra Nath Koor* (7), the same case which was referred to the Full Bench [*NorendraNath Koer* v. *Bhushan Chandra Pal* (2)] This case came up for decision before a Division Bench consisting of Mookerjee, Acting Chief Justice, and Fletcher, J., and the learned Judges held that a suit for damages was maintainable for wrongful attachment of property, which was pointed out by the defendant as the property of his judgment-debtor. That such a suit is contemplated by the Legislature as capable of being brought would appear by a reference to sub-s. (2) of s. 95, Civil Procedure Code. In that section, arrest, attachment and temporary injunction are placed under the same category. It would also appear to be absolutely wrong to deprive the plaintiff of a right of suit and to say that his only remedy is by an application under s. 95, Civil Procedure Code, if he suffers damages to the extent of more than Rs. 1,000. I may also refer to Art. 35, cl. (*k*) of the Second Schedule of the Provincial Small Cause Courts Act which contemplates that such a suit is maintainable and under which the cognizance of a suit like this is taken out of the jurisdiction of a Small Cause Court. It can, therefore, hardly be said that a suit like the present one is not maintainable.

It is quite true that certain observations made in the judgment of Mr. Justice Fletcher in the case of *Mohini Mohan Misser* v. *Surendra Narain Singh* (1) may be considered as supporting the decision of the learned Subordinate Judge. But the general observations made with regard to the maintainability of a suit for damages for wrongfully obtaining a temporary injunction may be considered as *obiter*, because it was held in that case that even assuming that the suit was maintainable it was barred by limitation. Mr. Justice

(5) 9 W. R. 133.
(6) 4 C. 583; 2 Ind. Dec. (N. S.) 370.

* Page of 14 C. L. J.—[*Ed.*]
† Page of 9 W. R.—[*Ed.*]

(7) 60 Ind. Cas. 280; 32 C. L. J. 236.

Richardson expressed his doubt whether such a suit was maintainable or not. But having regard to the long line of cases which have been enumerated in the judgment in the case of *Bishun Singh* v. *Wyatt* (4) to some of which I have referred, it can hardly be doubted that such a suit has always been regarded in this Court to be maintainable.

It is unnecessary for me to state at this stage what the plaintiff must prove in order to succeed in such a suit. The only thing that we have to decide now and about which we need express an opinion, is that having regard to the observations made above it cannot be held that the suit should be thrown out on the ground that it is not maintainable.

The judgment and the decree of the Subordinate Judge must, therefore, be reversed and the case sent back to the lower Appellate Court for decision on the other questions involved in the case.

Costs of this appeal will abide the final result.

Cammiade, J.—I agree.

Appeal allowed:
Case remanded.

R. L.
A. N. A.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1881 OF 1925.

November 24, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

Maharaj HARI RAM—DECREE-HOLDER—APPELLANT

versus

SRI KRISHAN RAM—JUDGMENT-DEBTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 27, 28, 31, 43—Adjudication order—Arrest of insolvent in execution whether prohibited—Expiry of time for applying for discharge—Automatic discharge.

Without an order of the Insolvency Court an insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge. The provisions of s. 43 of the Provincial Insolvency Act do not contemplate any automatic discharge.

Abraham v. *Sookias* (1), followed.

The mere adjudication of a judgment-debtor as an insolvent does not prevent his arrest in execution of a decree obtained against him.

Radhey Shiam v. *Mohammad Taqi* (2), followed.

Execution second appeal from the decree of the District Judge, Ghazipur, dated the 9th September, 1925.

Mr. *U. S. Bajpai*, for the Appellant.

Messrs. *Gadadhar Prasad* and *Mokshada Prasad*, for the Respondent.

JUDGMENT.—A decree-holder applied for the arrest of the judgment-debtor, who was an insolvent, and it was granted by the first executing Court of the Subordinate Judge. On appeal the learned District Judge held that in consequence of an order of adjudicaton in favour of the judgment-debtor passed by the Insolvency Court under s. 27 of the Provincial Insolvency Act, the respondent was protected from arrest. The decree-holder has come here in second appeal. It was first argued that the application for execution was time-barred because the insolvent was automatically discharged six months after the order of adjudication, that is, on the 13th November, 1921. The application was made by the appellant on 2nd March, 1925. We are of opinion that the provisions of s. 43 of the Insolvency Act do not contemplate any automatic discharge. A Bench of the Calcutta High Court was of that opinion in *Abraham* v. *Sookias* (1). Without an order of the Insolvency Court the insolvent is not discharged automatically at the end of the period fixed in the order of adjudiction for an application for discharge.

In s. 28 of the Provincial Insolvency Act the effect of an order of adjudication is described and protection from arrest in execution of a decree is not provided. If it had been the intention of the Legislature to protect insolvents, the provisions of s. 31 which permit an insolvent to apply to the Insolvency Court for a protection order, would have been superfluous. We find that one of the learned Judges of this Court, Mr. Justice Daniels, held in Oudh that under the present Act the creditor can proceed to arrest as if no adjudication had taken place [*Radhey Shiam* v. *Mohammad Taqi* (2).] The first Court was correct in its opinion. We set aside the decree of the lower Appellate Court, restore the decree of the first Court and decree this appeal with costs of all Courts.

A. N. A. *Appeal allowed.*

(1) 81 Ind. Cas. 584; 51 C. 337; A. I. R. 1924 Cal. 777.

(2) 72 Ind. Cas. 911; A. I. R. 1923 Oudh 36; 9 O. & A. L. R. 37.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES
NOS. 543 AND 544 OF 1923.
June 23, 1926.

Present:—Mr. Justice Pearson and Mr. Justice Chakravarti.

BHABADEB CHATTERJEE—
DEFENDANT—APPELLANT

versus

BHUSAN CHANDRA MUKHERJEE—
PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 26, object of—'Easement'—Right to bathe in tank—Acquisition of easement otherwise than under Statute—Long user of tank by public—Dedication.

The object of s. 26 of the Limitation Act is to make more easy the establishment of easement rights, but it is remedial and neither prohibitory nor exhaustive and it does not exclude or interfere with other modes of acquiring easements. [p. 321, col. 2.]

A right to the use of the water of a tank for bathing and for other domestic purposes can be acquired in India by long user. [p. 321, col. 1; p. 322, col. 1.]

When one finds that a tank exists from a long time past and the public have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for the public use. Such a dedication can be inferred from the manner and the duration of such use. [p. 322, col. 2.]

Per *Pearson, J.*—The word 'easement' as used in s. 26 of the Limitation Act is wider than it is in English Law and includes at least a *profit a prendre.* [p. 321, col. 1.]

Per *Chakravarti, J.*—Section 26 of the Limitation Act does not give an exhaustive description of the rights acquired by long user. [p. 322, col. 1.]

Second appeals against the decrees of the District Judge, Burdwan, dated the 10th June, 1922, affirming those of the Munsif of Burdwan, dated the 30th June, 1920.

Babu *Baranasibasi Mukerjee*, for the Appellant.

Babu *Sarat Kumar Mitra*, for the Respondent.

JUDGMENT.

S. A. No. 543 OF 1923.

Pearson, J.—The plaintiff claims the use of the water in the defendant's tank for bathing and other purposes. His claim has been upheld.

The argument on behalf of the appellant has been rested very largely upon considerations arising upon the English authorities relative to the law of easements prevailing in that country, though it is indeed conceded that the word in its use in s. 26 of the Indian Limitation Act, as shown by the Explanation in s. 2, is wider than the meaning of the word in English Law and would include at least a *profit a prendre.* In cases of this character attention has been directed by the Judicial Committee to the danger of proceeding necessarily upon English authorities. In *Bhola Nath Nundi* v. *Midnapore Zemindary Co.* (1), a case of villagers claiming a right of pasturage, Lord Macnaghten said: "It appears to their Lordships that on proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed. Unfortunately, however, both in the Munsif's Court, and in the Court of the Subordinate Judge, the question was overlaid, and in some measure obscured, by copious references to English authorities and by the application of principles or doctrines more or less refined, founded on legal conceptions not altogether in harmony with Eastern notions." I am of opinion that the present case does not in fact fall to be decided upon a question of easement arising under s. 26 of the Limitation Act, and it does not follow that, because the plaintiffs may fail to show their right to relief on that ground, they are, therefore, entitled to no relief, and the suit must fail. As pointed out in *Rajrup Koer* v. *Abul Hossein* (2) the object of the Statute was to make more easy the establishment of rights of this description; but it is remedial and neither prohibitory nor exhaustive, and it does not exclude or interfere with other modes of acquiring easements. Clearly, therefore, it is open to the plaintiff to show, if he can, that he is entitled to a right which may be of that nature although not actually within the strict meaning of the term. It is argued that the Court ought not to make out a case for the plaintiff which he has not made himself, and that the plaintiff in this case has grounded his case on easement and must, therefore, succeed upon that or not at all. From an examination of the plaint, however, which has been placed before us, it is clear that though mention is made of the plaintiff's claim as upon an easement it is also said to be based on customary right, and in any case what the plaintiff has done substantially is to plead the facts and ask for such relief as he may be entitled to. There is nothing unreasonable in the right claimed, which is one without which in this country probably village life could not go

(1) 31 C. 503; 8 C. W. N. 425; 14 M. L. J. 152; 31 I. A. 75; 8 Sar. P. C. J. 611 (P. C.).

(2) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

on. From the long continued user which has been proved in the present case it is reasonable to presume a dedication of the tank to these uses. As pointed out in *Rajrup Koer's case* (2) the upholding of such a right does not mean that the owner is shut out altogether from improving or dealing with his property. An instance where a right of this nature was upheld is to be found in *Channanam Pillay* v. *Manu Puttur* (3).

For these reasons I think the appeal must be dismissed with costs.

Chakravarti, J.—I agree with the order which my learned brother proposes to make in this case and wish to add a few observations.

The right claimed by the plaintiff is for the use of the water of the tank for bathing and for other domestic purposes. It was clearly stated in the plaint that the claim is based upon user for over 20 years peacefully, uninterruptedly, openly and as of right. The lower Appellate Court has found upon the evidence that such user by the plaintiff has been fully made out. On this finding the lower Appellate Court has granted a decree to the plaintiff and has affirmed the decree of the trial Court.

The main contention of the defendant-appellant is that the right which the plaintiff sought to establish was a right of easement and that in the circumstances of this case the plaintiff's claim cannot be based on easement as contemplated in s. 26 of the Limitation Act.

It is a well-established proposition now that s. 26 of the Limitation Act does not give an exhaustive description of the right acquired by long user.

The right claimed in this case is by the neighbouring residents of an old tank. The water of the tank they say was used for the various purposes stated in the plaint.

In a hot country like Bengal necessity for the user of pure water is very great indeed. A good tank largely supplies such a need and it is only a rich man who can find the money necessary for the construction of such a tank but the poor people also need the water which they cannot themselves provide for. In these circumstances it has been an immemorial custom in this country that those who can afford think it an act of great public benefaction to construct tanks for public use. The Hindu Sastras have laid down in numerous texts the high merits which a man acquires by digging a tank and dedicating it for public use. I shall quote one of such texts which when translated runs as follows:—

"As there is no sustaining of life in both worlds without water consequently the wise man should always construct a reservoir of water. A well is equal to the Agnistama Sacrifice, in a desert it equals the Ashwamedha": Vishnudharmattora. "Again it promises heaven to the maker of wells and large tanks." See P. N. Saraswati's Tagore Law Lectures, pages 192-193. The words by which the dedication is made are these:—"This water has been given by me to all beings in common; let all beings be satisfied by bathing, drinking and immersion." See page 205. Whether from religious views or from a sense of public duty many thousands of such tanks were excavated all over Bengal and dedicated for public use.

In this country, therefore, where this mode of dedication is so widely known when one finds that a tank exists from a long time past and the public, that is the people of its neighbourhood, have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not necessary, therefore, to seek the aid of s. 26 of the Limitation Act for the acquisition of such a right. It should also be remembered that in this country a large number of tanks do exist which were intended for private use and no dedication to the public was intended, although, as a matter of fact, the people in the neighbourhood are ordinarily allowed to use the water. The words used in dedicating such a tank are expressive of a limited use. They are these:—"Let the relations in my family that have come to this world, or will come into existence in future have satisfaction by means of the water: let all beings enjoy it by washing, drinking and bathing," (see Raghu Nandan in his Treatise on Consecration of Tank.) Such private tanks are usually found in the compound of a private house. In such cases the user by the neighbours will, of course, be merely taken to be permissive. The Court shall find in the circumstances of each case whether the tank is a private one, or one in which a dedication in favour

(3) 1 M. L. J. 47.

of the public may be presumed. The tank in this suit was not shown to be a private one.

S. A. No. 544 OF 1923.

Our judgment in S. A. No. 543 of 1923 governs this appeal also. This appeal is, therefore, dismissed with costs.

R. L.
A. N. A.

Appeals dismissed.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 205 OF 1925.
September 3, 1926.
Present:—Mr. Justice Carr and Mr. Justice Mya Bu.

MA AH PU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

U PO LAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Buddhist Law—Partition—Grandchildren's right to claim partition.

Out-of-time grandchildren by an *Orasa* child cannot claim partition of the joint property of their grandparents on grandfather's re-marriage after their grandmother's death. [p. 323, col. 2.]

Tun Myaing v. *Ba Tun* (1), followed.

Appeal from the District Court, Henzada, in Civil Regular No. 11 of 1925.

Mr. *Paw Ten*, for the Appellant.

Mr. *Thein Maung*, for the Respondent.

JUDGMENT.—The plaintiffs-appellants are the grandchildren of the 1st defendant-respondent U Po Le, being the children of U Po Le's *Orasa* son Mg Po Kaing who predeceased his mother, Ma Ma. Ma Ma died in 1283 *B. E.*, and two years later U Po Le married Ma Pu Shan, the 2nd defendant-respondent. The 3rd defendant-respondent Ma Ma Zun is the only surviving child of U Po Le and Ma Ma.

The first question for determination is whether the plaintiffs-appellants are entitled to claim a share in the joint property of their grand-parents on the re-marriage of their grandfather U Po Le.

In support of the plaintiffs-appellants' claim two distinct lines of argument have been adopted. One is that as the out-of-time grandchildren by an *Orasa* child are placed on the same plane as their uncles and aunts in matters relating to inheritance in the estate of their grandparents, and as after the death of one of the parents a younger child or younger children of a Burmese Buddhist couple can claim partition of the parental estate from the surviving parent on the latter marrying again, the grandchildren by an *Orasa* child who predeceased his first deceased parent, have the same rights as their uncles or aunts in regard to the right to claim partition from the surviving grand-parent, who re-marries. We find it unnecessary here to decide the question as to the rights of the younger children of a Burmese Buddhist couple to demand partition on the re-marriage of the surviving parent after the death of the other, because we are not satisfied that the first part of this line of argument can be upheld. Out-of-time grandchildren of the *Orasa* child are placed in the same position as their uncles or aunts in the division of estate of their grand-parents, whereas other out-of-time grandchildren are allowed, in such division, only one-fourth of what their parents would have got had they survived their own parents. The origin of this rule lies in the *Dhammathats* cited in ss. 162, 163 and 164 of the Digest, Volume I, which deal with the modes of division among the children and grandchildren of a couple who have both died, and we can find no authority whatsoever to warrant an extension of that rule or its principle to a case like the one under consideration. The last sentence in the extract from *Manu Vannana Dhammathat* in s. 163 of the Digest, Volume I, runs: "The same rule applies whether the partition is made during the lifetime of the grandparents or after their death," and it may at first sight appear to give support to the argument in favour of an extension of the rule to the present case. But it is impossible to fix its import with any claim to accuracy, since we are unable to say that the clause "whether the partition is made during the lifetime of the grand-parents" was intended to refer to any form of disposition of property other than what an aged or dying owner might do by means such as a *Thedansa* more or less in accordance with the ordinary rules of succession.

The other line of argument leads us to an examination of the texts dealing with the rights of the grandchildren as such as against the surviving grand-parent to demand partition on the latter's re-marriage. The grandchildren whose parents are still alive obviously have no such right. The texts relating to the point under consideration are to be found in ss. 260 and

261 of the Digest, Volume I, each of which presents the same extracts from three *Dhammathats*; *Yazathat*, *Vinicchaya* and *Kungyalinga*. These two sections are headed respectively. "The grandfather being dead, partition between the grandmother and the grandchildren on her marrying again," and "the grandmother being dead partition between the grandfather and his grandchildren on his marrying again."

The extract from the *Yazathat* gives as much as three-fifths of the whole estate to the grandchildren on the re-marriage of the surviving grand-parent. The reason for the rule appears to lie in the desire to penalize the grand-parent for "not living unmarried as he or she ought to, on the maintenance and support of the grandchildren." This reason is pregnant with practical absurdities, for we are unable to believe that in the year 991 *B. E.* when this *Dhammathat* was compiled, appreciably more than at the present day, most grandchildren were capable of looking after and willing to maintain, their grandparent. Again, in granting three-fifths of the general joint estate of the grandparents to the grandchildren, the *Dhammathat* goes much farther than the largest possible extent to which the rights even of the children might for the sake of argument be stretched in partitioning the joint estate of their parents after the death of one parent and on the re-marriage of the survivor, which is only half.

Inasmuch as the *Kungyalinga* merely reproduces the same rule, it requires no separate discussion here. The only other *Dhammathat* on the point is the *Vinicchaya* according to which on the re-marriage of the survivor the grandchildren whose parents predeceased the deceased grandparent receive half of the share to which their parents were entitled. It is difficult to rely on this extract of the *Dhammathat* on account of its isolated nature.

It has been argued that support is lent to the claim of the grandchildren by the *Dhammathat* quoted in s. 256, with its cognate s. 258, and s. 257 with its cognate s. 259. These *Dhammathats* lay down the rules for partition of the grand-parents' estate on the death of one of them between the surviving grand-parent and the grandchildren. If these rules hold good, we would at once find that the grandchildren who are the children of younger children, who predeceased their first deceased parent, are in a better position than the younger children themselves, who according to the accepted principles, have no right whatsoever in the parental estate. In regard to these rules the *Manugye a Dhammathat* of paramount authority is conspicuously silent.

For these reasons, we are unable to hold that the rules in ss. 256 to 259 lend any material support to those laid down by *Venicchaya* in ss. 260 and 261.

For the above reasons we are unable to find sufficient grounds for departing from the decision in the case of *Tun Myaing* v. *Ba Tun* (1) which is for practical purposes on all fours with the present case. In the result we dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(1) 2 L B. R. 292.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 941 OF 1924.

December 1, 1926.

Present:—Mr. Justice Iqbal Ahmad.

Sheikh ABDUL KARIM—PLAINTIFF—APPELLANT

versus

DURGA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 8—Mortgage—Suit for redemption—Preliminary decree—Second suit for redemption before passing of final decree, whether maintainable—Limitation Act (IX of 1908), Sch. I, Art. 181.

A mortgagor who has failed to comply with the terms of a decree in a redemption suit filed by him, is not entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage. [p. 325, col. 1.]

During the period of three years prescribed by Art. 181 of Sch. I of the Limitation Act for applying for a final decree, a suit for redemption continues and during that period the rights of the mortgagor and mortgagee are governed by the preliminary decree. [p. 325, cols. 1 & 2.]

Sita Ram v. *Madho Lal* (1) and *Hari Ram* v. *Indraj* (2), distinguished.

Second appeal from the decree of the District Judge, Benares, dated the 29th of February, 1924.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—The question of law involved in this appeal is, as to whether a mortgagor, who has failed to comply

with the terms of a decree in a redemption suit filed by him, is entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage. The trial Court answered the question in the negative and dismissed the suit. The decree of the trial Court dismissing the plaintiff's suit has been affirmed by the lower Appellate Court, though not for the reasons assigned by the trial Court. In my judgment a second suit for redemption is not maintainable during the continuance of a previous suit for redemption of the same mortgage or until the decree in the former suit is capable of execution.

By the preliminary decree in a redemption suit, the mortgagor is allowed a period of six months within which he is required to pay the amount declared due, at the date of such decree, to the mortgagee, as a condition precedent to the redemption of the mortgage, and on his failure to do so that decree directs the sale of the mortgaged property. The provisions of O. XXXIV, r. 8 (4) are imperative, and if the payment required to be made by the mortgagor is not made by him within the time allowed by the preliminary decree, the Court is, unless it extends the time for payment, bound under the provisions of O. XXXIV, r. 8 (4), on application by the mortgagee, to pass a decree, that the mortgaged property or a sufficient part thereof be sold and the proceeds of the same be applied in the manner provided for in sub-cl. (4). It follows, therefore, that the failure of the plaintiff in a redemption suit to pay the amount fixed by the preliminary decree within the time allowed by that decree entitles the mortgagee to have a decree in terms of sub-cl. (4) of r. 8 of O. XXXIV and this right is vested in the mortgagee by the very terms of the preliminary decree which is binding both on the mortgagor and the mortgagee. The mortgagee has, by Art. 181 of the First Schedule to the Limitation Act, a period of three years from the last date fixed by the preliminary decree for the payment of the amount due on the mortgage, to apply for a final decree. If he fails to make such an application within three years, his right to apply for a final decree becomes time-barred, and the redemption suit comes to an end. But during the three years, from the date fixed for payment by the preliminary decree, the suit for redemption continues, and during that period the rights of the mortgagor and the mortgagee are governed by the preliminary decree.

The necessary consequence of holding, that during the continuance of the first redemption suit, the mortgagor is entitled, notwithstanding his failure to pay the amount fixed by the preliminary decree within the time allowed by that decree, to institute fresh suit for redemption, will be to hold that the mortgagor is entitled to ignore the previous decree. This obviously he cannot be allowed to do inasmuch as the decree in the former suit is binding on him. Again, if a second suit for redemption were under the circumstances noted above to be allowed to continue, there will be the anomaly of two suits for redemption of the same mortgage, between the same parties, going on side by side and ending in two inconsistent decrees for redemption. The decrees in the two suits must necessarily be inconsistent, inasmuch as the time fixed for payment of the mortgage money by the decrees in the two suits must necessarily be different. If the preliminary decrees in the two suits will be inconsistent, it follows that final decrees prepared on the basis of those preliminary decrees must necessarily be inconsistent, with the result that there will be two contradictory decrees capable of execution between the same parties. Therefore, to answer the question of law noted in the beginning of this judgment in the affirmative would be to reduce the law to an absurdity, and I am not prepared to so answer the question unless I am compelled by authorities to do so.

But it was urged by the learned Counsel for the appellant, with all the earnestness at his command, that the authorities do countenance the maintainability of a second suit for redemption, under the circumstances noted above. As, in my judgment, the assertion and the argument of the learned Counsel for the appellant are not well-founded, I must proceed to notice the authorities cited by him, and to give my reasons for holding that a second suit for redemption is not, under the circumstances of the present case, maintainable.

The first case on which reliance has been placed by the learned Counsel for the appellant is the Full Bench decision of this Court reported as *Sita Ram* v. *Madho Lal*

(1). No doubt, in that case it was held that notwithstanding the fact that the mortgagors had failed to make the payment within the time allowed by the decree in a former redemption suit brought by them, they were entitled to maintain a second suit for redemption. But the facts of that case were essentially different. In that case the former suit for redemption was brought in the year 1869 and presumably the decree for redemption was passed in the same year, and the second suit was not brought till about 27 years after the institution of the first suit. The decree in the former redemption suit provided that on failure of the plaintiffs to make the payment within the time allowed by that decree "this judgment shall after the expiry of the above-mentioned period be considered as non-existent." That decree was so to say entirely one-sided. In other words, though it entitled the mortgagors to redeem the mortgage within a certain period, it did not invest the mortgagee with a right to have an order for sale of the mortgaged property, on the failure of the mortgagors to make the payment within the time fixed by that decree. This being the form of the decree in the first redemption suit, this Court, having regard to the fact, that the only limitation put upon the right given to the mortgagors to redeem the mortgage by s. 60 of the Transfer of Property Act, was that that right could be extinguished by acts of the party or by an order of the Court, held that the order of the Court embodied in the decree in the first redemption suit not having taken away that right, the second suit for redemption was maintainable. Moreover, in that case the first decree in the redemption suit had, long before the institution of the second suit for redemption, become incapable of execution by lapse of time, with the result that by allowing the second suit for redemption there could not come into existence two decrees, contradictory to each other and capable of execution. The question that the Full Bench had to decide in *Sita Ram's case* (1) was in the words of the Acting Chief Justice "whether a mortgagor who has obtained a decree for redemption, which does not contain a provision that if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained." In the present case I have not to consider that question, inasmuch as it is common ground that the plaintiff in the first suit for redemption filed by him obtained a preliminary decree on the 21st of February, 1922, which provided that in the event of the payment of the mortgage-money not being made by the plaintiff, within the time fixed by that decree, "the right of redemption will be lost." After the period so fixed by the Court expired without any payment having been made, the second suit for redemption giving rise to the present appeal was filed by the plaintiff on the 4th of July, 1923. During the pendency of this second suit for redemption, the preliminary decree in the first suit for redemption was, at the instance of the present plaintiff, amended and brought into conformity with the provisions of O. XXXIV, r. 8 (4). After the amendment of the decree the defendant-mortgagee applied for a final decree, but the disposal of that application was stayed pending the decision of the second suit for redemption filed by the plaintiff out of which the present appeal arises.

It will be noticed, from the statement of the facts contained above, that in the present case there was never a decree of the nature that formed the subject-matter of consideration in the case of *Sita Ram* v. *Madho Lal* (1). The first suit for redemption filed by the plaintiff still continues and will continue till the Court draws up a final decree in the case. If it were to be held that the suit giving rise to the present appeal is also maintainable, the necessary consequence will be, as pointed out above, to bring two inconsistent preliminary and final decrees into existence. This question was not for consideration before the Full Bench in the case of *Sita Ram* v. *Madho Lal* (1) nor was it considered.

It is pressed upon me, by the learned Counsel for the appellant, that there are certain observations in the judgment of Banerji, J., which point to the conclusion, that that learned Judge intended to hold, and did hold, that unless the Court in pursuance of the decree in the first redemption suit passes an order that the mortgaged property or a sufficient part thereof be sold as provided by s. 93 of the Transfer of

(1) 24 A. 44; A. W. N. (1901) 194 (F. B.).

Property Act, the right of the mortgagor to redeem the mortgage is not extinguished and this right he can exercise by a second suit for redemption. My attention has been invited to a passage at page 53 of 24 Allahabad which runs thus:—"The rulings of the Madras High Court, which he (Aikman, J.) has considered in detail, are consistently to the effect that in the case of a usufructuary mortgage, the right to redeem is not extinguished, unless, upon default in payment on or before the day fixed, the Court passes an order that the mortgaged property or a sufficient part thereof be sold as provided in s. 93."

I have consulted all the rulings of the Madras High Court noticed in the judgment of Aikman, J., in the case of *Sita Ram* v. *Madho Lal* (1) and I find that in none of those cases in which a second suit for redemption was held maintainable, was the decree in the former suit for redemption of the mortgage capable of execution. This being so, the observations of that eminent Judge quoted above cannot be held to apply to the circumstances of the present case.

The next case relied on by the learned Counsel for the appellant is the case of *Hari Ram* v. *Indraj* (2). In that case also the decree for redemption obtained in the former suit had become, long before the institution of the second suit for redemption, incapable of execution, because of lapse of time, and as such, that case also is distinguishable from the present case.

It may be pointed out that before the passing of the present Code of Civil Procedure, the proceedings for the preparation of a decree absolute were execution proceedings, and the suit for redemption did not continue, as is the case now after the passing of the new Civil Procedure Code, up to the date of the passing of the final decree.

The case of *Nakta Ram* v. *Chiranji Lal* (3) is an authority for the proposition that "where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions, the property will be sold or he will be debarred of all his rights to redeem." If the decree in the first redemption suit provides that the mortgaged property, on the failure of the plaintiff to make the payment required by the preliminary decree, will be sold, then so long as the time to apply for a final decree does not expire, a second suit for redemption is not maintainable inasmuch as the first suit for redemption continues till then.

For the reasons given above, in my judgment, the decrees of the Courts below are right and must be affirmed. Accordingly, I dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

(2) 69 Ind. Cas. 167; 20 A. L. J. 631; A. I. R. 1922 All 377; 44 A. 730; 9 O. & A. L. R. 123.

(3) 5 Ind. Cas. 269; 7 A. L. J. 185; 32 A. 215.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 499 OF 1925 AT HEARING CHANGED INTO CIVIL REVISION No. 155 OF 1926.

June 4, 1926.

Present:—Mr. Justice Duckworth.

U PAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MAUNG PO TU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 20—Specific Relief Act (I of 1877), s. 14—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 15—Civil Procedure Code (Act V of 1908), ss. 100, 115—Vendor and purchaser—Deficiency in area sold—Purchaser's right to compensation—Suit for compensation—Suit of Small Cause nature—Second appeal—Misapplication of law—Revision.

Section 20 of the Contract Act is not applicable where the purchaser obtains substantially the thing which is the subject-matter of sale. [p. 328, col. 2.]

Compensation can be awarded to a vendee for deficiency in the area of land purchased by him and it makes no manner of difference that the mistake is discovered only after the conveyance has been executed and registered. [p. 328, col. 2; p. 329, col. 1.]

Janga Venkatareddy v. *Jamal Ahmed Saheb* (2) and *Rutherford* v. *Acton Adams* (3), followed.

A suit by a vendee for compensation for deficiency in the area sold is a suit of a Small Cause nature. [p. 328, col. 2.]

Puttangowda Mallangowda Patil v. *Nilkanth Kalo Deshpande* (1), followed.

Misapplication of law by a Court is a material irregularity in the exercise of its jurisdiction justifying interference in revision. [p. 329, col. 1.]

Mr. *Sein Tun Aung*, for the Appellants.

Mr. *J. C. Chatterjee*, for the Respondents.

JUDGMENT.—The facts of this case, for the present purpose, may be stated as follows:—

The plaintiffs-appellants, U Pan and Ma Nge, purchased in March 1924 from the respondents, Ma Pa Tu and Ma Kyaw, two plots of paddy land, really amounting to one holding, which is described in the conveyance which was drawn up according to the tax receipts, as containing 16·18

acres. The purchase price of Rs. 5,000 was duly paid and the conveyance was duly executed and registered, so that the property actually passed to the appellants. The latter also took delivery and worked the land.

In or about January, 1925, Government resumed a portion of the land on the western side on the ground that the plot had encroached on Government enclosed land and fined the 1st respondent. The acreage was thus reduced to 15·40 a reduction of 1·44 acres.

The plaintiffs appellants appear to have every intention of adhering to their purchase, which is presumably a good one, but in these proceedings they sued the respondents for compensation amounting to Rs. 3,281, owing to their loss in acreage due to the Government resumption.

The plot, which was resumed by Government is alleged to have been included in Government enclosed land as far back as 1907. There is, however, no definite or satisfactory proof of this fact with the exception of a statement of a new Revenue Surveyor.

The respondents prior to the sale had been in possession of the land for 10 years and had been assessed to revenue for the full area. They, therefore, claimed to have known nothing of the fact of encroachment, but it must be noted that, when they bought the land in 1914, the area was much smaller, and the encroachment must have been made by them.

The loss in acreage bears a proportion of roughly 1/12th of the whole acreage and thus, though financially it may be of importance to the vendor and vendee, it is in reality not a large portion of the whole acreage. In other words, the appellants have purchased substantially what they laid themselves out to purchase.

The respondent-vendors defended the suit on the ground that they were not liable, inasmuch as the resumption had taken place nearly a year after the plaintiffs' purchase and occupation of the land.

The trial Court dismissed the suit.

The District Court, on first appeal, confirmed that decision, holding that the whole contract was void under s. 20 of the Contract Act and that the sole relief to which the plaintiffs-appellants were entitled was to file a suit for the return of the whole amount of the purchase-money. Against this decision the plaintiffs-appellants come up to this Court on second appeal.

Mr. Chatterjee, for the respondents, raised a preliminary point at the hearing that there was no second appeal, inasmuch as the suit was one cognizable by a Court of Small Causes, and was not valued at over Rs. 500. He contended that the suit did not fall under Art 15 of the Second Schedule of the Provincial Small Cause Courts Act, but was a mere claim for compensation amounting to Rs. 428.

Mr. Sein Tun Aung, on the other hand, urged that the suit was one in which title to a part of the land was involved and that, therefore, under Art. 11 of the same Schedule it was not a suit of a Small Cause Court nature. He further claimed that Art. 15 was applicable, inasmuch as it was in reality for rescission of a contract.

I think that there can be no doubt Mr. Sein Tun Aung's contentions are erroneous and that the suit was one cognizable by a Court of Small Causes, inasmuch as it was a suit for compensation for part failure of consideration owing to a mutual mistake. The Full Bench case of *Puttangowda Mallangowda Patil* v. *Nilkanth Kalo Deshpande* (1) seems to me to render it clear that a suit of the present nature is cognizable by a Court of Small Causes.

There is, therefore, no second appeal under s. 102 of the Civil Procedure Code.

Mr. Sein Tun Aung thereupon asked that the memorandum of appeal should be treated as an application for revision under s. 115 of the Code of Civil Procedure. Mr. Chatterjee did not seriously oppose. I am, therefore, treating the appeal as an application for revision.

In my opinion, the learned Additional Judge of the District Court misapplied s. 20 of the Contract Act, which is not applicable where the purchaser obtains substantially the thing which was really the subject of the sale.

The law in these cases appears to me to be well laid down in the case of *Janga Venkatareddy* v. *Jamal Ahmed Saheb* (2) where Sadasiva Aiyar and Napier, JJ., of the Madras High Court held that in such cases as this, compensation can be awarded and obtained. As a matter of fact, the learned Judge applied the legal princi-

(1) 20 Ind. Cas. 974; 37 B. 675; 15 Bom. L. R. 773.
(2) 29 Ind. Cas. 394; (1915) M. W. N. 422; 29 M. L. J. 122; 18 M. L. T. 364.

ples involved in s. 14 of the Specific Relief Act.

Their Lordships of the Privy Council in an appeal from the Court of Appeal of New Zealand in the case of *Rutherford* v. *Acton Adams* (3) laid down very similar principles.

It would seem that it makes no difference that the mistake is discovered only after the conveyance has been executed and registered.

Since the District Court and the trial Court applied the wrong law to the case, there are clearly good grounds for interference in revision under s. 115 of the Civil Procedure Code, inasmuch as the lower Courts acted illegally and with material irregularity in the exercise of their jurisdiction.

I allow this revisional application, set aside the decrees of the two lower Courts and decree the plaintiffs-appellants' claim for Rs. 426 with costs on that amount in all Courts.

R. L. *Application allowed.*

(3) 32 Ind. Cas. 47; 84 L. J. P. C. 238; (1915) A. C. 866 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1653 OF 1922.

December 13, 1926.

Present:—Mr. Justice Harrison and Mr. Justice Agha Haider.

GOBIND MAL—PLAINTIFF—APPELLANT

versus

RAM CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Land Redemption and Foreclosure Regulation (XVII of 1806), ss. 7, 8—Mortgage—Foreclosure proceedings—Presentation by special Mukhtar—Validity of presentation—Notice of foreclosure—Absence of reference to s. 7—Error as to amount—Proceedings, validity of—Power-of-attorney—Construction—General clause, effect of.

The presentation of an application under s. 8 of the Bengal Land Redemption and Foreclosure Regulation XVII of 1806 by a special *mukhtar* on the strength of a special power-of-attorney is not defective inasmuch as the word 'himself' in the said section is merely another way of putting 'in person' and by virtue of the provisions of O. III, r. 3 of the Code of Civil Procedure, acts which can be done in person can be done by an attorney. [p. 330, col. 1.]

In a notice for foreclosure proceedings under Bengal Land Redemption and Foreclosure Regulation XVII of 1806, the mortgagee has the option either of giving the actual contents of s. 7 and specifying the three methods in which foreclosure may be avoided, or of quoting the actual section and referring the mortgagor to its contents. A notice is not invalid merely because words 's. 7' do not occur in it provided the contents of the section are embodied in it. [p. 330, col. 2; p. 331, col. 1.]

An error in the amount shown in such notice does not render the notice invalid provided the claim is made quite clear, it being for the mortgagor to deposit or tender the amount which he believes to be due on the mortgage. [p. 331, col. 1.]

Mulraj v. *Harsa Singh* (1), followed.

A power-of-attorney authorising a person to conduct foreclosure proceedings which states that all the steps taken by him shall be accepted as done by the executant, empowers the holder of the power to present the application for foreclosure even though such power is not expressly conferred. [p. 330, col. 2.]

First appeal from the decree of the Subordinate Judge, First Class, Ferozepore, dated the 31st March, 1922.

Messrs. *Badri Das*, *Faqir Chand* and Pandit *Vas Dev Kuneria*, for the Appellant.

Messrs. *Moti Sagar* and *Jagan Nath Bhandari*, for the Respondents.

JUDGMENT.—The plaintiff in this case being the minor son of an original mortgagee brought a suit through his mother for possession of the mortgaged property after foreclosure proceedings under Regulation XVII of 1806 had taken place. This suit was contested on various grounds but mainly on the allegations that the presentation of the original application was not regular and that the notice was not valid. The suit was dismissed, the finding being that the *mukhtar* who presented the application was not duly authorised to do so inasmuch as the power-of-attorney was defective. In the second place it was held that the notice was not valid as it made no reference to s. 7 of the Regulation and stated the wrong sum as due, *i. e.*, it claimed interest in lieu of rent in addition to the principal. It was held that it was defective because of certain slight clerical errors in the body of the notice such as the 25th of October the actual date of execution of the mortgage being shown as the 26th of October which was the date of registration.

On appeal Counsel contends that the suit should have succeeded in spite of any such defects and further contends that there were no real defects at all and nothing more than immaterial clerical errors. The first point is that of presentation. Although this point has not been taken in this form by the Senior Subordinate Judge, Mr. Moti Sagar appearing for the respondents draws our attention to the wording of s. 8 of the Regulation. The words are "Apply for that purpose by a written petition to be presented by himself, (*i. e.*, the mortgagee)

or by one of the authorised Vakils of the Court, etc." The application in question was presented by a special *mukhtar* on the strength of a special power-of-attorney executed by the guardian of the minor *Musammat* Viro. Mr. Moti Sagar contends that the word 'himself' is stricter than the words 'in person' as used in O. III, r. 1 of the Code of Civil Procedure and draws an analogy from O. XXXIII, r. 3, where the presentation of a certain application can only be effected by a pauper himself or his duly authorised agent. In our opinion the word 'himself' is merely another way of putting 'in person' and under O. III, r. 1 of the Code of Civil Procedure an act which can be done in person can also be done by an attorney.

The second point is the validity of the power-of-attorney under which Ganga Ram was authorised to act. This, in our opinion, is a very much stronger point. The power-of-attorney runs as follows:—

"Application for issue of a foreclosure notice."

Then a recital of the names of the principal and the attorney and then the following:—

> "All acts and deeds performed by them shall be acceptable to me as if done by me. They are authorised to make mutual settlement to effect compromise, to conduct case jointly and severally, to appoint any Vakil or Bar.-at-Law or certified *mukhtar* to conduct the case, to nominate any arbitrator or Umpire for purposes of the decision of the case, to get witnesses summoned, to put questions to the parties and their witnesses to produce evidence of all sorts and to realize from Court money due to me after filing their receipt in Court. In short all the steps taken by them in this case shall be accepted, as done by me."

It has been held by the trial Court that this does not authorise the *mukhtar* to present the application itself but only to conduct the case in its subsequent stages. Great stress is laid by Counsel for the respondents on the passage which forms the central portion of this paragraph and which describes in detail certain acts. It is true that this passage does not include the presentation of an application and there is certainly all the difference in the world between the presentation and the subsequent proceedings and, were it possible to exclude the opening words of the concluding sentence in this paragraph we think there would be great force in what he says. The paragraph, however, must be read as a whole and we believe the meaning of it to be that the lady *Musammat* Viro, intended to authorise these two men jointly and severally to do all acts necessary in the matter of the presentation of the application and the following up the same, that where certain acts were described in detail they were merely instances of what could be done and that some such words as "in particular" should be read as inserted between the first and the second sentences in order to bring out this fact more clearly. In other words, we do not hold that this enumeration of acts is exhaustive and excludes every thing which is not therein contained, but rather that it is merely illustrative of what these attorneys may do. We realise that the matters are further complicated by the place in the paragraph in which the words "jointly and severally" occur, and that the meaning would have been very much clearer had these occurred at the beginning, for it is contended, and with some force that the power-of-attorney does not authorise, in so many words, each of the attorneys to do each or any of these acts himself. Holding, that this is the meaning which the paragraph, as a whole, conveys we find that the attorneys acted with due authority.

The next point is the actual wording of the notice and it is contended that this also is defective. The words "s. 7" are not used and the word "radium" or 'redemption' is not used. Various authorities have been quoted, more especially *Mulraj* v. *Harsa Singh* (1), *Wasawa Singh* v. *Rura* (2), *Ram Chand* v. *Sandal Khan* (3) and *Bulanda* v. *Fateh Din* (4). Excluding *Ram Chand* v. *Sandal Khan* (3), a judgment by a Single Judge which deals only, in our opinion, with the particular facts of that particular case, we find that the general gist of these rulings is that the mortgagee has the option, either of giving the actual contents of s. 7 and specifying the three methods in which foreclosure may

(1) 123 P. R. 1894.
(2) 24 P. R. 1895.
(3) 21 P. R. 1903; 83 P. L. R. 1903.
(4) 25 Ind. Cas. 504; 57 P. R. 1914; 256 P. L. R. 1914.

be avoided, or of quoting the actual section and referring the mortgagor to its contents. We do not find it anywhere laid down that a notice is invalid if the sacrosanct words "section 7" do not occur therein provided always that the contents of that section are embodied in the notice. The final objection is as to the amount, and on the authority of *Bhagirath* v. *Nath Mal* (5) it is contended that this is wrong. Whether right or wrong this defect, in our opinion, is cured by the view taken in *Barkat Rai* v. *Ali* (6). It is immaterial whether mistakes are made or not provided the claim is made quite clear and it is for the mortgagor to deposit or to tender the amount which he himself believes to be due on the foot of the mortgage. It is true that there is a distinction in this case in that not only is there some question as to the amount, but it is a fact admitted by both sides that the claim of future interest during the whole of the year of grace in advance is wholly unjustified. Even so we think that *Barkat Rai* v. *Ali* (6) governs the position for this claim was made quite clear. The sum was not added without due notice to the mortgagor, and it was for him to repudiate it if he wished to do so. We find, therefore, that in spite of the technical omissions the notice is good and valid. We accept the appeal and give the plaintiff a decree for foreclosure with costs.

A. N. A. *Appeal accepted.*

(5) 105 P. R. 1907; 184 P. W. R. 1907.

(6) 21 Ind. Cas. 643; 91 P. R. 1913; 341 P. L. R. 1913: 223 P. W. R. 1913.

CALCUTTA HIGH COURT.

In the matter of an APPLICATION IN SUIT No. 1016 OF 1925.

December 22, 1926.

Present:—Sir George Claus Rankin, KT., Chief Justice, and Justice Sir Charu Chunder Ghose, KT.

Shaikh HYAT MAHOMED—APPLICANT

versus

Shaikh MANNU AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 3, 23—Suit pending on Original Side of High Court—Division Bench, power of, to transfer—Judge of Original Side, whether 'subordinate' to High Court—'District Court,' meaning of.

A Judge of the Original Side of a High Court is not subordinate to the High Court and a Division Bench of the High Court has, therefore, no jurisdiction to transfer a case pending on the Original Side to another Court under s. 23 of the Code of Civil Procedure. [p. 332, col. 1.]

Although the word 'District' in the Civil Procedure Code includes not merely the local limits of what is ordinarily called a District Court, but includes the local limits of a High Court in its Ordinary Original Civil Jurisdiction, the words 'District Court' cannot, wherever they appear in the Civil Procedure Code, be construed to include a High Court in the exercise of its Ordinary Original Civil Jurisdiction. [p. 331, col. 2; p. 332, col. 1.]

Kedarnath Mondal v. *Gonesh Chandra Adak* (1), commented upon.

Application by defendants for transfer of suit under s. 23 of the Civil Procedure Code.

Mr. *H. S. Suhrawardy*, for the Applicant.

Mr. *I. C. Seth*, for the Opposite Party.

JUDGMENT.

Rankin, C. J.—In this case a mortgage suit was tried and decreed at Arrah. It would appear that a preliminary decree was passed on the 24th of June, 1921, and the final decree on the 27th of January, 1922. The sale was in April, 1922, at which the mortgagees purchased the properties. It is true that a writ for delivery of possession was issued in September, 1922, by way of execution on the Original Side of the High Court.

The present application concerns a suit brought by the defendants to that mortgage suit on the 20th April, 1925. It appears that that suit was brought to set aside the decree of the Subordinate Judge of Arrah on the ground of suppression of processes. Curiously enough the writ of summons was not served for more than a year. An application is now made to us by the defendants in the suit for an order that that suit be transferred to the Court at Arrah which is within the limits of the Province of Behar and Orissa.

It is said that the application is competently brought before this Division Bench by virtue of the terms of s. 23 of the Code of Civil Procedure. In our opinion, s. 23 of the Code of Civil Procedure does not govern this case so as to make this Division Bench a proper forum to which such an application can be made. It is quite true that the word "District," in the Civil Procedure Code includes not merely the local limits of what is ordinarily called a District Court but includes the local limits of a High Court in its Ordinary Original Civil Jurisdiction. That is a very different thing

indeed from saying that the words "District Court" wherever they appear in the Code of Civil Procedure mean and include a High Court in the exercise of its Ordinary Original Civil Jurisdiction. If that is what was intended to be laid down by Mr. Justice Fletcher in the case of *Kedarnath Mandal* v. *Gonesh Chandra Adak* (1), I do not agree with it. A case has been referred to which seems to me very much in point the case of *Fakaruddin Mahomed Chowdhry* v. *Garth* (2) and speaking for myself and bearing in terms also of s. 3 of the Civil Procedure Code, I decline altogether to hold that a learned Judge of the Original Side is a Court subordinate to the High Court. He is the High Court and, in my judgment, we would be going contrary to authorities and upsetting well-settled principles if we entertained the present application. It may be that one consequence of this ruling is that there is no machinery provided by express terms in the Civil Procedure Code for the particular occasion which has arisen. Even so the applicants may take steps on the ground of malicious abuse of process or on the ground of *forum conveniens*. We are not here to advise. We will not for the sake of dealing with this case lay down a principle which would interfere with the settled practice and constitution of this Court.

In my opinion, this application is incompetent and must be dismissed with costs.

C. C. Ghose, J.—I entirely agree.

A. N. A. *Application refused.*

(1) 12 C. W. N. 446.

(2) 3 C. W. N. 91; 26 C. 133; 13 Ind. Dec. (N. S.) 689.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1916 OF 1925.

January 12, 1927.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice and Mr. Justice Banerji.

FIRM SHEO PRASAD-RAM PRASAD—DEFENDANTS—APPELLANTS

versus

GOBIND PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), s. 46—Evidence Act (I of 1872), s. 92—Promissory note, suit on—Oral evidence to show that note can be enforced only in certain contingencies, admissibility of.

The liability in relation to a promissory note, or negotiable instrument, attaches by or from delivery, and s. 46 of the Negotiable Instruments Act provides that as between the immediate parties to an instrument it may be shown that the instrument was delivered conditionally, or for a special purpose only and not for the purpose of transferring absolutely the property therein. [p. 333, col. 2.]

In answer to a suit on a promissory note it is open to the defendant to lead evidence to show that the promissory note was given merely as a security for the plaintiff's share of the capital advanced towards a partnership and that the promissory note can be enforced only when such capital becomes payable to the plaintiff. [p. 336, col. 1.]

Second appeal from the decree of the District Judge, Moradabad, dated the 21st of May, 1925.

Messrs. *P. L. Banerji* and *N. P. Upadhiya*, for the Appellants.

Mr. *G. W. Dillon*, and Sir *T. B. Sapru*, for the Respondents.

JUDGMENT.—This is a second appeal which raises a very nice point of evidence, or rather the admissibility of evidence, a point which is constantly arising in various forms, and about which there is really a good deal of authority, both in the English reports and in the Indian reports.

The appeal is brought by the defendant, whose defence has in substance been struck out, on the ground that he had not been allowed to prove his real case, because it has been held against him that his real case consists of evidence which is rendered inadmissible by s. 92 of the Evidence Act. Inasmuch as the learned District Judge, who is now a member of this High Court, followed a reported decision, which seemed to be in point, by two Judges of this High Court which was, undoubtedly, binding upon him, he naturally decided in the way that he did. We are not making any complaint, and the existing practice is perhaps intelligible but, as a matter of fact, it is extremely embarrassing to have to decide the admissibility, or otherwise, of a fundamental piece of evidence, tendered in support of defence, when one has only the vaguest idea as to what that evidence is. It is not only embarrassing but also dangerous to the parties, because if the Court of Appeal is compelled to interfere and order either a new trial, or further evidence to be taken, there is great temptation to the party tendering the evidence, so to frame his evidence as to fit it into the propositions which have been extracted from the Court of Appeal. It is perhaps necessary, therefore, to utter a word of warning to the Court which will have to

take the evidence again in this matter, that a substantial variation from the original statements tendered, or attempted to be made, at the first hearing, should be regarded with suspicion; but at the same time it is desirable to utter a warning that that suspicion ought not to be allowed to rest upon evidence which is additional and is really only developing the point which the defendant all along desired to make. A further warning seems necessary, owing to the old complaint of the lack of training in precise pleadings, and the vague and inartistic way in which pleadings are allowed to pass muster in these Provinces, it would be unjust, as this Court has said scores of times, to apply a rigid standard of scrutiny to a pleading which, however, clumsily, was really endeavouring to set up the real defence, and is not flagrantly inconsistent with the story which the party attempts to support by his evidence. In a case of this kind it is true to say that whatever instructions are given to the Pleader in the initial stages of the case, when the pleadings have to be framed, no body really knows what the case of either side is until the matter comes into Court; and, as a matter of strict justice, the fault, where the Court has to deal with a vague and clumsy attempt in a pleading to set up a definite defence, is not entirely on the shoulders of the defendant and his Pleader. The law has, for excellent reasons, and as the result of long experience, provided machinery by which the other side, if there is doubt, prolixity, or vagueness about the pleading, may apply to the Court for an order for particulars, and the plaintiff in this case could, undoubtedly, have applied to the Court to direct the defendant to give further and better particulars of the defence sought to be set up under para. 3 of the further pleas. We recognise, however, that this machinery, valuable though it is for the purpose of clearing ground before the parties come into Court, is almost wholly ignored in the proceedings of the trial Courts, and little or no notice is taken of it until the unfortunate Court of Appeal is asked to disentangle the knot into which the case has tied itself for lack of adequate preparation.

The question of law, which we have to determine, turns upon the true application of two sections of the codified law, and we think we should be doing less than our duty indeed we have no right to interfere with this decision at all, without expressing our disagreement with the legal position which has been taken in the matter up to this moment, giving our reasons for so doing, and stating what we believe to be the law applicable to the evidence. The two sections are s. 46 of the Negotiable Instruments Act and s. 92 of the Evidence Act. Possibly owing to the unfamiliarity of the ordinary Courts with cases relating to bill transactions, the point has been discussed in the case before us, and other authorities which have been cited, as depending solely upon s. 92 of the Evidence Act. There is really no difference in substance between the two provisions, but at any rate in English business transactions the question arises far more often in relation to negotiable instruments, or promissory notes, than in relation to any other documents, and is easier to expound and easier to apply in relation to such documents. It must be borne in mind that the liability in relation to a promissory note, or negotiable instrument, attaches by or from delivery, and s. 46 of the Negotiable Instruments Act provides that as between the parties to an instrument (that means to say, the immediate parties) it may be shown that the instrument was delivered conditionally, or for a special purpose only, and not for the purpose of transferring absolutely the property therein. There really should be no difficulty in applying this simple provision. A note is sometimes given as, what is described as, collateral security. The term 'security' is misleading because a note of hand conveys no higher security than the personal liability of the executant—but it is a collateral liability, and arms the creditor with conclusive documentary evidence of the loan, for the recovery of which none-the-less he might sue even if he had no document at all; and in a case in which *A* lends *B* a thousand on a verbal promise to re-pay on demand, and a day or two afterwards *B* gives *A* a promissory note for a thousand, as what is called collateral security, it is clear law that if after *B* re-paid the thousand to *A*, *A* put the promissory note in suit, it would be open to *B* to set up the true story under s. 46, and to show that he gave the promissory note conditionally, or for a special purpose only, namely, as a document on which the plaintiff could sue in the event of *B* failing to pay the loan, or fulfil his verbal promise. Another illustration is that of a

signature upon a bill given by a guarantor, A guarantor, or surety, is always able under s. 46 to show that he put his name upon the bill merely as a guarantor for the debtor originally liable, and received no consideration, and that may be a matter of the utmost importance, because a surety has defences open to him, which are not open to the debtor. If the creditor gives the debtor unreasonable time for payment, so that the position of the surety is altered, the surety may set up in defence that he is discharged by the creditor having given time to the debtor, and he could not do that unless he could show under this section that he signed only in the capacity of a surety. In the great majority of cases no body can tell by looking at the bill whether the names are the names, for example, of three joint debtors, or of three persons who have accepted different liabilities. Similarly it may be shown that the instrument was delivered conditionally, that is to say, as a collateral undertaking, given to the creditor, to be enforced only in the event of the debtor failing to discharge some contemporaneous undertaking. There is, as we have said, no difference in substance but only in illustration and application between the provision in s. 46 of the Negotiable Instruments Act, and proviso 3 to s. 92 of the Evidence Act. Proviso 3 of s. 92 of the Evidence Act runs as follows:—"The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract.....may be proved." Applying that to the illustrations which we have given, and bearing in mind that the attaching of an obligation under the Negotiable Instruments Act is delivery, it is quite consistent with s. 92 of the Evidence Act that the signatory to a bill should be able to prove by oral evidence that the condition precedent at the time of the making of the bill, or the delivery of the bill, was that it should merely be a record of a collateral liability against the failure of some other undertaking.

Applying these considerations to the defence set up in this case, it appears to us after hearing such evidence as the defendant gave, not apparently in the ordinary course of the trial, but under the exceptional procedure of an examination conducted by the Court itself by way of anticipation and the wholly vague allegation in para. 3 of the defence that the defendant desired to prove, or was attempting to prove that the promissory note in question was not the substantive liability such as it would be if given for a loan, or for the payment of the price of goods sold and delivered, but was a collateral undertaking, or recognition of liability arising out of another contract in the nature of a partnership transaction under which the defendant had become answerable to the plaintiff for the sum of Rs. 2,188 set out in the note, which represented the plaintiff's share of the capital in the partnership when the partnership came to be dissolved.

The defendants' statement to the Court, roughly, was that he had bought or entered into a bargain and sale for the purchase of certain springs in Lahore some time in May and that being unable to put up the whole amount of the price, which, of course, would be the working capital in the business of selling these springs and iron things at a profit, he approached certain persons to come in as partners. He had deposited, he says, a thousand rupees to bind the bargain and to secure delivery, and had secured a person named Maula Baksh to come in as a partner, and presumably to provide capital. The story was very sketchily told, and was not extracted from him by any body. He went on to say that the plaintiff joined in the spring transaction only for Rs. 2,100. He gave the plaintiff no receipt. It only appeared in his account books, but either at the request of the plaintiff, or in the ordinary course of events, as would be expected between two business-men, it was considered right that the plaintiff should have some document which he could use as, what we have described as, a collateral liability, or which he could produce as conclusive evidence of his share in the partnership capital, or which, when dissolution came and there were substantial profits to be divided, he could tender as the mark of his claim in the distribution. The defendant distinctly stated, if he meant by what he appears to have said, that the promissory note was executed by him, which means given to the plaintiff to re-pay the sum of Rs. 2,100 which the plaintiff had paid towards the total sum necessary for purchasing the goods through him, the defendant, who was conducting the negotiations for their purchase and delivery from Lahore. We have not the slightest hesitation in holding that such evidence is not

only admissible, but is precisely the class of evidence contemplated by the proviso, which we have only partly cited, in s. 46 of the Negotiable Instruments Act, and in s. 92 of the Evidence Act We might emphasize an expression in s. 46, to which we have not hitherto adverted, namely, that it may be shown that the instrument was delivered not for the purpose of transferring absolutely the property therein. It is a significant feature of the evidence and cannot be altered as the result of any observation which we make in this judgment, that the defendant alleged that he deposited the money necessary for securing the goods in Lahore on the 21st of June, 1921. That may not be so, but it is a significant fact that the promissory note in question is dated the 15th of June; that is to say, before the actual liability of the defendant towards the plaintiff in the partnership transaction had become crystalized. The moment the money was handed over by the plaintiff to the defendant, the defendant became entitled to restore it if the transaction fell through; but if the transaction went through the plaintiff would have no claim upon the defendant until the partnership was dissolved, and it does seem to support the defendant's case, with regard to the preliminary deposit of the money in Lahore and the negotiations for the purchase which were taking place there, that the promissory note should have been dated the 15th of June.

The Courts below followed the decision of a two-Judge Bench of this Court, *Sri Ram* v. *Firm Sobha Ram-Gopal Rai* (1). No arguments are set out in the report, and s. 46 of the Negotiable Instruments Act was not even referred to. We doubt whether we should have come to the same decision as that Bench did on that occasion, but we desire to make it plain how we think authorities, which seem to be inconsistent with the view which we take, ought to be dealt with. The point of law, as we have said, in this case is clearly statutory. We have no authority to vary the language of the Statute, or to attempt either to alter or defeat its plain meaning. We have to apply it. There are cases where ambiguous expressions in Statutes give rise to fundamental differences of opinion. But where an authority is cited merely as an illustration of a particular application of language in a Statute, which is not in dispute, one can only say that a decision in such a case is not necessarily binding in another case. Circumstances alter cases, and we hold that we are free to apply what we understand to be the plain English of the Statute to the circumstances of this case, without regard to the fact that in another case a Bench of this High Court applied the same language to circumstances apparently similar in a different way. Whether these observations would be any assistance to any Subordinate Court, which was invited to decide or distinguish between the decisions we are giving to-day and the decision in the Allahabad Law Journal, we are unable to say, and, therefore, we will go this much further and say that if there is pronounced inconsistency between our decision and that decision, we do not hesitate to say that that decision was not correct. If any body should feel a difficulty in applying the provisions of these two sections he cannot do better than study the decision in *New London Credit Syndicate* v. *Neale* (2). The law in England and the law in India in this mattter does not differ. There was a simple Bill of Exchange for 110 pounds. There the contention was that, at the time the bill was accepted, an oral agreement was made, and was relied upon by the defendant, that if the defendant could not meet it at maturity, the drawers would renew it. The first observation is that that defence appears to be an attempt to vary the terms. The internal provisions of the bill were that it should be payable on a certain date, and an oral agreement that it should not be payable on that date but some other, looks very much like an attempt to vary the substance of the bill. The importance of the case is that Mr. Justice Darling, who tried it, believed the defence. Whether the evidence was objected to or not, it probably was, it was received and acted upon by the learned Judge. He held that the defendant's story was true and that the negotiation of the bill by the holders, which, of course, would put it in the hands of a third party, who could sue upon it, was in breach of good faith and a trick upon the defendant, having regard to the agree-

(1) 67 Ind. Cas. 513; 20 A. L. J. 315; 4 U. P. L. R. (A.) 153; 44 A. 521; A. I. R. 1922 All. 213.

(2) (1898) 2 Q. B. 487; 67 L. J. Q. B. 825; 79 L. T. 323.

ment that it should be renewed at maturity. The point of law, therefore, arose in the most concrete form. There was finding by an experienced Judge that the defence was true, and that the plaintiffs had agreed not to negotiate the bill, not to enforce it, but to renew it at the date of maturity; and, therefore, if that evidence, which was accepted, was admissible by law the plaintiff's suit failed; the old cases were cited in argument, including *Pym* v. *Campbell*, and the Court of Appeal held that it was inadmissible, because it was an attempt to vary the liability. The case is valuable because it contains two clear statements by two great commercial lawyers, which enable any body who takes the trouble to study them, to guide his course without possibility of mistake. Lord Justice A. L Smith said at page 490*: "If the evidence be to the effect that the document is only delivered as an escrow (which means to say, a provisional liability) or that it is not to take effect as a contract until some condition is fulfilled, it is admissible. But that is not this case." Lord Justice Vaughan Williams on the next page of the report said this: "For lawyers practising under the old system of pleading there was a convenient test in these cases as to whether the oral evidence which it was sought to give was admissible. If the evidence were such as would support a plea of the general issue in an action of contract, like *non est factum*, that is to say, if it amounted to shewing that, though the defendant signed the instrument, he signed it on the understanding that it should not be an effective instrument until some condition was fulfilled, then it was admissible." If in this case the truth really is that the defendant gave this promissory note on the understanding that it should be an effective instrument, if and when the liability arose upon his part to restore to the plaintiff his share of the capital, that evidence would, in accordance with that exposition of the Statute Law in India, be admissible.

We would only repeat that the Court to which we propose to refer the issue will, of course, in taking the additional evidence, which will be necessary, do so with great care and be careful to see that in substance advantage is not taken of this decision by the defendant and his witnesses to trim their case according to what they now understand to be the admissible aspect of it in the view of the law. We think that on the whole it would be to the interest of the parties if we retain control of the case, and, therefore, we refer an issue to the lower Appellate Court under O. XLI, r. 25. We direct the following alternative issues:—(1) Was the promissory note in suit given to the plaintiff in discharge of an existing debt for past consideration or for the purpose of transferring absolute property therein to the plaintiff, or (2) was it given as a collateral security or undertaking only to be enforced if and when the defendant became liable to refund or pay to the plaintiff the sum of Rs. 2,100 as the result of their joint undertaking? The parties will be at liberty, of course, to give further evidence and the usual ten days will be allowed for objections, and the Judge will be at liberty if he finds himself unable on a consideration of the whole evidence to answer either of these issues, definitively, to set out in a separate statement what he believes to be the true facts.

Z. K. *Issues remitted.*

*Page of (1898) 2 Q. B.—[*Ed.*]

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2459 OF 1922.

November 22, 1926.

Present:—Mr. Justice Broadway and Mr. Justice Zafar Ali.

DULLAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SARDARAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Ejectment suit—Limitation—Possession and dispossession—Possession proved till certain date, whether can be presumed to continue till dispossession.

Plaintiff who was the owner of an item of land and was recorded as such was found to have been in possession of the land through his tenant till 1907. In 1910 the Revenue Records showed the defendant as owner holding through the person in actual possession. Plaintiff instituted a suit in 1920 for recovery of possession of the land:

Held, that it must be presumed in the absence of evidence to the contrary that the plaintiff continued to hold possession through his tenant till 1910 and that the suit was not, therefore, barred either under Art. 142 or Art. 144 of Sch. I of the Limitation Act. [p. 337, col. 2.]

Second appeal from the decree of the District Judge, Jhelum at Gujrat, dated the 15th July, 1922, reversing that of the Additional Munsif, First Class, Phalia, District Gujrat, dated the 24th April, 1922.

Mr. *M. L. Puri*, for the Appellants.

Mr. *Bishan Narain Mathur*, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit brought by Dullah and Walli, sons of Muhammad, against Muhammad Din, son of Lakhan and Rahman, son of Sabhu. The parties are residents of *Mauza* Bhakhi in the Phalia Tahsil of the Gujrat District. The plaintiffs claimed possession of 32 *kanals* of land, alleging that they were the owners thereof, and that the defendants had taken forcible possession of the same. The defendants set up the plea of adverse possession, and the trial Court found that the plaintiffs had proved, firstly, that they were entered as owners certainly from 1906 to the date of suit, and that they were shown as in possession of the said lands in the *Jamabandis* of 1906-07 through their tenants Kadu and Mula. Lastly, he held that whether Art. 142 or Art. 144 of the Limitation Act applied, the plaintiffs' suit was clearly within limitation. The plaintiffs were accordingly granted a decree against which the defendants preferred an appeal to the learned District Judge. The learned District Judge took a different view. He agreed with the findings of fact arrived at by the trial Court but came to the conclusion that the latest date on which the plaintiffs could be said to be in possession through the tenants was 1907 and that it could not be presumed from the absence of any documentary evidence that they were in actual possession up to 1910, that being the year when Lakhan's name appears as claiming to be proprietor of the land in suit, Lakhan being the father of Muhammad Din. He accordingly accepted the appeal and dismissed the plaintiffs' suit.

The plaintiffs have now come up to this Court in second appeal and it has been urged that the view taken by the trial Court was correct and that whether Art. 142 or Art. 144 applied, the suit is within time. It is further contended that it was for the defendants-respondents to establish that their possession was adverse. In support of this contention Mr. Mokand Lal Puri quoted various authorities but placed most reliance on the *Secretary of State for India* v. *Chelikani Rama Rao* (1). At page 631* their Lordships of the Judicial Committee say that "Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession." In the present case there can be no doubt that the plaintiffs were the owners and entered as such certainly up to 1910. The entries as to their ownership continued up to the present time. They were never in actual physical possession of the land and they never claimed such possession. Throughout their case has been that they held possession through tenants. In 1906-07 the tenants through whom they held were Kadu and Mula. In 1910-11 the Revenue Records show that Lakhan, father of defendant Muhammad Din claimed to be the owner and in possession of the land cultivating through Mula and Jiwan tenants-at-will. Thus we see that Mula must have attorned to Lakhan in 1910 or 1911. We disagree with the view expressed by the learned District Judge when he says that it cannot be presumed from the absence of any documentary evidence that the plaintiffs were in actual possession up to 1910, provided the word "actual" be regarded as possession through tenants, for in the present case the plaintiffs, as already pointed out, never claimed to be in actual possession of the land at all. As owners they have been in possession through tenants up to such time as some other person advanced a claim of ownership adverse to theirs. This, according to the evidence on this record, did not take place till 1910. The suit was brought in 1920 and whether Art. 142 or Art. 144 applies, it is perfectly clear that the plaintiffs are entitled to a decree.

We, therefore, accept this appeal, set aside the order of the learned District Judge and restore the decree of the Additional Munsif. The plaintiffs will be entitled to their costs throughout.

A. N. A. *Appeal accepted.*

(1) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. T. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 192 (P. C.)

*Page of 30 M.—[*Ed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 433 OF 1925.

October 12, 1926.

Present :—Mr. Justice Ramesam.

SUNDARAMMAL—RESPONDENT No. 9 LEGAL REPRESENTATIVE OF THE DECEASED RESPONDENT No. 4—APPELLANT

versus

SUNDARA REDDI AND OTHERS—PETITIONER AND RESPONDENTS Nos. 1 TO 3 AND 5 AND 8—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, O. XXXIV, r. 5—Transfer of Property Act (IV of 1882), s. 82—Mortgage suit—Preliminary decree—Non-payment into Court—Assignment of decree in favour of purchaser of equity of redemption of one of mortgaged items—Decree, whether extinguished—Assignee brought on record—Final decree, whether can be passed—Proportionate abatement of mortgage amount—Transfer by next friend of minor plaintiff without sanction of Court, void or voidable—Execution by transferee—Proper procedure—Security against claims of minor—Parties—Impleading of party at one stage, effect of.

Where the amount due under a preliminary decree in a mortgage suit is not paid into Court before the appointed day, a decree for sale must be made under O. XXXIV, r. 5, cl. (2) of the Civil Procedure Code. [p. 339, col. 2.]

Where after the preliminary decree, a defendant, purchaser of the equity of redemption of one of the mortgaged properties, obtains an assignment of the rights of the decree-holder in the name of a *benamidar*, the effect of the assignment is not to destroy the rights under the mortgage-decree and substitute therefor a mere right of contribution. The assignee-decree-holder if brought on record as party is entitled to obtain a final decree for sale. But, as a consequence of the assignment, the mortgage amount must be held to have been reduced by the proportionate part of it to which the property purchased by him was liable. Such amount should, under s. 82 of the Transfer of Property Act, be ascertained by taking the proportion of its value to the total value of the mortgaged properties. [p. 340, col. 1.]

An assignment of the rights under a preliminary decree in a mortgage suit by the next friend of a minor decree-holder without the sanction of the Court under O. XXXII, r. 7 of the Civil Procedure Code is not void but merely voidable at the instance of the minor. [p. 340, col. 2.]

Where objection is taken by the defendants to the validity of such an assignment when the assignee seeks to execute the decree, the assignee-decree-holder should be directed to furnish security to the satisfaction of the executing Court for indemnifying the defendants against any possible claims by the minor plaintiff on the ground that the assignment on his behalf was made without the sanction of the Court. [p. 333, col 2; p. 339, col. 1.]

An introduction of a plaintiff or defendant for one stage of a suit is an introduction for all stages. [p. 339, col. 2.]

Brij Indar Singh v. *Kanshi Ram* (1), followed.

Second appeal against the decree of the Court of the South Arcot, in A. S. No. 376 of 1924, preferred against the order, dated the 12th February, 1924, of the Court of the Subordinate Judge, Cuddalore, in I. A. No. 49 of 1923, in O. S. No. 14 of 1919, on the file of the Court of the Additional Subordinate Judge at Cuddalore.

Messrs. *S. Srinivasa Ayyangar* and *N. S. Srinivasa Iyer*, for the Appellant.

Messrs. *S. Varadachari* and *E. V. Sundara Reddi*, for the Respondents.

JUDGMENT.—The facts of this second appeal may be stated as follows:—Two persons named Lakshmanan Chetty and Muthiah Chetty, a minor represented by his next friend, obtained a preliminary decree for sale on the foot of a mortgage in O. S. No. 14 of 1919. Defendants Nos. 1 and 2 are the heirs of the original mortgagor; defendants Nos. 3 to 8 were subsequent purchasers of the equity of redemption of separate portions of the mortgage properties. Defendants Nos. 3, 4, 5 and 8 also claim right of subrogation to some prior mortgages which they had discharged. This right was recognised in the preliminary decree which directed sale of the items purchased by them subject to the prior mortgage. An appeal against this direction was filed by the mortgagor. After the appeal was filed the rights of the decree-holders were assigned by a deed (Ex. A) dated 26th July, 1920, and the assignee applied to have his name brought on record as the 3rd appellant (Ex. C, dated 5th of August, 1921). The order of Court was "the petitioner will be added as the 3rd appellant." The appeal was dismissed on the 31st of March, 1922. The assignee-decree-holder then applied before the Subordinate Judge for the passing of a final decree. The Subordinate Judge dismissed the petition. There was an appeal to the District Judge of South Arcot and the District Judge, reversing the order of the Subordinate Judge, passed a final decree as prayed for. The present second appeal is filed by the 9th defendant who was added as the legal representative of the 4th defendant who died, by an order dated the 29th of November, 1923.

Two objections were taken by the appellant to the passing of a final decree: (1) That the assignment by the mortgagees was really obtained *benami* for the benefit of the 5th defendant; (2) the assignment in respect of the minor 2nd plaintiff was invalid as no sanction of the Court was obtained under O. XXXII of the Civil Procedure Code. Taking up the first point, the Subordinate Judge found that the

assignment was really for the benefit of the 5th defendant. This finding was not questioned before the District Judge whose order was passed on the footing of the finding. Before me Mr. Varadachariar also argued the case on the basis of that finding. Both parties concede before me that this is not a matter arising in execution, but is a proceeding in the suit, *vide*, O. XXXIV, r. 5, so that O. XXI, r. 16, of the Civil Procedure Code, does not apply. The only question is, as the suit has not yet been disposed of, what is the proper procedure to be observed? The result of the Subordinate Judge's finding is that the 5th defendant, a purchaser of the equity of redemption in one of the mortgaged properties, has now become, by the assignment, entitled to the mortgagee's rights. Only in obtaining the assignment, with a view to keep his position as a purchaser of the equity of redemption and his position as assignee of the mortgagee's rights, distinct, he obtained assignment, in the name of a *benamidar* who for this purpose may be regarded as a trustee for the 5th defendant. The District Judge held on a strict construction of O. XXXIV, r. 5 that the Court is bound to pass a final decree when the defendants have not made the payment of the mortgage amount into Court.

Mr. Srinivasa Ayyangar, who appeared for the appellant, has suggested in some portion of his argument (though I do not think very seriously) that under O. XXXIV, r. 5, cl. (2) the Court shall pass a decree on application made on that behalf by the plaintiff. And here the assignee-decree-holder is not a plaintiff. The assignee-decree-holder has certainly become after being added to the record an additional appellant and in becoming an additional appellant I think he has also become an additional plaintiff. In *Brij Indar Singh* v. *Kanshi Ram* (1) the Privy Council held that where a party had been brought on record as the representative of an original plaintiff in a proceeding in appeal against an interlocutory order, he must be regarded as brought on record for all the purposes of the suit and he need not be added again when the case went back to the first Court. At page 110* they refer to the added party as a plaintiff though he was not an original plaintiff. "The plaintiff, as representative of the original plaintiff, and the defendant's representatives of Joti Lal, had been introduced in the Chief Court. No doubt, that was only done in the course of an interlocutory application as to the production of books. But the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages." I, therefore, think that the assignee has now become, for the stage between the preliminary decree and the final decree, the 3rd plaintiff in the suit. Even if it were not so, reading s. 146 in conjunction with O. XXXIV, r. 5, I think it is open to the assignee to apply for a final decree.

The main point argued by Mr. Srinivasa Ayyangar is that the District Judge was wrong in construing O. XXXIV, r. 5, strictly. He relied on *Jogendra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu* (2) for the position that even where a payment is not made into, but outside, Court, it is open to the Court to enquire into any payments made by the defendants and to embody the result in the final decree that may be passed by it. In the present case the decree has been paid up and the charge is extinguished and no final decree has to be passed. On the other hand in *Singa Raja* v. *Pethu Raja* (3) this Court held that if no payment is made into Court a final decree shall be passed. The learned Judges say at page 580*:—

"Sub rule 2 says where such payment is not so made, that is to say, where such payment is not made into Court, the Court shall pass a decree ordering the sale of the mortgaged property or a sufficient part thereof.....Therefore we are of opinion that the scheme of the Code, so far as mortgage-decrees are concerned is that if the amount due under preliminary decree has not been paid before the appointed day a decree for sale is to be made and the machinery for sale is to be set in motion .....The provisions of the Code are imperative....." I do not think it is necessary for me to consider in this case the conflict between a decision of this Court and the Patna High Court. In the case before me there was no payment towards the decree. What has happened is one of the defendants who was only a purchaser of the equity of redemp-

(1) 42 Ind. Cas. 43; 45 C. 94; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 101 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 44 I. A. 218 (P. C.).

*Page of 45 C.—[*Ed.*]

(2) 40 Ind. Cas. 138; 2 P. L. W. 66; 2 P. L. J. 5[illegible].

(3) 48 Ind. Cas. 196; 35 M. L. J. 579; (1918) M. W. N. 809; 8 L. W. 497; 24 M. L. T. 501; 42 M. [illegible] 61.

*Page o[illegible] 35 M. L. J.—[*Ed.*]

tion in one of the properties and who is, therefore, entitled to redeem the suit mortgage obtains a transfer of the mortgagee's rights. He has not paid any amount towards the decree. Mr. Srinivasa Ayyangar contends that where one of the mortgagors pays up the mortgage amount, an intention cannot be attributed to keep the mortgage alive for his own benefit as against other mortgagors or owners of the equity of redemption in portions of the mortgage property, and his only remedy is a suit for contribution. This may be so. But we are not dealing with the case of one of several mortgagors or one out of several heirs of a mortgagor. I doubt even in the case of one of several mortgagors if there is any prohibition preventing him from obtaining an assignment of the mortgagee's rights. Where he pays up the mortgage amount and obtains no document, there is no presumption that he intended to keep the mortgage alive. But, where he obtains a transfer of the mortgagee's rights, I think that, in the capacity of such a transferee he is entitled to maintain a suit on the mortgage. It is true in such a suit he has to give a deduction for a proportionate part of the mortgage amount to which he himself was liable as one of the mortgagors, but it cannot be said that he cannot maintain a suit on a mortgage. But, whatever may be said as to one of several mortgagors or one of several heirs of a mortgagor, I think it is clear that in the case of a purchaser of the equity of redemption of one of the mortgaged properties, there is no law or principle, prohibiting him from obtaining an assignment of the mortgagee's rights and it cannot be said that the effect of such an assignment is to destroy the mortgage and to give him only rights of contribution. I think the only effect of such an assignment is to reduce the mortgage amount by the proportionate part of it to which the property purchased by him was liable. Such amount should be ascertained by taking the proportion of its value to the total value of the mortgaged properties. (*Vide* s. 82 of the Transfer of Property Act). In this case while on the one hand, I agree with the District Judge in thinking that there is nothing to stop the passing of a final decree, on the other hand, I think the District Judge ought to have enquired into the question what amount has to be deducted from the mortgage amount by reason of the 5th defendant obtaining an assignment of the mortgagee's rights and then passed a final decree against the other defendants for the rest of the amount. Before passing a final decree this proportion will have to be ascertained.

Before passing the final order in connection with this matter, I will now deal with the second point arising in the appeal. Mr. Srinivasa Ayyangar contended under O. XXXII, r. 7, that the assignment by the minor plaintiff ought to receive the sanction of the Court and, therefore, cannot be recognised, but Mr. Varadachariar has pointed out that the only effect of the absence of such a sanction is that it is voidable at the instance of the minor: See *Phulwanti Kunwar* v. *Janishar Das* (4) and *Umed Singh* v. *Sobhag Mal Dhadha* (5) where the Privy Council say that they are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right. This is true, but something must be done in this case to protect the other defendants from being harassed by the minor later on if he chooses to avoid the transfer for a second payment. Mr. Varadachariar says that directions indicating such protection may be made in the execution stage and it is unnecessary to consider the question at present before passing the final decree. But I do not agree. If the question is not settled now the defendants will be in an inconvenient position. They cannot pay up the amount outside Court directly to the decree-holder. This is practically compelling them not to pay and to insist on the decree-holder taking out execution through Court so that the Court may pass some order protecting them from being harassed by the minor. There is no justification for this. I think the assignee-decree-holder must be called upon to give security for indemnifying the defendants from being harassed by the original minor 2nd plaintiff for his share of the amount and only on his giving such security that the final decree should be passed. With reference to the first point I now call upon the District Judge to ascertain what amount should be regarded as discharged by reason of the 5th defendants' double position as

(4) 83 Ind. Cas. 782; 46 A. 575; 22 A. L. J. 521; A. I. R. 1924 All. 625; L. R. 5 A. 785 Civ.

(5) 32 Ind. Cas. 161; 43 C. 290 at p. 299; 20 C. W. N. 137; 30 M. L. J. 67; 14 A. L. J. 97; 3 L. W. 145; 19 M. L. J. 108; 23 C. L. J. 130; (1916) 1 M. W. N. 6; 18 Bom. L. R. 308; 43 I. A. 1 (P. C.).

purchaser of the equity of redemption and as assignee of the mortgagee's rights and for this purpose he will ascertain the proportion the value of his property bears to the total value of the mortgaged properties.

Finding in six weeks and objections ten days. Fresh evidence will be taken for this purpose.

In compliance with the order contained in the above judgment the District Judge of South Arcot submitted the following

FINDINGS.—In this case, I have been asked to ascertain what amount should be regarded as discharged by reason of the 5th defendant's double position as purchaser of the equity of redemption in items Nos. 28 and 29 and assignee of the mortgagee's right to and for that purpose to ascertain what proportion the value of his properties items Nos. 28 and 29 bears to the total value of the mortgaged properties.

I, therefore, find that the property in which the 5th defendant has purchased the equity of redemption will, in proportion to all the other mortgaged properties, bear the proportion of 3, 340 to 4, 6352 or 0·72.

The decree amount is given as Rs.4,955-9 0 in the preliminary decree. Towards the value of the mortgaged properties Rs.356-12-0 will have to be deducted in respect of the properties purchased by the 5th defendant.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.

The finding is accepted. The result is that cl. (1) of the final decree will be modified as follows:—

The figure 5 out of the words "also to 4, 5 and 8 defendants" will be omitted The figures "28 and 29" out of the words "on items No. 11 to 27, 28 and 29" will be omitted. The words "what is declared due .....in A. S. No. 31 of 1921" will run "what will be due by the said preliminary decree as confirmed by the decree of this Court in A. S. No. 31 of 1921 after figure Rs 4,598-13 0 is substituted for Rs. 4,955-9 0 therein after cl (2a), cl. (2a) will be added." The assignee decree-holder before applying for sale shall give security to the satisfaction of the executing Court for indemnifying the defendants against any possible claims by the 2nd plaintiff on the ground that the assignment on his behalf was made without the sanction of the Court. The appellant 1st respondent will give and take proportionate costs on Rs.356-12-0 (rupees three hundred and fifty six and annas twelve and Rs. 4,598-13-0 (rupees four thousand and five hundred and ninety-eight and annas thirteen) respectively in second appeal.

The order of the lower Appellate Court as to costs in the lower Courts will stand.

V. N. V. *Decree modified.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 23 OF 1924.
CONNECTED WITH
FIRST CIVIL APPEALS Nos. 524, 525 AND 526 OF 1923.
October 19, 1926.

Present :—Mr. Justice Dalal and Mr. Justice Pullan.

THE PUNJAB NATIONAL BANK—PLAINTIFF—APPELLANT

versus

TAJAMMUL HUSAIN-BISHESHAR NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Negotiable Instruments Act(XXVI of 1881), ss. 27, 82 —Bill of Exchange—Renewal by drawer without acceptor's consent—Acceptor, whether discharged.

The renewal of a Bill of Exchange without the consent of the acceptor does not discharge the acceptor from his liability. [p. 342, col. 2.]

When a cause of action for money is once complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. [p. 342, col. 1.]

Sheikh Akbar v. *Sheikh Khan* (2), *Dargavarapu Sarrapu* v. *Rampratapu* (3) and *Torrance* v. *Bank of British North America* (4), followed.

Sirdar Kuar v. *Chandrawati* (1), distinguished.

First Appeal from the decree of the First Subordinate Judge, Cawnpore, dated the 21st September, 1923.

Dr. *K. N. Katju* for the Appellant.

Messrs. *Nehal Chand* and *S. B. Johari*, for the Respondents.

JUDGMENT.—The Punjab National Bank has appealed from the dismissal of its suit for money on foot of two *hundis*, dated the 2nd of November, 1921. The *hundis* were drawn by the firm of Tajammul Husain-Bisheshar Nath, and the drawee was the firm of Moti Lal-Bisheshar Nath at Calcutta. These *hundis* wer

duly accepted by the firm of Moti Lal-Bisheshar Nath. The question of acceptance has already been dealt with by us in our judgment in First Appeal No. 524 of 1923 delivered to-day. We hold acceptance to have been made by a person duly authorised by the firm as required by s. 27 of the Negotiable Instruments Act. These *hundis* were renewed on the 4th of February, 1922, by the same drawer but were not accepted by the firm of Moti Lal-Bisheshar Nath on presentation. The learned Judge of the lower Court held that the renewal of the 4th of February, 1922, was a full discharge of the two prior *hundis* and that, therefore, the firm of Moti Lal-Bisheshar Nath was not liable to make payment either on the former two *hundis* of the 2nd of November, 1921, or on the subsequent *hundis* of the 4th of February, 1922.

The learned Judge relied on a ruling of this Court reported in the case of *Sardar Kuar* v. *Chandrawati* (1). In our opinion, the facts in that case were not similar to those of the present case. The principle applicable to a case like the present is one laid down in the case of *Sheikh Akbar* v. *Sheikh Khan* (2): "When a cause of action for money is once complete in itself.....and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under, such circumstances as to make the debtor liable upon it to some third person." There has been no such endorsement in the present case, and the principle of the above rule, which was followed by the Madras High Court in the case of *Dargavarapu Sarrapu* v. *Rampratapu* (3) would apply. If we refer to the relevant section of the Negotiable Instruments Act, the different ways in which the acceptor of a negotiable instrument may discharge his debt are given in s. 82. The three ways are cancellation, release and payment. Admittedly there was no cancellation here and there was no discharge because the new *hundi* was only a provisional discharge, which would have been complete if that *hundi* had been accepted. For the same reason there was no payment in due course. In a case of the Judicial Committee [*Torrance* v. *Bank of British North America* (4)] it was held under similar circumstances that a fresh agreement between the drawer and the holder of value of a Bill of Exchange did not release the acceptor of the first bill from liability on foot of the first bill. The learned Counsel for the respondents drew our attention to the observations on renewal of a Bill of Exchange in Halsbury's Laws of England, Vol. II, page 553, where it is said: "*Prima facie* the giving of a new instrument in place of an existing one has the effect not of discharging the instrument then existing, but of being a conditional satisfaction of it, so that if the new instrument is duly paid at maturity the first instrument is discharged; but if not, then the dormant rights on the first instrument are revived." This is the rule enunciated in *Sheikh Akbar's case* (2). Then follows the sentence on which the learned Counsel for the respondents has relied:—"Parties to the first instrument who do not assent to its renewal are in any case discharged." Possibly this covers the case of sureties and not of principal debtors such as an acceptor of a *hundi* is. It is also to be noticed that Bisheshar Nath, one of the partners of the firm was a party as partner in another firm to the drawing of the new contract and was cognizant of the renewal.

The ruling from the Privy Council Law Reports quoted above does not favour the view that the acceptor of a Bill of Exchange is discharged from his liability on the renewal of that bill to which he has not consented.

We are of opinion that the Bank can enforce the liability of the firm of Moti Lal-Bisheshar Nath on foot of the two Bills of Exchange of the 2nd of November, 1921.

In the result we set aside the decree of the lower Court and decree the plaintiff's suit on the two *hundis* of the 2nd of November, 1921, with costs in all Courts including in this Court fees on the higher scale.

A. N. A. *Appeal allowed.*

(1) 4 A. 330; A. W. N. (1882) 55; 2 Ind. Dec. (N. s) 939.

(2) 7 C. 256; 8 C. L. R. 528; 3 Ind. Dec. (N. s.) 713.

(3) 25 M. 580.

(4) (1871) 5 P. C. 246; 29 L. T. 109; 21 W. R. 329.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 349 OF 1924.

February 18, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Panton.

DASARATHY CHAKRAVARTY—APPELLANT

versus

Maharaja KHAUNISH CHANDRA RAY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 9, O. XXI, r. 90, O. XLIII, r. 1, cls. (c) (j)—Application to set aside execution sale—Dismissal for default—Application for restoration, maintainability of—Appeal, whether lies.

No appeal lies against an order refusing to set aside an order dismissing for default an application to set aside a sale under O. XXI, r. 90 of the Civil Procedure Code. [p. 343, col. 2.]

Jung Bahadur v. *Mahadeo Prasad* (2), followed.

Order IX, r. 9 of the Code of Civil Procedure is not applicable to an application for setting aside a sale in execution of a decree under O. XXI, r. 90 of the Code of Civil Procedure. [p. 344, col. 1.]

Thakur Prasad v. *Fakir-Ullah* (3), *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (4) and *Hari Charan Ghosh* v. *Manmatha Nath Sen* (5), relied on.

Appeal against the order of the Subordinate Judge, Nadia, dated the 20th September, 1924.

Babus *Rupendra Kumar Mitter* and *Dharmadas Sett*, for the Appellant.

Mr. *D. N. Bagchi* and Babu *Mohini Mohan Bhattacharjee*, for the Respondent.

JUDGMENT.—This appeal raises the question whether O. IX, r. 9 of the Code of Civil Procedure is applicable to an application made for setting aside a sale in execution of a decree under O. XXI, r. 90 of the Code of Civil Procedure. The question arises in this way:—The appellant before us presented an application for setting aside a sale under O. XXI, r. 90. On the date fixed for the hearing of the case the applicant was not ready with his evidence and he asked for time. Time was granted on one occasion but on the next occasion he was still not ready with his evidence. Further time was asked for and the learned Subordinate Judge refused to grant time and thereupon the Pleader for the applicant stated that he had no evidence and no further instruction. Upon that the application for setting aside the sale was rejected for default of the applicant. This order of dismissal was passed on the 23rd of August, 1924. On the 20th of September, 1924, one of the judgment-debtors put in an application purporting to have been made under O. IX, r. 9 of the Code of Civil Procedure for restoration of the application for setting aside the sale. The learned Subordinate Judge rejected the application on the ground that that rule did not apply to such an application. The judgment-debtor appeals to this Court and a preliminary objection has been taken to the competency of the appeal on the ground that there was no appeal under the Code against an order made by the Subordinate Judge. In answer to that objection the learned Vakil for the appellant relies on O. XLIII, r. 1 cls. (c) and (j) of the Code of Civil Procedure. Clause (c) only refers to an order rejecting an application for setting aside the dismissal of a suit. That clause, therefore, does not apply in terms. It is contended that the order falls under cl. (j), and reliance has also been placed on the case of *Kali Kanta Chuckerbutty* v. *Shyam Lal Das Basu* (1) in support of an appeal. This appeal is not against the order of dismissal for default which might fall within cl (j) of that rule. But this appeal is against the order refusing to set aside the dismissal for default. It is contended on behalf of the respondent that on the authority of the case of *Jung Bahadur* v. *Mahadeo Prosad* (2) which was decided under the old Code, no appeal lies against such an order. We think that the contention of the respondent should be accepted that there is no appeal against an order refusing to set aside an order of dismissal for default of an application such as this. Then with regard to the main question whether O. IX, r. 9, applies to such a case as this, we are asked to set aside the order in the exercise of our revisional jurisdiction. We are of opinion that the case of *Thakur Prasad* v. *Fakir Ullah* (3) is really decisive of the question. There, their Lordships in dealing with the contention that by virtue of s. 647 of the Code of 1882, s. 373 of the Code applied to execution proceedings observed as follows:—"The suggestion is that it is applied by force of s. 647. But the whole of Ch. XIX of the Code, consisting of 121 sections, is devoted to the procedure in executions, and it would be surprising if the framers of the Code had intended to apply another procedure

(1) 38 Ind. Cas. 593; 25 C. L. J. 163.
(2) 31 C. 207; 8 C. W. N. 160.
(3) 22 I. A. 44; 17 A. 106; 5 M. L. J. 3; 6 Sar. P. C. J. 526; 8 Ind. Dec. (N. S.) 393 (P. C.).

mostly unsuitable, by saying in general terms that the procedure for suits should be followed as far as applicable. Their Lordships think that the proceedings spoken of in s. 647 include original matters in the nature of suits such as proceedings in Probates, guardianships, and so forth, and do not include executions." Their Lordships approved of the case of *Bunko Behary Gangopadhya* v. *Nil Madhub Chuttopadhya* (4) where the matter is stated in equally clear terms. The section of the present Code corresponding to the old s. 647, is s. 141, which runs thus:—"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction." This section, it may very well be assumed, was enacted in these terms to give proper effect to the decision of their Lordships in the case of *Thakur Prasad* v. *Fakir-Ullah* (3). If it was intended that proceedings relating to suits should be applicable to proceedings under O. XXI of the Code or similar proceedings it might have been stated that the procedure with regard to suits would be applicable to other proceedings under the Code. It seems, therefore, that the clear intention of the section is that the procedure relating to suits would not apply to proceedings relating to execution, the procedure with regard to which is laid down in O. XXI of the Code itself. In the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (5) Sir Lawrence Jenkins, Chief Justice, held that O. IX, r. 13 of the Code of Civil Procedure, 1908, was not applicable to a proceeding under rr. 100 and 101 of O. XXI of the Code and, in delivering the judgment of the Court he referred to the case of *Thakur Prasad* v. *Fakir Ullah* (3), as laying down the rule that the procedure referred to does not apply to execution proceedings. The argument urged on behalf of the appellant by Babu Rupendra Kumar Mitra is that the Privy Council decision should be confined to an application for execution but the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (5) is a clear answer to this contention. It is urged on behalf of the appellant that there are conflicting cases on the point and the matter should be referred to a Full Bench for decision. But as we understand the decision of the Privy Council the matter seems to be clearly laid down and we do not think that any reference to a Full Bench is called for. The appeal, therefore, is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

A. N. A. *Appeal dismissed.*

(4) 18 C. 635; 9 Ind. Dec. (N. S.) 423.
(5) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 3 OF 1921.
October 26, 1921.
Present:—Sir William Bock Ayling, KT., Officiating Chief Justice and Mr. Justice Odgers.

SUBBARAYA PILLAI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
C. D. DEVASAHAYAM PILLAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific performance—Suit for directing execution of fresh deed, when maintainable—Non-registration due to plaintiff's negligence, effect of.

A suit for directing the execution of a fresh document does not lie where the document originally executed is neither lost, destroyed or fraudulently suppressed by the defendant, but was in the possession of the plaintiff and it was open to him to have applied in time to get it registered.

Venkatasami v. *Kristayya* (1), followed.

Nynakka Routhen v. *Vavana Mahomed Naina* (2), *Nallappa Reddi* v. *Ramalingachi Reddi* (3) and *Chinna Krishna Reddi* v. *Dorasami Reddi* (4), distinguished.

Second appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No. 44 of 1920 (A. S. No. 94 of 1920, on the file of the District Court of Coimbatore), preferred against that of the Court of the Principal District Munsif, Erode, in Original Suit No. 813 of 1918.

Mr. *S. Muthiah Mudaliar*, for the Appellants.

Mr. *K. S. Desikan*, for the 1st Respondent.

JUDGMENT.—The lower Courts were right in following *Venkatasami* v. *Kristaya* (1) and dismissing the suit The cases relied on by appellants *Nynakka Routhen* v. *Vavana Mahomed Naina* (2). *Nallappa Reddi* v. *Ramalingachi Reddi* (3) and *Chinna Krishna Reddi* v. *Dorasami Reddi* (4) are all distinguishable inasmuch as the documents sought to be replaced in those suits were burnt, lost or fraudulently suppressed by the defendants therein.

(1) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945.
(2) 5 M. H. C. R. 123.
(3) 20 M. 250; 7 Ind. Dec. (N. S.) 178.
(4) 20 M. 19; 7 Ind. Dec. (N. S.) 13.

In the present case the document was in the possession of plaintiffs from the time of execution and it was open to them at any time to apply to get it registered.

The second appeal is dismissed with costs.

V. N. V.

A. N. A. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

May 11, 1926.

Present:—Viscount Dunedin, Lord Atkinson and Mr. Ameer Ali.

LAKSHMAN CHANDRA MANDAL—PLAINTIFF—APPELLANT

versus

TAKIM DHALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Suit by purchaser for possession—Purchaser found not entitled to recover possession—Claim for refund of purchase-money—Separate suit.

A purchaser asking for re-payment of the purchase-money in a suit for recovery of possession of the property, on his claim for possession being found unsustainable, may be directed to raise the question in a separate suit, where the question whether the purchase was a truly speculative one or a purchase under such circumstances as would warrant a good title has been not specifically investigated in the Courts below.

Appeal from the judgment of the Calcutta High Court.

Messrs. *L. deGruyther* and *H. N. Sen*, for the Appellant.

Messrs. *A. M. Dunne* and *K. C. Hyam*, for the Respondents.

JUDGMENT.

Viscount Dunedin—The appellant-plaintiff in the case is the purchaser of two-thirds of a certain lease-hold property which he says originally belonged to Idu Sana from whom his vendors are descended, in right of two sons of Idu Sana, and he sues the defendant-respondent who is in possession, he having acquired the whole property from Budhai the other and remaining son of Idu Sana.

The whole point in the appeal, therefore, depends upon whether the lease-hold in question was originally settled with Idu Sana who was the head of the whole family here represented, or whether it was originally settled with one of his sons Budhai. Budhai was, undoubtedly, in possession, and it was necessary for the plaintiff to prove his case. He attempted to do so by bringing forward certain statements that were made in various litigations that had happened, but upon looking into those litigations the learned Judge of first instance and the High Court both came to the conclusion that the statements made were absolutely contradictory and, therefore, no affirmative proof for what the plaintiff wished to deduce from them. The oral evidence suffered the same fate ; it was contradictory and was not believed and accordingly, there again, we have concurrent findings that the plaintiff has not made out his case. That really disposes of the merits of the case.

There is a second branch of the case as launched in which the disappointed purchaser owing to the result of what has been narrated, asks for re-payment of the price which he has paid. It is quite clear that that point was never really investigated in the Courts below. It has never been gone into as to whether it was a truly speculative purchase or a purchase under such circumstances as would warrant a good title, and accordingly the learned Subordinate Judge said he could not decide the matter, but gave leave to the plaintiff to raise the question in a separate suit. That also was confirmed by the High Court.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs

A. N. A. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Ranken Ford & Chester.*

Solicitors for the Respondents:—Messrs. *Barrow Rogers & Nevil.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 195 OF 1 26.

December 16, 1926.

Present:—Mr. Findlay, J. C.

DADU KHUSHIRAM—PLAINTIFF—APPLICANT

versus

HORILAL KASIRA—DEFENDANT—NON-APPLICANT.

Contract Act (IX of 1872), s. 23—Gambling, money advanced for—Place of gambling not proved to be

public or a gaming house—Loan, whether recoverable —Public policy.

In the absence of evidence that the gambling for the purpose of carrying on which a loan is advanced, was going on in a public place or a gaming house, the amount of the loan is recoverable from the debtor inasmuch as the loan was not advanced for a purpose which was necessarily illegal.

Pringle v. *Jafar Khan* (1) and *Subbarayya* v. *Devandra* (2), followed.

Revision against the decree of the Small Cause Court Judge, Seoni, dated the 15th April, 1926, in Small Cause Suit No. 74 of 1926.

Mr. *W. R. Puranik*, for the Applicant.

Mr. *V. R. Dhok*, for the Non-Applicant.

ORDER.—The plaintiff-applicant, Dadu Khushiram, sued the defendant-non-applicant, Horilal Kasira, in the Court of Small Causes, Seoni, for recovery of a sum of Rs. 146-4-0 said to have been borrowed by the latter. The defence was that the loan was, in reality, taken by one Lakhmichand in the defendant's presence and that it had been borrowed by Lakhmichand for a gambling purpose. The lower Court found that the loan had actually been taken for a gambling purpose by the defendant, but it dismissed the suit as it was of opinion that the consideration was illegal under s. 23 of the Indian Contract Act.

It is urged on behalf of the applicant that the findings of the Subordinate Judge go beyond the pleadings on record and that, in view of the defendant's denial of having taken the loan at all as well as of the lower Court's finding to the contrary, the plaintiff was entitled to a decree. After perusing the evidence and statements on record, I entertain not the slightest doubt but that the defendant, on the day he took the loan, was engaged in gambling and that the plaintiff knew perfectly well that the loan was taken during play for the purpose of carrying on the latter.

I am of opinion, however, that in the circumstances of the present case, the consideration cannot be held to have been for an object forbidden by law. There is no proof that the gambling was going on in a public place; on the contrary, it was apparently being conducted in a private house and there is nothing to show that the play was being conducted for purposes of profit by the owner of the house. In those circumstances I am of opinion that the money lent to enable the non-applicant to continue gambling is recoverable, as not necessarily being for an illegal purpose: *cf. Pringle* v. *Jafar Khan* (1) and *Subbaraya* v. *Devandra* (2).

In the circumstances of the case, however, I do not think the plaintiff-applicant is entitled to any interest and I am further of opinion that the parties should bear their own costs in both Courts. I, therefore, reverse the judgment and decree passed by the lower Court and instead give a decree for Rs. 138 in favour of the plaintiff applicant.

Z. K. *Order accordingly.*

(1) 5 A. 443; A. W. N. (1883) 68; 3 Ind. Dec. (N. S.) 375.

(2) 7 M. 301; 2 Ind. Dec. (N. S.) 794.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1107 OF 1924.

January 10, 1927.

Present:—Mr. Justice Iqbal Ahmad.

MAHA MANGAL RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KISHUN KANDU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 4, 33—Appeal by some judgment-debtors—Others not made parties—Decree, whether can be reversed in respect of all—Transfer of Property Act (IV of 1882), s. 59—Limitation Act (IX of 1908), Sch. I, Arts. 142, 144, 148—Mortgage, invalid, effect of—Possession of mortgagee, nature of—Recitals in mortgage-deed, whether evidence—Adverse possession—Redemption—Limitation.

Where a decree appealed from proceeds on a ground common to all the plaintiffs or all the defendants and only some of them appeal against the decree, the power vested in the Appellate Court by r. 4, of O. XLI, of the Civil Procedure Code to reverse or vary the decree appealed from in favour of all the plaintiffs or all the defendants, is not restricted to cases in which the plaintiffs or defendants who have not appealed are made parties to the appeal. Such power can be exercised by the Appellate Court even if the plaintiffs or the defendants who have not appealed are not made parties to the appeal. [p. 348, col. 2.]

Where a mortgage is not effected by a registered deed as required by s. 59 of the Transfer of Property Act, it is invalid, but nevertheless the recitals contained in the unregistered mortgage-deed are admissible in evidence for the purpose of explaining the nature and character of the possession of the mortgagee over the mortgaged property. [p. 349, col. 2.]

A mortgage of an occupancy holding is not permitted by law, but where a mortgagee of an occupancy holding enters into possession of the holding and continues in possession thereof for more than twelve years, he can only prescribe for a title as mortgagee and his possession cannot be regarded as being adverse to the mortgagor. If the mortgagor in such a case brings a suit for possession of the holding against the mortgagee within twelve years from the

date of the execution of the mortgage, he can claim an unconditional decree for possession on the ground that the mortgage being of an occupancy holding is void in law. But after the expiry of twelve years the mortgagee obtains a valid title as such and the mortgagor can recover possession of the holding only by redemption. The period of limitation for a suit for redemption in such a case, however, is sixty years as provided by Art. 148 of Sch. I to the Limitation Act. [p. 349, col. 2; p. 350, col. 1.]

Second appeal from the decree of the Additional District Judge, Gorakhpur, dated the 22nd of April, 1924.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *Benod Behari Lal*, for rhe Respondent.

JUDGMENT.—This is a defendants' appeal and arises out of a suit for redemption of a mortgage. The plaintiffs' case was that the mortgage sought to be redeemed was effected by means of an unregistered deed of mortgage executed 19 years prior to the institution of the suit, that is, in or about the year 1904, by Charan and Nath, the predecessors-in-title of the plaintiffs, in favour of Maha Mangal Rai, defendant No. 1, for a sum of Rs. 200 and that the property mortgaged was an occupancy holding. It was further alleged in the plaint that though the relation between the parties to the suit was that of mortgagor and mortgagee, the plaintiffs had on a former occasion, because of a wrong advice given to them, brought a suit for ejectment of the defendants from the holding in dispute in the Revenue Court, but that suit was dismissed on the finding that the defendants were in possession as mortgagees. The plaintiffs alleged that as the defendants refused to take mortgage-money and to deliver possession of the holding in dispute the plaintiffs were compelled to bring the suit for redemption.

The defence to the suit was a denial of the mortgage and an assertion by the defendants that they were the original tenants of the holding in dispute and were not in possession as mortgagees. The defendants further urged that the decision in the ejectment suit filed by the plaintiffs in the Revenue Court operated as *res judicata* in the present suit.

The trial Court held that the plaintiffs had failed to prove that the defendants were in possession as mortgagees, and on that finding dismissed the plaintiffs' suit.

Out of the four plaintiffs only one, namely Kishun Kandu, filed an appeal against the decree of the trial Court in the lower Appellate Court. But it was noted in the memorandum of appeal filed by him that he was preferring the appeal under O XLI, r. 4 of the Civil Procedure Code on behalf of all the plaintiffs.

The lower Appellate Court disagreed with the trial Court and held that the defendants were in possession as mortgagees, and that the mortgage in favour of the defendants was made about 20 years prior to the institution of the suit. It further held, that the mortgage being unregistered was unenforceable and invalid, but notwithstanding the invalidity of that mortgage, the defendants' possession was not adverse and the suit was not barred by limitation, and that the plaintiffs were entitled in any case to a decree for redemption of the mortgage and for possession of the holding in dispute on payment of the sum of Rs. 200 alleged by the plaintiffs to be the amount of the mortgage money.

On these findings the lower Appellate Court set aside the decree of the trial Court and passed a decree for possession of the holding in dispute in favour of all the plaintiffs on payment of Rs. 200 to the defendants.

The decree of the lower Appellate Court has been assailed before me by the learned Counsel for the appellants on three grounds. Firstly, it is argued that as only one of the plaintiffs, namely Kishun Kandu, appealed against the decree of the trial Court, and did not make the remaining three plaintiffs parties to the appeal, the appeal itself was incompetent and the lower Appellate Court had no jurisdiction to set aside the decree of the trial Court. Secondly, it is argued by the learned Counsel for the appellants that the alleged mortgage being invalid, because the property mortgaged was an occupancy holding, the transfer of which is prohibited by law, and because the mortgage was effected by an unregistered instrument which could not be done in view of the provisions of s. 59 of the Transfer of Property Act, the possession of the defendants could not be held to be in the capacity of mortgagees, and as the plaintiffs discontinued to be in possession of the holding from 1904, the suit was barred by Art. 142 of the Limitation Act. Thirdly, it is argued that the lower Appellate Court was wrong in proceeding on the assumption that the possession of the defendants was as licensees or was permissive and not adverse, inasmuch

as no such case was set up by the plaintiffs either in the plaint or in the trial Court.

In support of the first point argued by the learned Counsel for the appellants reliance has been placed by him on the cases of *Ambika Prasad* v. *Jhinak Singh* (1), *Wajid Ali Khan* v. *Puran Singh* (2) and *Balaram Pal* v. *Kanysha Majhi* (3). In the case of *Ambika Prasad* v. *Jhinak Singh* (1) only one of three plaintiffs in a pre-emption suit filed an appeal professing to do so not only on his own behalf but also on behalf of his co-plaintiffs who were not made parties to the appeal. One of those co-plaintiffs died during the pendency of the appeal and his heirs were not brought upon the record and the appeal was heard and allowed by the High Court in ignorance of the fact that one of the co-plaintiffs was dead. When the successful plaintiffs wanted to take possession of the property pre-empted in execution of the decree of the High Court, it was contended by the vendee that the decree of the High Court was a nullity and was incapable of execution. This Court upheld the objection of the vendee and held that the appeal pending in the High Court had, because of the omission to bring upon the record the legal representatives of the deceased plaintiff, abated as a whole and the decree passed by the High Court was a nullity and incapable of execution. The decision in the case of *Ambika Prasad* v. *Jhinak Singh* (1) has not been approved by two learned Judges of this Court in the case of *Wajid Ali Khan* v. *Puran Singh* (2) and because of this conflict of judicial opinion in this Court, I have already referred Execution First Appeal No. 414 of 1926 for decision to a Bench of two Judges but that case has not yet been decided. In any case, neither the case of *Ambika Prasad* v. *Jhinak Singh* (1) nor that of *Wajid Ali Khan* v. *Puran Singh* (2), noted above, has any application to the present case. The question that formed the subject-matter of consideration in those cases was, as to whether the omission of the appellants to bring upon the record the legal representatives of one of several plaintiffs in a suit for pre-emption during the pendency of an appeal against the decree in that suit, has or has not the effect of causing an abatement of the appeal as a whole. That question does not arise in the present case. The question that arises for consideration in the present case is as to whether, when the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants, and when only some and not all the plaintiffs or defendants have appealed against the decree of the trial Court, the power vested in an Appellate Court by O. XLI, r. 4, Civil Procedure Code, to reverse or vary the decree appealed from in favour of all the plaintiffs or all the defendants, is restricted to cases in which the plaintiffs or defendants who have not appealed are made parties to the appeal, or that power can be exercised by the Appellate Court even if the plaintiffs or defendants who have not appealed are not made parties to the appeal. In the case of *Balaram Pal* v. *Kanysha Majhi* (3), cited by the learned Counsel for the appellants, two learned Judges of the Calcutta High Court are reported to have observed that "We think that when a plaintiff prefers an appeal in which other plaintiffs are interested, that section (O. XLI, r. 4, Civil Procedure Code) does not authorise him to proceed with the appeal without making other plaintiffs parties to the appeal." The Calcutta case is distinguishable from the present case, inasmuch as in that case the question for consideration was, whether or not the failure of one of several appellants who claimed a joint title to a certain land to bring upon the record the legal representatives of one of the deceased appellants resulted in an abatement of the appeal as a whole. This is not the question that arises for consideration in the present case. But if the learned Judges meant to lay down that an Appellate Court can only exercise the powers vested in it by O XLI, r. 4, Civil Procedure Code, if all the plaintiffs or defendants in whose favour it reverses or varies the decree are parties to the appeal, I, with all respects, am unable to agree with them. The only condition laid down by the Legislature in order to bring into operation the provisions of r. 4 of O. XLI, Civil Procedure Code, is that the decree appealed from should have proceeded on any ground common to all the plaint-

(1) 71 Ind. Cas. 321; 45 A. 286; 21 A. L. J. 91; A. I. R. 1923 All. 211.

(2) 85 Ind. Cas. 66; 47 A. 100; 22 A. L. J. 994; L. R. 6 A. 39 Civ.; A. I. R. 1925 All. 108.

(3) 53 Ind. Cas. 548.

iffs or to all the defendants. It is not provided by that rule that the plaintiffs or defendants in whose favour the decree is reversed or varied by the Appellate Court, should be made parties to the appeal, and, therefore, to hold, that an Appellate Court cannot reverse or vary the decree appealed from in favour of such plaintiffs or defendants who have not appealed, when the decree appealed from proceeds on any ground common to all the plaintiffs or defendants, will be to read into the rule words which are not there. I may also with all respect point out that the learned Judges of the Calcutta High Court have not assigned any reason in support of the opinion expressed by them. The observation of the learned Judges pressed to its logical consequence comes to this, that it is not open to one of several plaintiffs jointly entitled to maintain a suit, to appeal against the decree of the trial Court without making the other plaintiffs parties to the appeal, that is, in other words, an appeal by one of several co-plaintiffs having a joint title is incompetent. I am unable to accept such a broad proposition of law. Every party to a suit has a right to appeal against a decree by which he is aggrieved, and the mere omission of other parties to the suit, who are equally aggrieved, not to join hands with him in preferring an appeal cannot debar an Appellate Court to grant such relief to the party who has appealed to which he is found entitled. Ordinarily on an appeal by one of several plaintiffs or defendants the Appellate Court can only reverse or vary the decree of the trial Court in favour of the party appealing, but exceptions to this rule are provided for by rr. 4 and 33 of O. XLI, Civil Procedure Code. A comparison of those rules shows that the powers given to an Appellate Court by r. 33 of O. XLI, Civil Procedure Code, can only be exercised by that Court in favour of "all or any of the respondents or parties." But no such qualification is to be found in r. 4. This leads to the inference that the Legislature deliberately empowered an Appellate Court in cases contemplated by r. 4 to reverse or vary the decree in favour of all the plaintiffs or defendants even though some of them may not be parties to the appeal. For these reasons, I am of opinion, that there is no substance in the first ground urged by the learned Counsel for the appellants.

There is no substance either in the other two points urged by the learned Counsel for the appellants. On the findings of the lower Appellate Court, which findings are binding on me in second appeal, it is abundantly clear that the plaintiffs-respondents had, before the mortgage alleged by them, a title to the holding in dispute and were in possession of the same. The defendants entered into possession of that holding because of the unregistered mortgage-deed executed by the plaintiff. The mortgage not having been effected by a registered deed as required by s. 59 of the Transfer of Property Act was invalid, but nevertheless the recitals in the unregistered mortgage-deed were admissible in evidence for the purpose of explaining the nature and character of the possession of the defendants over the holding in dispute, *vide*, *Varada Pillai* v. *Jeevarathnammal* (4). The unregistered mortgage-deed being in possession of the defendants and they not having produced the same, secondary evidence of its contents could be given in view of the provisions of s. 65 of the Indian Evidence Act. On the basis of such evidence the lower Appellate Court has found as a fact, that the plaintiffs mortgaged the holding in dispute to the defendants about 20 years prior to the institution of the suit, and, therefore, it admits of no doubt, that the defendants entered into possession of the holding in dispute as mortgagees and not as trespassers. A mortgage of an occupancy holding is, no doubt, not permitted by law, but by entering into possession as mortgagees of the holding in dispute and by continuing in such possession for more than 12 years, the defendants could only prescribe a title for the limited interest of a usufructuary mortgagee. This was the view taken in the case of *Nadepena Appamma* v. *Saripilli Chinnavadu* (5). If the plaintiffs had brought a suit for possession of the holding in dispute against the defendants within 12 years, from the date of the execution of the mortgage, the plaintiffs could have claimed an unconditional decree for possession on the ground that the mortgage being of an occupancy

(4) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

(5) 79 Ind. Cas. 510; 45 M. L. J. 667; (1923) M. W. N. 825; 33 M. L. T. 146; 19 L. W. 37; A. I. R. 1924 Mad. 292; 47 M. 203.

holding was void in law. In that case the defendants could not have set up the mortgage as a bar to the plaintiffs' claim, but by continuing in possession for more than 12 years as mortgagees, the defendants have prescribed a title to the mortgagee right and it is this acquisition of the prescriptive title that has vested in the defendants, the rights of a mortgagee. The defendants never took possession of the holding claiming an absolute title to the same, and obviously, therefore, the plaintiffs' title to the holding in dispute has not been extinguished. It is, as if it were, that by the continuance of the defendants' possession for more than 12 years as usufructuary mortgagees, there came into existence a legally operative mortgage which the plaintiffs must redeem as a condition precedent to a decree for possession of the holding in dispute. This is what has been held by the lower Appellate Court.

Dr. Agarwala has argued that a person can prescribe a title to something which is permitted by law but not with respect to something which is prohibited by law, and he maintains that the mortgage of an occupancy holding being prohibited by law, the defendants could not prescribe a title to mortgagee rights. I cannot agree with the contention of the learned Counsel for the appellants. If a trespasser by taking unlawful possession of certain property can prescribe a title as against the true owner by adverse possession for more than 12 years, I find it difficult to follow why a usufructuary mortgagee of a property, the mortgage of which is not premitted by law, cannot prescribe the limited interest of a usufructuary mortgagee in the property mortgaged to him.

In my judgment, Art. 142 of the Limitation Act has no application to the present case. A suit for redemption of a usufructuary mortgage is, no doubt, in substance a suit for possession of immoveable property, but the period of limitation for such a suit is that provided for by Art. 148 of the Limitation Act and it is that Article that governs the present case. The allegation of the plaintiffs that the defendants entered into possession of the holding in dispute as mortgagees necessarily leads to the conclusion that the defendants' possession was permissive and, therefore, the lower Appellate Court was right in assuming that the defendants' possession was permissive and not adverse, and in doing so that Court has not made out a new case for the plaintiffs which was not set up by them in the trial Court.

For the reasons given above, the decree of the lower Appellate Court is perfectly correct and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 311 OF 1926.

February 7, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr Justice Raza.

NISAR AHMAD KHAN—DEFENDANT—APPELLANT

versus

Musammat RAHMAT BEGUM—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 25 (1)—'Parties standing in a near relation'—'Natural love and affection'—Agreement by Muhammadan to pay maintenance to wife's father and mother—Validity of agreement.

The meaning of the words "parties standing in a near relation" in s. 25 (1) of the Contract Act of 1872 should not be narrowed down so as to mean "near relatives." [p. 351, col. 1.]

The parents of a Muhammadan lady are relatives of her husband and they must be considered to be parties standing in a near relation to him. An agreement by a Muhammadan to pay certain maintenance to his wife's father and mother is, therefore, a valid disposition by virtue of s. 25 (1) of the Contract Act as having been made on account of natural love and affection between parties standing in a near relation to each other. [*ibid.*]

Appeal from the decree of the Second Additional Subordinate Judge, Lucknow, dated the 12th May, 1926, in Appeal No. 26/186/48 of 1926, reversing that of the Second Munsif, Lucknow District, dated the 13th August, 1925.

Mr. *Khaliq uz-zaman*, for the Appellant.

Mr. *F. L. Verma*, for the Respondent.

JUDGMENT.—The question for our decision in this second appeal is whether a registered deed executed on the 22nd of April, 1893, by Nisar Ahmad Khan under which he agreed to pay certain maintenance to his wife's father and mother is a valid disposition within the meaning of s. 25 (1) of Act IX of 1872 as having been made on account of natural love and affection between parties standing in a near relation to each other. Although the recital in deed itself contains no refer-

ence to the existence of natural love and affection we find that on the evidence on the record it is established that the disposition was made on account of natural love and affection. Having decided this question of fact, which had not been clearly decided by the Court below, we now come to the legal question involved. In a Muhammadan family, are the husband and wife parties standing in a near relation to their daughter's husband? When the meaning of this proviso has been under discussion in previous cases there appears to have been a tendency to interpret the words "parties standing in a near relation" as though they mean "near relatives." We are of opinion that the mean- of the words should not be narrowed down in this way. There are many instances in which persons, who are not relatives or relations within the meaning of the law, nevertheless, stand in a near relation to one another. But, in any circumstances, the parents of a Muhammadan lady are relatives of her husband and we consider that they must be determined to be parties standing in a near relation to him, For the above reasons we accept the view taken by the lower Appellate Court and dismiss this appeal with costs.

G. H. *Appeal dismissed.*

A. N. A.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 6 OF 1926.

September 23, 1926.

Present:—Mr. Justice Chotzner and Mr. Justice Duval.

HAMID ALI AND OTHERS—ACCUSED—PETITIONERS

versus

MADHU SUDAN DAS SARKAR—OPPOSITE PARTY,

Criminal Procedure Code (Act V of 1898), ss. 424, 476, 476B—Civil Procedure Code (Act V of 1908), O. XLI—Complaint by subordinate Court—Appeal—Procedure—Appellate Court, duty of.

When a complaint has been made under s. 476 of the Criminal Procedure Code, the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate and the appeal must be dealt with as an ordinary appeal under the Criminal Procedure Code, as is provided for in s. 424 of the Code. The Appellate Court has no jurisdiction in such a case to require the Court making the complaint to answer arguments which the Appellate Court must answer itself, nor could the Appellate Court dismiss the appeal in a summary fashion without giving any reasons for such dismissal. [p. 351, col. 2; p. 352, col. 1.]

Per *Duval, J.*—Where, in such a case, the order making the complaint is made by a Civil Court, an appeal against such order must be regulated by the provisions of O. XLI of the Civil Procedure Code and not by the provisions of ss. 422 to 424 of the Criminal Procedure Code. [p. 352, col. 1.]

Rule against an order of the District Judge, Tipperah, dated the 22nd May, 1926, preferred against that of the Subordinate Judge, Tipperah, dated the 24th April, 1926.

Mr. *Narendra Kumar Basu* and Babu *Debendra Narain Bhattacharjee*, for the Petitioners.

Babu *Birendra Kumar Dey*, for the Opposite Party.

JUDGMENT.

Chotzner, J.—We are of opinion that this Rule must be made absolute on the first ground upon which it was issued, namely, that the judgment of the learned District Judge is not in accordance with law. It seems that the Subordinate Judge drew up an order directing the prosecution of the present petitioners on certain grounds. An appeal was taken from that order under s. 476B, Criminal Procedure Code, to the District Judge. The learned Judge, however, seems to have regarded the complaint drawn up by the Subordinate Judge as defective and he, therefore, sent instruction to the Subordinate Judge "to frame a proper complaint more or less in the form of a charge giving the date of the alleged offence or offences, the way in which they were committed (*i. e.*, in the case of the charge under s. 471 the mode of user)" and then he goes on to say "let him send me the complaint in this form" and he then proceeded to state what apparently was one of the grounds of appeal which was—"that judgment-debtors Nos. 2 and 3 took no active part in the prosecution of the case and cannot be bound by anything which judgment-debtor No. 1 may have done. The Subordinate Judge should meet that objection." This order was made on the 1st May, 1926. On the 22nd May, the learned Judge notes:—"Heard arguments for appellants and read the Subordinate Judge's reply to the points referred to in my order. I am not prepared to interfere or order withdrawal." Now, it is plain from the wording of s. 476B that when a complaint has been made under s. 476, the person affected by the complaint may take

an appeal to the Court to which the Court making the complaint is subordinate and that appeal must be dealt with as an ordinary appeal under the Criminal Procedure Code, as is provided for in s. 424 of the Code. The procedure, however, adopted by the learned District Judge was not in accordance with that section. We doubt whether he had jurisdiction when an appeal had been preferred against an order of the Subordinate Judge to require the Subordinate Judge to answer arguments which he was required to answer himself. We are also of opinion that the summary method he had followed in disposing of the appeal without giving any reason cannot be supported. We consider, therefore, that the Rule must be made absolute and the case remitted to the Court of the District Judge so that he may rehear the appeal and write a judgment in accordance with law.

Duval, J.—I agree with my learned brother that the appeal must be heard according to law. In my opinion, however, the appeal must be treated as a Miscellaneous Civil Appeal and regulated by O. XLI of the Code of Civil Procedure, and not by ss. 422-424, Criminal Procedure Code, it being an appeal against an order of a Civil Court to a superior Civil Court and the procedure in Civil Court being provided for by the Civil and not the Criminal Procedure Code.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 579 OF 1924.
November 2, 1926.
Present :—Mr. Justice Kendall.
GANGA AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JAI KUMAR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 79, 196—Occupancy tenant—Forcible dispossession by stranger—Ejectment suit—Jurisdiction of Civil and Revenue Courts—Appeal—Objection to jurisdiction, whether can be taken—Procedure.

Defendant took forcible possession of a certain occupancy holding without the consent of the occupancy tenant and the latter instituted a suit in the Revenue Court to eject the defendant on the allegation that he was his sub-tenant. The trial Court decreed the suit but on appeal the District Judge came to the conclusion that the defendant was not a sub-tenant but a trespasser and dismissed the suit. On second appeal:

Held, (1) that s. 79 of the Agra Tenancy Act was not applicable to the case but that it was open to the plaintiff to sue for the ejectment of the trespasser in the Civil Court;

(2) that having regard, however, to the provisions of s. 196 of the Agra Tenancy Act no objection with regard to the jurisdiction of the trial Court could be entertained in appeal and that the decree of the trial Court must, therefore, be restored.

Second appeal against the decree of the District Judge, Cawnpore, dated the 15th February, 1924.

Mr. *U. S. Bajpai*, for the Appellants.

JUDGMENT.—This is a second appeal from the order of the learned District Judge of Cawnpore, setting aside the order of the first Court, by which the plaintiffs-appellants were given a decree for the ejectment of the defendant-respondent. The facts that have been proved in the lower Courts are that the plaintiffs-appellants are the occupancy tenants of the holding in dispute, and that the defendant-respondent took forcible possession of that holding without the consent of the plaintiffs some time in the year 1328 *F.*, and that the relation of landlord and tenant has never been admitted between the parties by the payment of rent. The first Court held that the defendant must be regarded as a sub-tenant and, in fact, was recorded as such, and that he was liable to ejectment. The lower Appellate Court, however, came to the conclusion that the defendant was not a sub-tenant but a trespasser, and that the plaintiffs should have either taken proceedings under s. 79 of the N.-W. P. Tenancy Act of 1901 or else they should have proceeded in the Criminal Court. The facts appear to be very similar to those in the case reported in *Rani* v. *Aidal Singh* (1) in which it is held that s. 79 of the Act would not apply, and indeed, I think, it is clear from the provisions of the section itself. It was open to the plaintiffs to sue for the ejectment of the trespasser in the Civil Court, but under s. 196 of the N.-W. P. Tenancy Act, no such objection can be entertained in this Court. I agree, therefore, with the learned Counsel for the appellants, and allow the appeal with costs. I set aside the order of the lower Appellate Court and restore that of the Court of first instance, decreeing the plaintiffs' suit for ejectment.

Z. K. *Appeal allowed.*

(1) 78 Ind. Cas. 1041; 22 A. L. J. 113; A. I. R. 1924 All. 431; L. R. 5 A. 37 Rev.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 6 OF 1926.
May 17, 1926.
Present :—Mr. Justice Suhrawardy and Mr. Justice Duval.

ASERUDDIN—ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 161, 162, 297—Statement of witness that he did not make any statement to Police, admissibility of—Charge to Jury—Omission to draw attention of Jury to right of private defence—Misdirection.

To attract the operation of s. 162 of the Criminal Procedure Code, there must be a statement which is capable of being recorded and reduced into writing and, therefore, a statement by a witness that he did not make any statement to the Police cannot be said to be a statement within the meaning of this section. [p. 353, col. 2; p. 354, col. 1.]

It is doubtful whether a statement of a witness to the Police that he knew nothing about the occurrence is not a statement within the meaning of s. 161 of the Criminal Procedure Code. [p. 354, col. 1.]

Failure on the part of the Court to put clearly before the Jury, the law relating to the right of private defence arising on the admitted and proved facts and to direct their attention to find as to whether the accused was, and, if so, how far, justified, in preventing injury to himself in attacking his opponent is a serious misdirection vitiating the trial. [p. 355, col. 1.]

Criminal appeal against the order of the Sessions Judge, Dinajpur, dated the 18th November, 1925.

Babu *Debendra Narain Bhattacharjee*, for the Appellant.

The Deputy Legal Remembrancer (Mr. *Khundkar*), for the Crown.

JUDGMENT.—In this case the accused Aseruddin, *alias* Botu, has been convicted under s. 326 of the Indian Penal Code on two charges: first, for causing grievous hurt with a dangerous weapon to one Rahimuddin, and secondly, for causing the same offence upon one Aseruddin; and sentenced to 7 years' rigorous imprisonment on the first count, and to 3 years' rigorous imprisonment on the second—the sentences to run concurrently. The case for the prosecution is that there was some dispute with regard to possession of a piece of land. The complainant was in possession of the land, and as he was late in transplanting crop, he called in a number of friends and dependents to help him in the matter on the 16th September, 1925. On that date he went with a large number of men and started transplanting paddy. About three *bighas* of land lay to the west of a path, and when the men came to that part the accused Botu with his brother, Anaruddin, and one Moji came on to the land and protested saying that it was his. Botu cut the strings of the foremost plough when Rahimuddin came and mended it, and started ploughing again. Botu caught his *penta* and threatened to strike Rahim. Rahim seized Botu by the neck, Botu seized Rahim by the neck with his left hand, and then taking the knife into his right hand stabbed Rahim until the latter fell down. Aseruddin seized the knife at which Botu struck him with the knife under the right arm-pit. On these facts the accused was charged under ss. 304 and 326 of the Indian Penal Code. The majority of the Jury found him not guilty under s. 304 of the Indian Penal Code, and convicted him under s. 326 on the first count, and on the second charge by a majority of four found him guilty under s. 326 for causing grievous hurt to Aseruddin.

Two points have been taken on behalf of the appellant—(i) that some statements made by the defence witnesses to the Police were admitted in violation of the provisions of s. 162 of the Criminal Procedure Code. With reference to this point, the facts are that two witnesses were examined on behalf of the accused. The first witness was Bibijan, who was set up by the accused as the owner of the land from whom he had taken settlement of it. In her evidence she stated —"The Sub-Inspector questioned me. I told him I knew nothing." The second witness was Sharitulla Sarkar who said—"I deposed to the Sub-Inspector. I started to tell him "about the possession but he said he did not want that, so I did not tell him any more." With regard to the statement made by the first witness it is not the accused's case that she saw the occurrence, or that she knew anything about it. She merely told the Police that she knew nothing about the occurrence. Even if this evidence is inadmissible, it does not in any way prejudice the accused. With regard to the statement made by the second witness, his statement is similarly innocuous. He said that he was not allowed by the Sub-Inspector to say what he intended to say, and he denied that he said that he knew nothing.

The question which has been raised before us is whether the statement made before the Police that the witness did not

say anything to the Police about the occurrence is a statement within the meaning of s. 162 of the Criminal Procedure Code.

If we accept the contention of the petitioner the result will be that the absence of a statement will be equivalent to a statement. Section 162 says that no statement made by any person to a Police Officer in the course of an investigation shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof be used for any purpose save as therein provided. For the application of this section there must be a statement which is capable of being recorded, and reduced into writing and, therefore, if a witness says "I did not make any statement to the Police", it cannot be a statement under s. 162 of the Criminal Procedure Code. The same view has recently been taken in the unreported case of *Emperor* v. *Nagendra Nath* alias *Dadhiram Nath* (Reference No. 5, and Appeal No. 510 of 1925), decided on the 8th October, 1925, in which it is said—"A question was put to one of the defence witnesses as to whether he had made a certain statement to the Police when he was examined under s. 161 of the Criminal Procedure Code. It is contended that, having regard to the provisions of s. 162 of the Criminal Procedure Code, the statement made to the Police Officer under s. 161 could not be used for any purpose. But all that was put to the witness was whether he had made such a statement to the Police, and his answer was that he did not remember. It is not proved that the statement was actually made to the Police, and the mere fact that a question was put to the witness asking him whether he had made a particular statement to the Police did not vitiate the trial as it is not proved that such a statement was actually made to the Police under s. 161 of the Criminal Procedure Code." It is, however, doubtful if a witness makes a statement to the Police under s. 161 that he knew nothing about the occurrence is not a statement within the meaning of s. 161 of the Criminal Procedure Code. We need not pursue this matter further in the view that we have taken with regard to the second objection made on behalf of the accused.

It is said that the learned Judge's charge to the Jury is defective inasmuch as he had not laid before the Jury the law with regard to the right of private defence that arises in this case on the admitted and proved facts. We have said that the prosecution case was that the deceased Rahimuddin was the first to catch hold of the accused by the neck. There is no evidence before us as to how and with what force the attack was made by the deceased and whether it was such as to raise an apprehension in the mind of the accused of grievous hurt. These are matters which should be considered by the Jury. It is said that thereupon the accused brought out his knife and gave a few strokes with it to the deceased. The question that arises on these facts is whether the accused had any right of private defence and if so, how far it extended. The learned Judge in explaining the law referred to relevant sections, as it appears from his written charge, relating to the right of private defence. He made the following observation: "If these facts are correct", (that the accused was defending his own property), "then the prosecution party were committing criminal trespass and the accused had a right to defend his property and, if attacked, his person, but he had no right to cause death unless you think that there was a reasonable apprehension that he would otherwise suffer death or grievous hurt." It may be stated here that the learned Judge was of opinion that the property was probably in the possession of the accused. He did not, however, specifically put the case of defence of person based on the facts alleged by the prosecution before the Jury. But this statement of law as appears from the charge which contains only the heads of what it really was orally delivered might have been sufficient. But the learned Judge in the concluding portion of his charge made the following observation: "There is nothing to show that he was ever called on to defend his person before he killed Rahimuddin and wounded Aseruddin." This, in our opinion, is a clear misstatement of facts. We have stated that the case for the prosecution was that it was the deceased who first caught hold of the accused by the neck; and the question whether the accused was justified in defending his person to the extent of causing grievous hurt to the deceased was a question of fact which should have been left to the Jury. The statement "that there is nothing to show that he was ever called on to defend

his person" is also incorrect from another point of view. There is some evidence on the point adduced by the accused. Whether it was sufficient for the purpose of proving his case is a matter for the consideration of the Jury. It is, therefore, not correct to say that there is nothing to show that the accused had any occasion to exercise the right of private defence of person. According to the prosecution story the deceased caught the accused first by the neck, and according to the defence it was the deceased who actually gave the first blow. In this view we cannot say how far the last sentence in the Judge's charge to the Jury influenced the Jury in the verdict they returned, though the Judge wound up the charge by observing "the only question in this case would be whether the accused exceeded the right of self-defence." The law as bearing on the facts set up had not been clearly placed before the Jury, and their attention was not directed to find as to whether the accused was, and, if so, how far, justified, in preventing injury to himself, in attacking the deceased. In this view we think that the charge as delivered by the Judge contains serious misdirection, and the conviction of, and the sentence passed on, the accused should be set aside, and we direct that he be re-tried according to law. The accused will remain in custody until further orders of the Sessions Judge.

K. L. *Conviction set aside: Re-trial ordered.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 506 OF 1926.
(CRIMINAL REVISION PETITION No 419 OF 1926).

December 10, 1926.

Present:—Mr. Justice Wallace.

In re JAYACHANDRA CHETTY AND ANOTHER—ACCUSED NOS. 1 AND 3—PETITIONERS.

Madras Abkari Act (I of 1886), ss. 34, 40, 55 (a), 56 (b)—Possession, what constitutes—Possession of illicit quantity of arrack—Offence whether comes under s. 55 (a) or s. 56 (b)—Arrest by Abkari Officer—Escape from custody—Offence—Legality of arrest—Procedure.

A person who carries arrack in excess of the permissible quantity from one place to another is in "possession" of it within the meaning of s. 55 (*a*) of the Madras Abkari Act. [p. 356, col. 1.]

Possession of an illicit quantity of arrack in breach of the license or permit or rule under the Madras Abkari Act comes under s. 55 (*a*) and, therefore, does not come under s. 56 (*b*) of the Act and s. 34 authorises an Abkari Officer to arrest for such an offence. [*ibid.*]

Under the provisions of s. 34 of the Madras Abkari Act, an arresting officer is empowered to take an offender to a Police Station within 5 miles where he is not authorised to admit the offender to bail and there is a Police Inspector in such station having such power. [p. 356, col. 2.]

[Need for amendment of the sections of the Madras Abkari Act relating to the procedure for arrest for abkari offences pointed out.]

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Saidapet, in Cr. A. No. 40 of 1926, preferred against that of the Court of the Stationary Sub-Magistrate, Saidapet, in C. C. No. 1378 of 1925.

Messrs. *V. L. Ethiraj, V. Rajagopalachariar* and *A. S. Natarajan*, for the Petitioners.

Mr. *R. N. Aiyangar*, Public Prosecutor, for the Crown.

ORDER.—The 1st petitioner in this case has been convicted of escaping from lawful custody, and the 2nd petitioner, of rescuing him from lawful custody, the 1st petitioner having been arrested by the Abkari Sub-Inspector for being in possession of an illicit quantity of arrack, and the 2nd petitioner has also been convicted of assaulting the Sub-Inspector. The assault and the rescue have been held to have been proved as facts by both the lower Courts and that concurrent finding of fact has not been disputed, as it could not easily have been disputed, before this Court exercising its powers of revision. The facts are that the 1st petitioner is a servant of the 2nd accused who holds an arrack license for certain premises, that the 1st petitioner was conveying without a permit from 2nd accused's shop to his house a quantity of arrack in excess of the amount which the 2nd accused or any one else is permitted to hold under the rules outside licensed premises, that the 1st petitioner was caught by the Abkari Sub-Inspector in possession of this arrack and arrested, and that when the Sub-Inspector was taking him to the Police Station, accused No. 2 and 2nd petitioner came up, assaulted the Sub-Inspector and rescued the 1st petitioner who made good his escape.

In this Court it is pleaded that the

custody of the 1st petitioner by the Abkari Sub-Inspector was not lawful and, therefore, no offence has been committed. This plea rests on three contentions, (1) that the 1st petitioner was not in possession, within the legal meaning of that word, of the arrack, (2) that the original offence was not one for which he could be arrested, and (3) that the action of the Sub-Inspector in taking him to the Police Station was contrary to law. As to the first point, the contention is that the 1st petitioner was really 'transporting' arrack and was not in possession of it within the legal meaning of the term. No authority has been cited for this position. No doubt he was transporting the arrack, but I do not see how it can be said that he was not also in possession of it. In the absence of any indication in the Abkari Act to the contrary 'possession' has its ordinary meaning and the 1st petitioner was certainly in possession of the arrack when he was carrying it. I see no force in this point.

As to the second point, the argument is based on a contention that the offence comes under s. 56 and not s. 55 of the Abkari Act, and that s. 34 gives no authority to an Abkari Officer to arrest for an offence under s. 56. The question is, does the present offence fall under s. 56 (*b*), and, if it does, does that prevent its falling also under s. 55 (*a*)? The wording of s. 56 (*b*) is very clumsy: "Whoever does anything in breach of the conditions of his license not otherwise provided for in this Act." This language is, to say the least, very dubious English, but I take it to mean: "Whoever does anything which amounts to a breach of the conditions of his license which breach is not otherwise provided for in this Act," that is, that the breach will be punishable under this section if it is not already designated as punishable under some other section. A breach under s. 56 (*b*) is a breach distinct from those provided for under s. 55. Breaches under s. 56 are, apparently from the fact that they do not entail liability to arrest, of a less serious kind than those under s. 55. I have no doubt that possession of an illicit quantity of arrack in breach of the license or permit or rule under the Act comes under s. 55 (*a*) and, therefore, does not come under s. 56 (*b*). Therefore, on the second point I hold that the 1st petitioner was lawfully liable to arrest under s. 34.

As to point 3, it involves a consideration of s. 40 (1) which lays down that on arrest the arrested person shall, if bail is not accepted, be forthwith forwarded to an Abkari Inspector, or, if there is no such officer within ten miles, to the nearest Police Station. There is no doubt that in this case there was an Abkari Inspector in Madras within ten miles of the scene of arrest. There is no doubt also that the Abkari Sub-Inspector who effected the arrest was taking the 1st petitioner to the Police Station; he definitely says so in his evidence, and it was when the 1st petitioner was almost at the Police Station that he was rescued.

Section 40 (1) as it stands seems impracticable to work. The arresting officer and the person arrested are to start off at once on a wild goose chase after an Abkari Inspector, who is a touring officer and may be anywhere within a circle of ten miles from the scene of arrest. The section would seem to indicate that this is the proper procedure. If any attempt is to be first made to find out the whereabouts of the Inspector within the circle, it is not clear what is to be done with the arrested person while this enquiry is being made. A reference to s. 34 proviso still further increases the difficulty of knowing what is the proper procedure. In that proviso, if the arresting officer is not authorised to admit to bail, he must forward the arrested person forthwith to an officer empowered to grant bail if there is such an officer within five miles. If such an officer is a Police Inspector who is at the Police Station, then, obviously, the arrested person must be sent to the Police Station for the purpose of admitting to bail. It follows then that if the arresting officer can admit to bail he cannot send the arrested person to the Police Station; but, if he cannot admit to bail, then he can send the arrested person to the Police Station, a rather topsy-turvy result. Whether the Abkari Sub-Inspector in this case was empowered to grant bail, does not appear to have been put in issue in the case. Before the lower Appellate Court the petitioners argued that he was not so empowered. If so, then s. 34 proviso would apply and the Abkari Sub-Inspector was in law bound to send him to an officer who could grant bail, such as the Police Inspector, and the taking of the 1st petitioner to the Police Station would then seem to be perfectly

lawful. I am of opinion that, if the petitioners wanted to make anything of this point, they should have done so before the trial Court when it could have been put in issue whether the arresting officer had or had not power to grant bail. This was not done. There is no definite fact proved from which, I can conclude that s. 40 and not s. 34 proviso applies to this case. Nor am I prepared at this stage to call for information.

I find, therefore, no case has been made out for revision and I dismiss this petition.

I would respectfully urge on Government the necessity of revising these provisions of the Abkari Act. This Court has in two other cases, namely, *In re Yerlagadda Venkanna* (1) and Cr. R. C. No. 568 of 1925 pointed out how confused and irreconcilable these sections regarding arrest and detention of persons suspected of committing abkari offences are and what difficulties are put in the way of the Courts which endeavour to interpret them.

V. N. V. *Petition dismissed.*

(1) 90 Ind. Cas. 436; 48 M. L. J. 605; (1925) M. W. N. 396; 22 L. W. 98; A. I. R. 1925 Mad. 856; 26 Cr. L. J. 1556.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 613 OF 1926.

October 12, 1926.

Present:—Mr. Justice Zafar Ali.

GHULAM AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 366—Abduction—Evidence—Woman abducted, a material witness.

The most important witness in an abduction case is generally the abducted woman herself and where she is not forthcoming and the other witnesses are not of a very reliable type, the prosecution evidence must be carefully scrutinised and weighed.

Appeal from the order of the Additional District Magistrate, Shahpur at Sargodha, dated the 1st June, 1926.

Mr. *M. L. Puri*, for the Appellants.

Mr. *Feroz-ud-Din Ahmad*, for the Government Advocate, for the Respondent.

JUDGMENT.—The eight appellants in this case have been found guilty of having abducted *Musammat* Imam Bibi, a married girl of about 15 years of age, and have been sentenced to rigorous imprisonment for 7 years each under s. 366, Indian Penal Code.

Musammat Imam Bibi has not been recovered so far, and she may be with Sher Bahadur accused who is absconding and could not be got hold of by the Police.

In a previous case in which *Musammat* Imam Bibi figured as a prosecution witness, twelve men were prosecuted for the offence of abducting *Musammat* Sahibzadi *chachi* of *Musammat* Imam Bibi but the trial resulted in their acquittal. Six of the present appellants, namely, the three sons of Rana and Ghulaman, Walli and Fatta were among these twelve men.

The prosecution theory in the present case is that *Musammat* Imam Bibi has now been abducted because she had given evidence against the accused in the former case. On behalf of the defence it is suggested that *Musammat* Imam Bibi has, as a matter of fact, eloped with Sher Bahadur and that the story of her abduction has been concocted to implicate as many as nine men, of whom six were acquitted in the former case.

The most important witness in an abduction case is generally the abducted woman herself, but in the present case *Musammat* Imam Bibi is not forthcoming, and the evidence of the witnesses of the type that have been examined by the prosecution requires to be carefully scrutinized and weighed. The principal witness is a boy of 10 years of age, who is the younger brother of the husband of *Musammat* Imam Bibi, and was obviously a tool in his hands. The rest are the so-called *Waj Thakkar* witnesses, who depose that they, one by one, came across the accused when they were taking away the girl by force. There are material discrepancies in their statements and as three of them are related to the husband of the girl, it appears very strange that they did nothing to rescue her, though, according to their story, she was crying and weeping. They did not even send immediate information of her abduction to her friends and relatives, and this fact also renders their story improbable and incredible. Further it does not appear likely that so many relatives of the complainant should have happened to come across the abductors.

One of the incidents of the abduction deposed to by the boy was that the girl was at that time carrying a pitcher con-

taining milk, which fell down and was broken to pieces; but no broken pitcher was found on the alleged spot when the *chaukidar* Dost Muhammad, P. W. No. 10, reached there on receiving information of the occurrence from one Barkhurdar.

After carefully considering all the evidence, I come to the conclusion that the alleged abduction of the girl by the appellants has not been proved. I, therefore, accept the appeal and setting aside the convictions and sentences direct that the appellants be released forthwith.

A. *Appeal accepted.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 503 OF 1926.
November 18, 1926.
Present:—Mr. Justice Cuming and Mr. Justice Gregory.
E. ST. C. MOSS AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 297—Trial by Jury—Charge to Jury, contents of—Failure to explain law applicable—Failure to draw attention to statement of accomplice—Misdirection.

In the case of a trial by Jury the Judge must put down sufficient in his heads of charge to the Jury for the High Court to ascertain whether he did or did not correctly explain the law to the Jury. A mere statement that the relevant sections have been read out and explained to the Jury is not enough and when the provisions of those sections are such that they require an explanation and it does not appear from the heads of charge what explanation of them was given to the Jury, the trial is vitiated. [p. 359, col. 1.]

Where on the evidence a strong suspicion is raised that a witness for the prosecution is an accomplice, the failure of the Judge to put it to the Jury to consider whether or not the witness is an accomplice and to caution the Jury against accepting his evidence without corroboration, in case they hold that he was an accomplice, amounts to a misdirection and vitiates the trial. [p. 359, col. 2.]

Mr. *Pugh* and Babu *Bhupendra Chandra Guha*, for the Appellants

Mr. *A. K. Basu*, for the Crown.

JUDGMENT.

Cuming, J.—This is an appeal by five persons, Jumman Bepari, Tasaddak, Hossain *alias* Bachu Mia, Mahammad Kurban Hossain, Tilla Mahmud Khan and E. St. C. Moss who have been convicted by the learned Additional Sessions Judge of Dacca sitting with a Jury under s. 46 of the Bengal Excise Act read with s. 120B, Indian Penal Code and sentenced to various terms of imprisonment and fine.

The case for the prosecution briefly is that the accused Moss who was a Sergeant in the Railway Police at Dacca went down to Calcutta ostensibly because his wife was ill but substantially in order to arrange for smuggling cocaine from Calcutta to Dacca and for that purpose he engaged in a conspiracy with the four other accused Bachu Mia, Kurban Hossain, Tilla Mahmud Khan and Jumman Bepari. In pursuance of this conspiracy one Kalu Mia who was a servant of the accused Moss set out for Dacca from Calcutta with a box which contained a quantity of cocaine. Bachu Mia who is one of the appellants went with him in the same train. When they arrived at a station called Tezgaon which is at a short distance from Dacca on the order of Bachu Mia Kalu got down from the train. Their movements were observed by one Azizar Rahaman, who is an Excise Sub Inspector. The box at Tezgaon was made over to one Jumman to be taken in a *ghary*. Jumman in whose possession the box was, was arrested at Tezgaon and the box was taken to the Station Master's room. There it was searched and a packet of cocaine was found in it which was placed on a table in the room. While the Excise Sub-Inspector proceeded to write the names of the witnesses a man snatched up the packet of cocaine and ran away. On these facts the accused were charged with committing an offence under s. 46 of the Bengal Excise Act read with s. 120B, Indian Penal Code, and were convicted as stated before. Mr. Pugh who appears for the appellants has raised a number of objections to the charge of the learned Additional Sessions Judge to the Jury. It is unnecessary to deal with all the points which Mr. Pugh has raised because two of them are fatal to the trial. Mr. Pugh's first argument is that the Judge has not explained the law to the Jury or rather that he has not set out in his charge how he has explained the law and, therefore, this Court is not in a position to say whether he has or has not correctly explained the law to the Jury. In dealing with this point the learned Judge observed as follows: "Section 46, Excise Act, and s. 120B, Indian Penal Code, read and explained to the Jury." This is all. Obviously it is impossible for this Court to determine from these words whether the law was or was not correctly

explained. Mr. Pugh further contends that it is obvious that the law has not been properly explained because the learned Judge does not even know how to correctly draw up a charge under s 120B and that he could not have convicted the accused of an offence under s. 46 of the Bengal Excise Act read with s 120B, Indian Penal Code. Mr Bose who appears for the Crown argues that the law both of conspiracy and also in s. 46 of the Bengal Excise Act is so simple that it would be sufficient for the Judge to read out the sections to the Jury and that it does not require an explanation. I am prepared to admit that possibly s. 46 does not require much elaborate explanation. The Judge would have to explain to the Jury what an excisable article was and beyond this the section does not require much explanation. But I am not prepared to say that s. 120B is such a simple section that it would be sufficient to read out the section to the Jury without any further explanation. As has been pointed out in the case of *Abdul Gafur Khan* v. *Emperor* (1) by my learned brother Walmsley, J., the law, no doubt, requires that the Judge should record only the heads of charge, but the learned Judge points out, as has been often explained in this Court, that the Judge must put down sufficient in the charge for this Court to ascertain whether he did or did not correctly explain the law to the Jury. This omission would of itself be sufficient to render a re-trial of the case necessary in the present case It is quite impossible to say whether the Judge did or did not correctly explain the law to the Jury.

Mr. Pugh has raised a further objection that the man Kalu is nothing better than an accomplice and that if so the learned Judge should have directed the Jury to consider whether or not Kalu was an accomplice and that if they considered Kalu to be an accomplice then it would be for the Jury to apply to his evidence the ordinary rules that are applied to the evidence of an accomplice. The Jury should have been warned that the evidence of an accomplice is unworthy of belief unless corroborated in material particulars and it should have been pointed out to them that although it was open to them to convict an accused upon an uncorroborated evidence of an occomplice it was, as a general rule, unsafe to do so. Looking on all the facts and circumstances of the case I think this point should have been put before the Jury, namely, whether Kalu was or was not an accomplice. The cocaine was alleged to have been found with Kalu. Kalu was the man who brought the cocaine from Calcutta. He admits that he was told by his master Moss to keep his mouth shut. And further when there was any difficulty about the box Kalu immediately made himself scarce. These facts would go to show that he had something to do with the transaction. I am not prepared to say that these facts must necessarily show that Kalu was an accomplice. But they must raise sufficient suspicion, I think, to render it necessary for the Judge to have put it to the Jury to consider whether Kalu was or was not an accomplice.

In the view of these circumstances it cannot be said that the Jury has been properly directed in the case. It is not necessary to deal now with the further points raised by Mr. Pugh, namely, that the charge although apparently covered two distinct offences is included in the single head of charge.

The conviction and sentences of the appellants must be set aside and they are ordered to be re-tried.

Such of the appellants as are already on bail will continue to remain on the same bail pending their re-trial.

Gregory, J.—I agree.

Z. K. *Conviction set aside.*

(1) 71 Ind. Cas. 56; 26 C. W. N. 996; 35 C. L. J. 437; A. I. R. 1922 Cal. 192; 24 Cr. L. J. 8.

MADRAS HIGH COURT.

REFERRED TRIAL No. 64 OF 1926.
CRIMINAL APPEAL No. 462 OF 1926.
October 11, 1926.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

In re KARUPPANA PILLAI—PRISONER—ACCUSED

Criminal Procedure Code (Act V of 1898), ss. 164, 288—Statement made under s. 164, use of—Admission before Committing Magistrate that a certain statement was made under s. 164—Transfer of deposition to Sessions' record—Statement made under s. 164, whether evidence—Penal Code (Act XLV of 1860), s. 302—Murder—Person discovered near dead body immediately after murder holding weapon with which offence could have been committed, whether guilty.

A statement made by a witness under s. 164 of the Criminal Procedure Code can be used by the prosecution only to contradict the witness and to

show that he is unreliable, with a view to taking his evidence out of the case which otherwise might re-act unfavourably upon the evidence of other witnesses examined for the prosecution. [p. 360, col. 2.]

Where a witness is asked in the course of his examination before the Committing Magistrate whether he made a certain statement when he was being examined under s. 164 of the Criminal Procedure Code and the witness admits having made such statement, and the deposition of the witness before the Committing Magistrate is subsequently transferred to the Sessions' record under the provisions of s. 288 of the Criminal Procedure Code, the statement admitted by him to have been made under s. 164 of the Code cannot be treated as substantive evidence in the case.

Immediately after the commission of a murder a half-witted brother of the deceased was discovered sitting in a corner of the room in which the murder was committed holding in his hand a weapon with which the injuries found on the person of the deceased could have been caused. The weapon was, however, not bloodstained and there was no other evidence connecting the brother with the murder of the deceased:

Held, that under the circumstances of the case it would not be safe to convict the brother of the murder of the deceased.

Trial referred by the Court of Session of the Trichinopoly Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 37 of the Calendar for 1926.

Appeal by the prisoner against the said sentence.

Messrs. *V. L. Ethiraj* and *K. G. Srinivasa Iyer*, for the Prisoner.

The Public Prosecutor, for the Crown.

JUDGMENT.—The accused in this case has been convicted by the learned Sessions Judge of Trichinopoly for the offence of murder and sentenced to death. The prosecution case shortly was that he murdered his brother on the night of 1st April, 1926. The brother was sleeping on the inner *pial* of the house that night and the mother and the accused were sleeping in the outer *pial*. The prosecution case is that about midnight the accused attacked the deceased with an *aruval*. The neighbours were roused by the cry of the deceased and several of them turned up and saw the mother assisting the deceased from the house and the accused according to one or two of them, was sitting on the *pial* with an *aruval* in his hand. Certain evidence is put in before the lower Court that the mother, P. W. No. 6, herself had at one stage in the proceedings said that she saw the accused attacked the deceased with an *aruval*, and the learned Judge's judgment, it appears to us, is based mainly upon her statement. That statement was made when the woman was examined under s. 164, Criminal Procedure Code. In the Committing Court she denied that she had seen the accused attack the deceased. Here we think the learned Judge makes a serious mistake when he thinks that Ex. K, which is her deposition before the Committing Magistrate, contains the statement that she admitted that the accused cut the accused. The statement runs:—

"It is true I told the Deputy Magistrate that the accused cut the deceased Kunju Pillai on the face. It is correct."

The learned Judge has accepted this as meaning that it is correct that the accused cut the deceased which is not what appears on the face of the evidence. In the Sessions Court the woman repeated very much the same statement and her deposition before the Committing Court, Ex. K, was put in under s. 288, Criminal Procedure Code. But the admission of that deposition does not entail the admission of her statement under s. 164 as substantive evidence in the case and we are not entitled to use that in that way. It is a statement which could be used simply to contradict the witness and to show that she was unreliable with a view to taking her evidence out of the case which otherwise might re-act unfavourably upon the evidence of other witnesses examined for the prosecution. It is clear from the various statements made by this woman that her evidence is unreliable and that her statements made both to the authorities and to the neighbours at the time cannot be accepted as reliable evidence that it was the accused who cut the deceased, and the safest thing to do in the case is to put aside these statements altogether.

Then we are left with the evidence of one or two witnesses who say that they were aroused by the deceased's cry and came to the place and saw the accused sitting on the *pial* with an *aruval*. These witnesses are P. Ws. Nos. 4 and 8. As far as P. W. No. 8 is concerned, her evidence is not reliable, because she stated for the first time in the Sessions Court that the accused had an *aruval* in his hand and did not make it in the Committing Court. An important fact of that kind could hardly escape her memory in the Committing Court. As regards P. W. No. 4, there is no particular reason for rejecting the evidence that he gives; but, on the other hand, P. W. No. 7, who lives practically in the same house in another portion of it and was the first on the scene among the neighbours

did not see any *aruval* in the accused's hand. So the evidence as to this *aruval* is conflicting. None of the witnesses who speak to the *aruval* say they noticed any blood upon it; which again is rather a striking circumstance.

We are faced with the question as to whether a conviction can, when we rule out of account the statements by the mother, be based simply upon the evidence that the accused was found sitting after the murder with an *aruval* not said to be bloodstained, in his hand. It is, no doubt, a case in which one would naturally expect a brother, assuming his brother had been attacked and almost killed on the spot, to go to the assistance of the injured man instead of sitting by himself with an *aruval* in his hand. But there is a certain amount of evidence that the accused is a person who is not always in his proper senses; and in the case of a person of such mental constitution it is almost impossible to prophesy with any certainty what his natural conduct would be. It is not, for example, impossible that it occurred to his mind that the person who attacked his brother might also be coming to attack him and that he thought it advisable to arm himself with an *aruval*. Of course, if the *aruval* had had bloodstains at the time, that possibility will be ruled altogether. But so far as appears from the evidence, the *aruval* is not said to have been sustained with blood. It has also been pointed out that the accused's hand is said to have been stained with human blood. We do not think that this is a strong point against the accused in the circumstances, since the deceased was being taken, no doubt bleeding profusely, down the entrance of the house past him.

We feel strongly that the learned Sessions Judge has convicted the accused relying almost entirely upon the earliest statement made by the mother which she has repudiated and which we rule was inadmissible. In the circumstances of the case, we are not prepared to conclude from the evidence that remains that the only explanation of the accused's conduct is one which is consistent with having been himself the murderer. We are, therefore, unable to support the conviction of the accused by the learned Sessions Judge and we must reverse the conviction and the sentence and direct the accused to be set at liberty.

V. N. V. *Accused acquitted.*

Z. K.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 626 OF 1926.

January 6, 1927.

Present:—Sir Cecil Henry Walsh, KT., Chief Justice, and Mr. Justice Banerji.

EMPEROR THROUGH INAMI—APPLICANT

versus

ALLAH MAHR AND ANOTHER—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), ss. 209, 210, 437, 438—Inquiry into case triable by Court of Session—Magistrate, duty of—Order of Sessions Judge directing committal—Remedy—Reference by District Magistrate whether competent.

A District Magistrate has no power to refer an order passed by a Sessions Judge to the High Court for the purpose of having it quashed or modified; and *a fortiori* he has no power to call upon the Sessions Judge to forward the reference to the High Court. [p. 363, col. 1.]

Where a Sessions Judge sets aside an order of discharge passed by a Magistrate and directs that the case should be committed to his Court, the person prejudicially affected by such order has the right to apply to the High Court in revision to set aside the order, and if he can show that it is an order which ought not to have been made and which the circumstances could not justify any Sessions Judge in making, the High Court has jurisdiction to reverse or modify such order. There is no other form of procedure by which such an order can be judicially reviewed. [p. 362, col. 2.]

It is the duty of a Magistrate inquiring into a case triable by the Court of Session, if the evidence is *prima facie* adequate, to commit the case for trial and leave the ultimate judicial decision to the trial Court; but if he has reason to think and is prepared to state for judicial reasons, in the exercise of his discretion in his committal order, that there is a possibility of an alternative view to that which is set out in the charge originally made, he can always commit the accused for trial on two or more alternative charges. What he cannot do is to shut the door finally to the possibility of a trial upon evidence which *prima facie* is capable of interpretation to support a graver charge. [p. 364, col. 1.]

Where the evidence is conflicting and lays itself open to suspicion, but where on the other hand it may be true, and may commend itself to certain tribunals, the Magistrate, even though he may have reason to doubt whether if he were trying the case, he would convict, has no right to substitute his judgment for the final judgment of the Court indicated by law for the trial and to arrive at final decision dismissing the case in the way in which he would do if he were the trial Court. If the evidence is balanced, however unevenly in his opinion, then it is a matter which is to be tried, and it is his duty to commit the case for trial. [p. 364, cols. 1 & 2.]

Criminal Reference made by the District Magistrate, Bulandshahr, dated the 2nd September, 1926.

The Assistant Government Advocate, for the Crown.

Mr. *Shiva Prasad Sinha*, for the Applicant.

Mr. *Hamid Hasan*, for the Opposite Parties.

JUDGMENT.—This is a Reference to this Court by the District Magistrate of Bulandshahr, the object of which apparently is to complain against, and to invoke the revisionary powers of the High Court with regard to an order of the Sessions Judge. For reasons which will appear in a moment, we can do no more than express an academic opinion about the decision of the Sessions Judge against which complaint is made.

We have no jurisdiction to entertain this reference at all. It is not made to us under any section of the law, or under any known procedure. It stands no higher, as a matter which we can entertain in due course of law, than a letter or complaint sent to the High Court informally by any citizen. As a matter of strict procedure, it should never have been put up before a Judge in Court at all, although one can understand that the officials in the office entertained some doubt as to whether they ought to disregard it altogether or whether they ought to lay it before a Judge in Court to be dealt with. In future the Trial Clerk and his department must disregard all such petitions, references or complaints, not made according to recognised procedure, and should submit them through the Registrar to the Chief Justice, for him to make such order as he, in his discretion, thinks desirable under the circumstances. We wish to make this clear beyond question or possibility of misunderstanding. Otherwise if other Magistrates, or other persons concerned to question an order made by a competent Court of superior jurisdiction, like the Sessions Judge in criminal matters, chose to follow the unprecedented course adopted by the Acting District Magistrate in this case, the office of the High Court would be inundated with petitions and documents by way of complaint, without any legal foundation, and which would cause a serious amount of embarrassment and superfluous labour.

What happened in this case was as follows: Various charges and complaints were made with reference to a cattle trespass and a *marpit*, which ended in the death of a woman. The Police sent up the case under s. 304, in addition to other sections, and other complaints were made by private complainants before the Sub-Divisional Officer. The Sub-Divisional Officer (we will omit for the moment other proceedings which were dealt with by him) dealt with the charge under s. 304 in this way. He does not appear to have decided judicially that the charge was groundless, and that the evidence did not establish any case, but he altered the charge to one under s. 304-A, thereby dropping altogether the charge under s. 304, and then proceeded to dismiss the case, which he could not have done if the charge under s. 304 had remained. We pass by for a moment the consideration of the question how far this order was in fact, or could be in law, interfered with by the Sessions Judge. What happened then was that the complainant applied in revision which he had a perfect right to do, to the Sessions Judge, to reverse the order of the Magistrate; and the Sessions Judge entertaining the matter under s. 437, as he had a perfect right to do, decided, for reasons which he expressed judicially in an order, that the Magistrate had not acted according to law, and that the case ought to be committed to the Sessions under the original charge, s. 304. Passing by for a moment again, the question whether, in the particular circumstances of this case, that order was justified, it is clear that it was an order of the character, which was within the competence of the Sessions Judge. It seriously affected the accused persons, because it was tantamount to an order that he, or they, should be put upon their trial under s. 304. If that order had been made without any foundation in fact, or upon palpably inadequate materials, or in breach of the legal sanctions limiting the powers of the Sessions Judge, there was a remedy open to anybody prejudiced by that order. The person prejudicially affected by such an order has the right to apply to the High Court in revision to review an order of that kind, and if he can show that it was an order which never ought to have been made, and which the circumstances could not justify any Sessions Judge in making, this High Court has jurisdiction to reverse or modify such an order. No other form of procedure is known to us by which that order could be judicially reviewed.

The District Magistrate, for reasons into which we need not enter, and so far as they involve questions of law, are contained in a letter sent to the High Court on the 2nd of September, had decided to invoke the jurisdiction of the High Court to

interfere with the order of the Sessions Judge. It appears from a letter of his, addressed to the Assistant Registrar of the High Court, dated the 27th of September, that the Sessions Judge, to whom the District Magistrate had submitted the reference for the purpose of its being forwarded to the High Court, had refused to forward it. That refusal appears to us to have been right, inasmuch as the District Magistrate has no power under any statutory provision, as we have already pointed out, to refer an order of the Sessions Judge to the High Court for the purpose of having it quashed, or modified; *a fortiori* he had not power to call upon the Sessions Judge to forward it to the High Court. It would perhaps have been better if the District Magistrate, on receiving the refusal of the Sessions Judge, had taken advice, or taken some trouble to look into his own powers in the matter before taking the next step which he took, which we have already described as quite unprecedented, and one which we trust will not be repeated by any Magistrate under similar circumstances. But what he did was in defiance of the rules on the subject. He sent the reference to the High Court. The Assistant Trial Clerk noted at once the informality of the proceeding, and wrote a note pointing out that a reference could only come through the Sessions Judge. This view was properly communicated to the District Magistrate. In spite of that the District Magistrate persisted in the course which he had chosen, and re-submitted the record with the remark, to which we have already referred, that the Sessions Judge had refused to submit it himself. The result of that was that the office of the High Court found itself embarrassed by a reference for which there was no precedent so far as they knew, but which was persistently made under cloak of legal justification by a gentleman occupying the high and responsible position of a District Magistrate, and in the result the matter was put up in Court before my brother Mr. Justice Banerji, and he realising that the questions raised were out of the common, decided to issue notice to the parties, so that the matter might be discussed and settled once for all, and to refer it to a Bench of two Judges, which is the Bench now dealing with the matter.

We can only repeat, what we have said, that the reference has no existence in law, and is not recognised by any legal procedure. If it is not to be treated as mere waste paper, it has at any rate no higher status than that of a private letter, addressed by some private individual to the High Court, and our duty is strictly confined to deciding that we have no jurisdiction to entertain the reference and to direct the record to be returned.

Inasmuch, however, as the whole proceeding appears to have arisen out of a difference of opinion upon a very important question, which, however, is elementary, and has been clearly settled for many years, and ought to be known to every body connected with the administration of the criminal law, namely, the duty of a Committing Magistrate in dealing with a *prima facie* case triable by Sessions, we think it desirable to add a word or two by way of re-statement of the law in regard to that matter. In what we are saying we are only re-stating the settled principles by way of *obiter*, and the decision which this Court would be compelled to give, if, as we have pointed out was open to him, the accused person had applied to this Court in revision to set aside the order of the Sessions Judge. But the necessity of making this re-statement is created by the somewhat surprising *dicta* of a gentleman occupying the position of a District Magistrate, in the letter which he has written to the Registrar of the High Court, and which has come to be dignified by the name of a reference. The District Magistrate suggests that the action of the Sessions Judge amounted to an unwarranted interference with the lawful exercise by the Magistrate of the discretion vested in him by s. 209, and went on to state that the order was *ultra vires*. The Sessions Judge appears to us to have approached the matter strictly in accordance with the settled principles. He differed from the view taken by the Magistrate in reducing the charge from s. 304 to s. 304A for the following reason: "If the prosecution evidence were true that the two accused intentionally assaulted the woman with *lathis*, of which she died, it is difficult to understand how the act would amount to no more than rashness or negligence." The view he took was that the Magistrate while not rejecting the evidence, had disregarded the inference of criminal liability, legally and necessarily

to be drawn from the *prima facie* facts established by the prosecution evidence and had himself usurped the function of the trial Court and reduced the quality of the acts testified to by the evidence to a totally different legal complexion, thereby shutting the door to the possibility of the alternative of a graver charge being established. Now it is easy to state in a question of a serious *marpit*, where serious bodily injuries, or death, have occurred, circumstances which raise a serious argumentative question of fact as to whether the acts complained of were committed with such intention as to amount to either s. 302 or s. 304, or were committed under such circumstances as, although criminal, would amount to no more than rashness or negligence. It is quite a simple matter for a Committing Magistrate to deal with a case of that kind. He is not the trial Court. His duty, if the evidence is *prima facie* adequate, is to commit and leave the ultimate judicial decision to the trial Court but if he has reason to think and is prepared to state for judicial reasons, in the exercise of his discretion in his committal order, that there is a possibility of an alternative view to that which is set out in the charge originally made, he can always commit the accused for trial on two or more alternative charges. What he cannot do is what was done in this case, namely, to shut the door finally to the possibility of a trial upon evidence which *prima facie* is capable of interpretation to support a graver charge. The question of the duty of a Committing Magistrate, where he has doubts about the real nature of the offence, and the quality of the evidence, is really well-settled, and should cause in the vast majority of cases no difficulty whatever. One may place the classes of cases into three categories. There is the case where the evidence is *prima facie* so clear that no body can entertain any doubt that the matter ought to be tried. There is, on the other hand, the class of cases where the evidence is so palpably tainted, absurd, incredible and, as it has been described on occasions, groundless, that no body could doubt that it would be a hardship and unjust to an accused person to allow the matter to go any further. There is the third category, which, of course, provides debatable ground, where the evidence is conflicting, and lays itself open to suspicion, but where, on the other hand, it may be true, and may commend itself to certain tribunals, the Magistrate, even though he may have reason to doubt whether if he were trying the case, he would convict, has no right to substitute his judgment for the final judgment of the Court indicated by law for the trial, and to arrive at a final decision dismissing the case in the way in which he would do if he were the trial Court. If the evidence is balanced, however unevenly in his opinion, then it is a matter which has to be tried, and it is his duty to commit it for trial. In England the existence of the procedure of trial by Jury makes the task of the Magistrate in such debatable cases perhaps easier than it does in India At any rate in England an experienced Magistrate, although he is bound to acknowledge that there is evidence, which by itself is adequate to support a charge, can, taking a broad view, and not substituting his own judgment for that of the trial Court, pronounce that he is perfectly satisfied that no Jury would convict. It is easier because it is well-known that it is more difficult in a very debatable case to obtain an unanimous verdict from 12 men than from one. Therefore, if there is any difference between the practice in England and the practice in India, it is rather in the direction of reducing the number of cases in which a Committing Magistrate in India is justified in throwing out the case as compared with a Committing Magistrate in England. We, in expressing our opinion in this matter, desire to endorse what has been laid down for many years in this Court as the correct test. In *Fattu* v. *Fattu* (1) this Court laid down that a Magistrate has a wide discretion in the matter of weighing the evidence produced on one side or the other, the remedy for an erroneous exercise of such discretion being provided in the powers conferred on Sessions Judges and District Magistrates by the revisional sections. But in the exercise of such discretion if the question of discharge or commitment is one merely of probabilities, the inquiring Magistrate ought rather to leave the decision thereof to the Court of Session than to make an order of discharge, because in his opinion the accused ought to have the benefit of the doubt. It would be difficult to state the principle more clearly and satisfactorily than it is there

(1) 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 519.

stated. That case was followed in more recent days by a most experienced and learned Judge of this Court, who had great experience as a Magistrate himself and as a Sessions Judge, and in *Dharam Singh* v. *Joti Prasad* (2) Mr. Justice Piggott, following *Fattu* v *Fattu* (1), said when a Magistrate has heard the evidence of the prosecution with entire disfavour, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when after examining certain witnesses named on behalf of the accused, he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution, he is well within his discretion in discharging the accused. There again is an admirable statement of the legal position. If there had been anything in the Sessions Judge's order in this case which appeared to us to offend against those principles, we think it would have been our duty to have expressed our opinion *obiter* upon the matter. As it is, it must be clear to everybody concerned in this case that this question lies at the root of the unfortunate proceedings, which we have been compelled to entertain to-day. But on the contrary in accordance with our view the learned Sessions Judge was careful to point out that, without rejecting the evidence as totally untrustworthy, and the charge as groundless, the Magistrate had in his view exceeded his jurisdiction, usurped the function of the trial Court, interpreted the evidence and gave it a legal complexion which to his mind it ought to receive, and as a result had dealt with the matter in a final judgment which he had no right to do.

Z. K. *Order accordingly.*

(2) 28 Ind. Cas 1005; 13 A. L. J. 497; 37 A. 355; 16 Cr. L. J. 429.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 105A OF 1926.

August 6, 1926.

Present :—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

In re BISWANATH DAS—ACCUSED—APPELLANT.

Penal Code (Act XLV of 1860), s. 409—Criminal breach of trust—Irregular drawing of public funds by public servant—Dishonest intention, absence of—Offence—Criminal trial—Procedure—Repudiation by prosecution of documents filed and witnesses relied on at earlier stage, propriety of—Filing of documents by prosecution in anticipation of defence, legality of.

The President of a Taluk Board drew out certain money from Taluk Board Funds, due in respect of certain works that were being carried on, on contingent bills with the object of preventing the moneys from lapsing at the end of the financial year. It was, however, against the Local Fund Rules to draw money on contingent bills before the work was actually completed and without a contract certificate bill after the work was check measured and passed. But the moneys though drawn out prematurely were ultimately used for the purpose for which they were drawn:

Held, that these facts did not import any dishonest or criminal intention and that the president could not be convicted of the offence of criminal breach of trust. [p. 366, col. 2.]

In a criminal case it is not open to the prosecution to put forward documents and witnesses as proving part of their case and then at the last moment to repudiate them all and start a new case altogether. [p. 367, col. 1.]

The prosecution ought to put forward from the beginning its real case and stick to it throughout. [p. 367, col. 2.]

It is not a proper procedure for the prosecution to file documents which the defence relies on for the purpose of discrediting them before the defence has had a chance to file them for itself, inasmuch as such a course is in effect permitting the prosecution to call evidence in rebuttal of the accused's defence, a practice wholly unauthorised and not admitted by the Criminal Procedure Code. [p. 369, cols. 1 & 2.]

Appeal against the order of the Court of the Session, Ganjam Division, in Case No. 2 of the Calendar for 1926.

Messrs. *Nugent Grant* and *B. Jagannadha Doss*, for the Accused.

The Public Prosecutor, for the Crown.

JUDGMENT.—The appellant in this case is a member of the Legislative Council and President of the Taluk Board, Chatrapur, and he has been convicted of criminal breach of trust in that he in his capacity as President of the Taluk Board dishonestly disposed of two sums of Rs. 1,385 and Rs. 725, being items of Taluk Board Funds, in violation of the Local Fund Rules under which he was entrusted with these moneys. The first sum was general Taluk Board Funds and the second was part of a provincial grant made by the Local Government to relieve water scarcity. It is admitted that for Rs. 1,385 the appellant drew contingent bills on 15th March, 1922, which were cashed at the Treasury next day, and that for Rs. 725 he drew contingent bills on 15th March, 1922, which after objec-

tions were cashed on 23rd March, 1922. It is also not disputed that appellant was leaving the District for a few days on 15th March, 1922, and that he left instructions in writing Ex. H with his Head Clerk to pay over these sums when realised to one Narayana Panda said to be his brother-in-law. It is not disputed before us that these moneys were eventually spent on works of utility, such as a President of the Taluk Board is authorised to finance, or that the Board or Government has not got full value in the end for the moneys. But the prosecution contention is that the appellant handed over the moneys to Narayana Panda to remain with him temporarily in order to finance him in the matter of the purchase of *khaddar* cloth and that the real intention from the beginning in the appellant's action was that purpose and, therefore, was dishonest and contrary to rules.

The prosecution relies on four main lines of argument to prove the criminal breach of trust, firstly, that the appellant obtained the money from the Treasury by breaking the rules; secondly, that he delayed long in making the payments after he got the moneys; thirdly, that he had no right to hand over public funds to Narayana Panda and fourthly, that Narayana Panda about that time was making large purchases of *khaddar*, he being a man who would not ordinarily have enough money for such purchases. The gist of the appellant's defence is that he was anxious that the moneys should not lapse at the end of the financial year on the 31st March, and in order to prevent that he followed what is a common practice, namely, he drew out the money to be kept until the works were complete and ready for payment, that as he was going to Madras he directed his Head Clerk to hand over the moneys to Narayana Panda for safe custody, that his Head Clerk handed over the Rs. 1,385 but not the Rs. 725, that when he returned he got back the Rs. 1,385 from Narayana Panda and applied it in payment for works done, that there was no undue delay in paying for the works after completion and that Narayana Panda's purchase of *khaddar* has nothing whatever to do with this money.

As to the first point that the appellant obtained the money irregularly and by misrepresentation, that the works were complete and would be paid for by 31st March, 1922, it is admitted. It is against the rules to draw on contingent bills for moneys due on works. These have to be paid at the Treasury on a contract certificate bill after the work is check measured and passed. The Sessions Judge is of opinion that at least it was unnecessary to draw the Rs. 1,385 because being Taluk Board Funds, they could heve been re-allotted at the next year. That would depend on whether they were re-allotted to the Taluk Board by the District Board which was, of course, uncertain. Now, such a method of preventing moneys lapsing at the end of the financial year is not uncommon. It is stated by P. W. No. 3 the Assistant Examiner of Local Funds, and it is admitted by Government, see Ex. Q.-3. Therefore, this fact in itself raises no presumption of dishonest intention nor in any way indicates that the appellant intended to apply the money to any other purpose than the purpose for which he could legitimately use it. If this were the only point proved against the appellant, we should not be prepared to hold that it imports dishonest or criminal intention.

As to the second point, a proper consideration of it has been greatly hampered by the extraordinary procedure of the prosecution. In the original complaint certain dates were given as the dates on which the payments were actually made. For some of these dates receipts were filed showing when the moneys were received by the persons who had constructed the works. These persons or some of them, were examined as prosecution witnesses. Then apparently the prosecution quietly and gradually dropped these receipts and witnesses as part of their case. Some receipts seized were never exhibited at all; some were exhibited in the Committing Court and some witnesses were examined there, and these were not subsequently exhibited or examined in the Sessions Court. But at one stage of the trial, which so far as we can gather was at the time of the arguments, these dates, witnesses and receipts were thrown overboard. That evidence was characterised as unreliable, if not false, and it was sought to persuade the Judge that the true dates of receipt were the dates given on the back of the completed "contract certificates" passed by the Treasury after

the works had been completed and check measured. The prosecution was able to persuade the learned Sessions Judge to accept this contention, but a very short consideration will show that it is fallacious. Payments made on these contract certificates would be made at the Treasury and not by the President. It is no part of the prosecution case that the contractors were paid once by the President in 1922 and again by the Treasury in 1924. That the appellant paid them is the prosecution case; it is not their case that the Treasury paid them. It is thus obvious that the receipts on the contract certificates are mere paper receipts, taken after the actual payments in order to regularise the transactions for Treasury routine purposes, and that the dates of the receipts on the contract certificates bear no relation to the actual dates of payment. No inference of the actual date of payment can be drawn from these receipts or from the stamps upon them, and the learned Sessions Judge has erred gravely in drawing such an inference.

The prosecution then, having already repudiated its original dates of receipts and witnesses to these, and having rested its case in the lower Court on an argument which is wholly fallacious, is now in the unhappy position before us of having no case at all on this point. The contractors examined by the prosecution, P. Ws. Nos. 18 to 22, have none of them been examined as to whether there was any long delay between the completion of the work and the payment. The prosecution will not accept the receipts exhibited; in fact, in the lower Court it did not produce some which it had in its possession. The excuse given for that before us, namely, that it did not press them before the Sessions Judge because the Committing Court had refused to allow them to be filed, is puerile. They were obviously not pressed in the Sessions Court, because the prosecution thought it had a better card up its sleeve. We are constrained to comment strongly upon this unfair method of conducting a prosecution. It was not open to it to put forward receipts and witnesses as genuine and then at the last moment, at the time of the argument, to repudiate them all and start a new case altogether. It is impossible that an accused can be prepared to meet such tactics. The learned Judge ought to have seen that the prosecution put forward from the beginning its real case and that it stuck to it throughout. The net result is that the only witnesses as to the actual dates of payment are witnesses which the prosecution itself has not relied on. The Special Public Prosecutor who appeared before us on behalf on the Public Prosecutor, asks us in these circumstances to presume that there must have been gross delays in payment. Why in the absence of reliable evidence we should draw this presumption against the appellant rather than in his favour we do not see. Such evidence as there is goes to show that all payments were made by the middle of August, 1922. No evidence is relied on before us to show that any payment was delayed long after the work was completed and measured. In the case of Ex. F-3 it would appear that the Overseer check measured on 8th October, 1921, but it does not appear that there is any final check measurement by the President long before the payment. The Sessions Judge also singles out the case of Ex. F-9 and accepts the date 25th June, 1921, as the date of the check measurement, when the figure, therein has obviously been superimposed on the figure 2, without any proof as to which is the correct figure, and when the measurement by the President was on 20th June, 1922. It is not necessary to refer to other cases in detail. There is no proof that the payment in these cases was delayed long after the works were complete. There is no doubt some suspicion attaching to the receipts Exs. E and W to connect with the work Ex. F 6; Ex. XVI would seem to show that these receipts had been subsequently got up, but unless something definite is established against the appellant to make it likely that it was necessary for him to cover up his tracks, we see no reasons why the responsibility of those documents should be fastened upon him. We are unable to hold it proved that the appellant grossly delayed payments for works actually done, and obviously he would not have been acting properly if he had paid up works before they were fully complete. The second contention, therefore, fails.

As to the third point, that is, whether the moneys were handed over to Narayana Panda to finance the latter's business, or

for safe custody, if the latter is the truth, even though Narayana Panda had no concern with Taluk Board moneys, it would not be a sound conclusion that the appellant's intention was dishonest, nor does the prosecution go so far. It is admitted that the Rs. 1,385 was handed over to Narayana Panda and a note to that effect by the appellant to the Head Clerk, Ex. H, was apparently kept among the Taluk Board Records, although the Special Public Prosecutor asserts that he cannot say from where the prosecution obtained it. It is at least arguable that a deliberate swindler would not leave such a paper behind him.

It would be convenient to consider the question whether the Rs. 725 was also handed over. That the Head Clerk got it from the Treasury on 23rd March, 1922, is clear from Ex. G and it may be remarked here that the final stage in this matter was carried through by the Vice-President and not by the appellant. The Vice-President has not been put into the witness-box. Apparently he saw nothing wrong in the appellant's action at the time in getting the moneys from the Treasury. The only evidence that Rs. 725 was handed over to Narayana Panda is that of P. W. No. 2 the Head Clerk. A perusal of his evidence with its shifty evasions and lies is sufficient to discredit it utterly for proving anything. It is a significant circumstance that whereas there is no receipt from Narayana Panda for either sum, the receipt Ex. N executed by P. W. No. 2 for the return of Rs. 1,385 by Narayana Panda is exhibited. There is also a note by P. W. No. 2, Ex. J, that he received the Rs. 1,385 and handed it over to Narayana Panda and got his receipt but there is no similar note regarding the Rs. 725. While swearing to Ex. N in the Committing Court P. W. No. 2 impugns it as a forgery in the Sessions Court and says that the appellant compelled him to draw it up. But if the appellant had handed the Rs. 725 also over to Narayana Panda who would hardly have boggled at a further forgery of a receipt for the return of that sum also. All the probabilities seem to us to indicate that the Head Clerk did not part with the Rs. 725 to Narayana Panda but kept it himself. Prosecution witness No. 7 the peon who cashed the bill Ex. G for Rs. 725 says he gave the money to P. W. No. 2 and there is no reliable evidence that P. W. No. 2 handed it on to any one else. The learned Sessions Judge thinks that the appellant on his return would have made sure that the Rs. 725 had been handed over to Narayana Panda. That is to assume the dishonest intention pleaded. If the money was only to go to Narayana Panda for safe custody while the appellant was out of the District, there was no particular point in seeing that it was handed over to him after the appellant returned. It is not denied that a sum of Rs. 200 paid towards the construction of a Sanskrit School was paid out of this Rs 725 temporarily. Now P. W. No. 2 admits that he paid that Rs. 200 on 1st June, 1922. See his evidence and the receipt Ex. K-1. This payment was afterwards recouped and diverted to its proper purpose. All this indicates that the Rs. 725 were with the Head Clerk. Exhibit F-14 which is the receipt *inter alia* for Rs. 50 out of this Rs. 725 so far as it goes implies the same. The prosecution which has examined P. W. No. 6 to prove this receipt refrained from asking him who paid him the money. In cross examination he said he thought it was the Head Clerk. The prosecution relies on this document and Ex. L to indicate that the appellant was dealing with the Rs. 725. Even if we accept Ex. L, the notes thereon have not been proved to have been in the handwriting of the appellant. It proves no more than that he was dealing with the money as he would deal with any Taluk Board Funds. These documents afford no evidence that the money was handed over to Narayana Panda. There is thus no satisfactory evidence that this money was handed over to him. The prosecution case as regards the sum, therefore, collapses.

As to the Rs. 1,385 it would be convenient to consider here the fourth contention, *viz.*, that Narayana Panda made large purchases in *khaddar* after this money was handed over to him, *i. e.*, after 19th March, 1922, because, if that part of the prosecution case is not established and we think it is not—then it is more probable that the money was only handed over for safe custody. The consideration of this matter turns upon the evidence and accounts of certain *khaddar* merchants P. Ws. Nos. 9, 10 11, 13 and 14 who assert that, when they made large consignments of *khaddar* to Narayana Panda in March, 1922, they did not send him the Railway receipts for clearance until they got the full price from him, and that it was only about the 20th March or so that they sent the Railway

receipts. In passing we may remark that there is also the evidence of P. W. No. 16 that he took charge of certain bales for Narayana Panda on 23rd March, 1922, but there is no evidence as to when or how the money for this was paid. So his evidence does not assist the prosecution case. Now the entries in the account-books of these *khaddar* merchants are relied on as evidence of the dates of despatch of the Railway receipts. They are all dates subsequent to 9th March, 1922. But the Railway parcels inward delivery book, Ex. HH. shows that these consignments were delivered to Narayana Panda on 9th March, 1922. The prosecution after putting forward in the Committing Court and abandoning in the Sessions Court a tale by the Head Clerk that he went with Narayana Panda to the Railway Station on 11th March, 1922, and got the bales, attempts to get over this awkward conflict of evidence by urging that the Railway might have delivered the bales on 9th March, 1922, without the Railway receipts or that the Railway books have been faked. Neither of these arguments appeals to us. There is absolutely no reason put forward why we should suspect the Railway accounts in this case or suppose that the Railway was foolish enough to hand over large bales of *khaddar* without the Railway receipts. It appears even that there was a Railway Audit between 21st March, 1922, and 23rd March, 1922, which would surely have disclosed any such whole-sale release of goods without payment of the Railway charges if that had taken place. The prosecution has again adopted a most curious procedure on this point. It examined the Station Master and filed Ex. HH as its own Exhibit and then promptly discredited it. We cannot understand this procedure of filing for the prosecution documents which the defence relies on for the purpose of discrediting them before the defence has had a chance to file them for itself. It is a practice which the learned Sessions Judge should never have permitted. It amounts to this, that when an accused has put forward his defence in the Committing Court it is open to the prosecution to call evidence in the Sessions Court to rebut and discredit the appellant's defence, before it is even known whether or not the accused intends to put forward that defence in the Sessions Court. It is in effect permitting the prosecution to call evidence in rebuttal of the accused's defence a practice wholly unauthorised and not admitted by the Criminal Procedure Code. The Sessions Judge should have been more alert in this matter and should not have allowed the prosecution to put forward evidence for the mere purpose of discrediting documents which it anticipated the defence was going to put forward. The prosecution in effect says: "I am going to put forward witnesses and documents which I intend to prove are false because I think the defence is going to put them forward as true. Such a procedure violates not only the principles but even the decencies of proper procedure.

The accounts put forward by these witnesses do not inspire much confidence. They are *kacha* books and appear to be only ledgers which can be written up at any time. Of the five witnesses P. Ws. Nos. 10, 13 and 14 have not themselves made the entries to which they speak, P. W. No. 9 is not certain that the entries were made then and there, P. W. No. 11 cannot give similar details of the receipt of the next sum he received from Narayana Panda's Company. The dealings of these persons were not with Narayana Panda by name but with the Swadeshi Trading Company of Chatrapur. There is no evidence that Narayana Panda was a partner in that Company, and he is styled by the witnesses as agent or manager. Why the Court is to assume that the Company itself did not finance its agent for these transactions, and why we should presume that the money received by these persons should come from the agent Narayana Panda himself, is not clear. In these circumstances, and having regard to the fact that the Railway receipts do not bear out the theory that Narayana Panda could have taken the *khaddar* from the Railway Station until after the dates given in the register, we are not prepared to accept the prosecution case in this matter that the moneys were not paid for these purchases until after the appellant had entrusted the Taluk Board sum of Rs. 1,385 to Narayana Panda. It has, therefore, not been proved to our satisfaction that Narayana Panda used this money for his *khaddar* purchases for the Swadeshi Trading Company; it follows, therefore, that there is nothing to justify an inference that the appellant handed the money over to him for that purpose, and the foundation of the prosecution case with reference to appellant's dishonest intention breaks down.

In the Committing Court the appellant put in certain Exhibits in order to show that Narayana Panda returned the Rs. 1,385 to the Taluk Board Office on 2nd April, 1922. There again the prosecution has dealt with in the same curious fashion as it dealt with the Railway receipts; that is, in the Sessions Court it put in these Exhibits for the prosecution which are Exs. M, N, O and P adducing correlative evidence that they were forgeries or at least false documents, in that they are not drawn up on the dates given in them. In this case in order to establish that the documents are false it relies upon the Head Clerk, P. W. No. 2, whose evidence we have already held to be unfit to prove anything at all. He is obviously out to save his own skin at the expense of appellant. This P. W. No. 2 in the Committing Court admitted that these documents were genuine, in the Sessions Court he maintained that they are concoctions. We must repeat out remarks on the unfairness of such a procedure by the prosecution which anticipates and attempts to rebut the accused's defence before it has been given. We do not think it is unnecessary to go in detail into the question of the genuineness of these documents. Prosecution witness No. 5 speaks to them, but on his evidence there is no doubt a certain mystery, about these documents, but we do not appreciate the learned Sessions Judge's reasons for concluding that they must be spurious. He seems to think it astonishing that the appellant should require copies. Such a desire for copies seems to us to be an ordinary and usual thing. Again he comments on the fact that the appellant did not rely on these in his explanations to Government. But that explanation was called for regarding the unauthorised withdrawal of funds and delayed payment for works. We fail to see how these documents would be relevant at that stage. His other criticisms on these seem to us to overlook the usual formality of routine of offices. His argument would condemn all office notes as spurious, because when the writer is in the next room to the Head Clerk there is no use writing at all. There has been far too much in this case of making mountains out of such molehills.

Of these documents Exs. M, O and P are said to be certified copies of records in Taluk Board Office and Ex. N is receipted by P. W. No. 2, the Head Clerk for the return of Rs. 1,385 from Narayana Panda. We found it difficult to pin down the Special Public Prosecutor to a definite case about these documents. He was not sure whether his case was that no originals ever existed for Exs. M, O and P or whether there were originals in the Taluk Board Office. That there were originals seems clear since the copies bear certificates of Mr. Venkata Rao a respectable gentleman, retired Government servant and once Vice-President of the Taluk Board whom the prosecution has not examined; but does not before us claim to discredit. If there were originals, where are they? They ought to be in the Taluk Board Office, but the prosecution which has had access to the Taluk Board Records has not produced them. The only point in this contention against the appellant is the fact that he has not explained how Ex. N which is in favour of Narayana Panda came into his possession and that he has not examined Narayana Panda himself to prove the return of the money. But this seems relatively unimportant as the prosecution case is not that this sum was permanently misappropriated but that it was temporarily handed over to Narayana Panda for a particular purpose. That we have held has not been made out. And if it was not handed over for that purpose we see no reason to suppose that it was not handed back in time for payment to be made for works when payments were due.

No doubt the appellant's irregular practices and neglect gave an infinite amount of trouble to Government and may have led to the concoction of spurious receipts. There may have been some delay in check measuring and paying for works actually completed and the appellant may be, and probably is a person whose methods render him eminently unfit to hold the charge of Public Funds; but there was any dishonest intention to cause wrongful loss to Government or wrongful gain to any one else we have not been able to find proved. In our opinion the prosecution in this case has been conducted in such a fashion as to betray a consciousness that it had a weak cause. It has endeavoured to weigh the case against the appellant by charging against him every mistake or disobedience of office routine that it can get hold of in the hope that the Court would accept that as proof of criminality. In these circumstances we are unable to support the

conviction and sentence and reverse it and direct the appellant to set at liberty and his bail-bond cancelled and the fine, if paid, will be refunded.

V. N. V. *Conviction reserved.*
A. N. A.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 758 OF 1926.
September 29, 1926.
Present:—Mr. Justice Chotzner and Mr. Justice Duval.

KRISHNA LAL MITRA—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 234—Misjoinder of charges—Charges for falsification of pay bills and cash accounts for three months—Conviction for falsification of pay bills—No finding on falsification of accounts—Legality of trial.

The accused, a Forest Ranger, was charged with having entered the name of a Forest Guard who was no longer in service at a rate of pay in the pay bill and the monthly cash accounts for three months, whereas as a matter of fact, another man was employed at a lower rate of pay for those months, and was sentenced on each of the three charges relating to the pay bill:

Held, that the trial was illegal though the Magistrate had not recorded any finding in respect of the falsification of the cash accounts, inasmuch as in the charge as framed by the Magistrate there were six distinct and separate charges of falsification of six separate and distinct documents, namely, three pay bills and three cash accounts.

Criminal Revision against the order of the Sessions Judge, Dinajpur and Darjeeling, dated the 18th June, 1926, affirming that of the Sub-Divisional Magistrate, Kalimpong, dated the 11th May, 1926.

Mr. *Narendra Kumar Basu* and Babu *Pashupati Nath Ghose*, for the Petitioner.

JUDGMENT.—In this case the petitioner was put on his trial before the Sub-Divisional Officer of Kalimpong under s. 477-A (Indian Penal Code) on the charge of making false entries with a view to defraud in the Range establishment accounts. These entries are set out in the appendix to the charge; that is, the pay bill and monthly cash accounts in respect of Sanman Forest Guard for the months of May 1924, June 1924, and March 1925. The case apparently was that this Guard who was no longer in service was entered at a rate of pay in the pay bill and in the monthly cash accounts of those months but, as a matter of fact, another man was employed at a lower rate of pay for those months as a Forest Guard. The Sub-Divisional Officer found the accused guilty and sentenced him to six months' rigorous imprisonment and a fine of Rs. 100 on each of the three charges relating to the pay bill. This Rule has been obtained on the ground, that the trial has been vitiated by misjoinder of charges, that there is no evidence that he falsified the accounts, that upon the charges as drawn up three separate sentences were not legal, that the sentence was too severe and further that the learned Sessions Judge was wrong in confirming the conviction.

Now before us the point first taken is that, as a matter of fact, the charge is defective and illegal in view of the provisions of s. 234, Criminal Procedure Code, in that as a matter of fact in the charge as framed by the Magistrate there were six distinct and separate charges of falsification of six separate and distinct documents—that is to say, three pay bills and three monthly cash accounts and that, therefore, the whole trial is illegal, as not more than three of such offences committed within the space of 12 months can be tried at one time. Though, no doubt, when convicting, the Magistrate has not recorded any finding in respect of the falsification of the monthly cash accounts, it appears to us that this non-fulfilment of the law in trying together more than three separate falsification of different papers makes the whole trial illegal. In our opinion, therefore, the conviction and sentence must be set aside and the case sent back to the Sub-Divisional Officer for re-trial according to law.

The petitioner will remain on the same bail pending the orders of the Sub-Divisional Officer.

A. N. A. *Rule made absolute: Case sent back.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 20 OF 1927.
January 13, 1927.
Present:—Mr. Justice Iqbal Ahmad.

TIRKHA AND ANOTHER—ACCUSED—PETITIONERS
versus
NANAK AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 137 (1), 537, 539B—Nuisance—Magistrate's duty to record evidence—Decision on local inspection, legality of—Local inspection, object of—Magistrate's duty to

record relevant facts—Non-compliance with s. 137 (1) —Illegality.

A Magistrate cannot make an order under s. 133, Criminal Procedure Code, absolute without recording evidence and simply on the basis of a local inspection made by him. [p. 373, col. 1.]

Ismail v. *Bunda* (4) and *Raimohan Karmokar* v. *Emperor* (5), followed.

The failure of a Magistrate to follow the procedure enjoined by s. 137 (1), Criminal Procedure Code, vitiates his order, and is not a mere irregularity of the nature contemplated by s. 537 (*a*) of the Code. [p. 372, col. 2.]

Section 537 Criminal Procedure Code, applies only to mere errors of procedure arising out of mere inadvertence, and not to substantive errors of law, and does not apply to cases of disregard or disobedience of mandatory provisions of the Code. [*ibid.*]

Subrahmania Iyer v. *King-Emperor* (1), followed.

If a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. [*ibid.*]

Moinuddin v. *Emperor* (2), followed.

A local inspection by a Magistrate is only permitted by s. 539B, Criminal Procedure Code, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself. [p. 373, col. 1.]

Ram Sahai Singh v. *Dwarka Singh* (3), followed.

In making a local inspection a Magistrate should in accordance with the provisions of s. 539B, Criminal Procedure Code, record a memorandum of any relevant facts observed by him at the time of inspection. [*ibid.*]

Criminal Reference made by the Additional Sessions Judge, Meerut, dated the 11th December, 1926.

JUDGMENT.—This is a Reference made by the learned Additional Sessions Judge of Meerut under s. 438, Criminal Procedure Code, recommending that the order of a Magistrate of the First Class, dated the 1st of November, 1926, by which he made absolute a conditional order under s. 133, Criminal Procedure Code, directing the removal of a portion of a certain *chabutra* be set aside, and the case be sent back for trial according to law.

The case was started on the complaint of the opposite party. The allegation in the complaint was that the petitioners had built the *chabutra* complained of and that the *chabutra* obstructed a certain pathway and caused inconvenience to the people using the pathway and might lead to the falling of the neighbouring houses during the monsoons.

The complaint was filed on the 8th of May, 1926, and it was not until the 23rd of September, 1926, that an enquiry into the case commenced. On that date the petitioners appeared and denied that they had blocked the way as alleged by the complainants. The case was then taken up on the 30th of October, 1926, and on that day the complainants did not offer to produce any evidence. The petitioners thereupon stated that they had no evidence to produce either, and it appears that the learned Magistrate was asked to inspect the locality and then to decide the case. An inspection was made by the learned Magistrate on the 31st of October, 1926, and, on the day following, the learned Magistrate passed the order now in question.

The petitioners having shown cause against the conditional order made under s. 133, Criminal Procedure Code, the learned Magistrate was bound to follow the procedure laid down by s. 137 (1) of the Criminal Procedure Code. In other words, the learned Magistrate was bound to take evidence in the matter as in a summons case. This the learned Magistrate did not do. The learned Additional Sessions Judge is perfectly right in observing, that the failure of the Magistrate to follow the procedure enjoined by s. 137 (1), Criminal Procedure Code, vitiates his order, and is not a mere irregularity of the nature contemplated by s. 537 (*a*) of the Criminal Procedure Code.

It has been pointed out in numerous cases that s. 537, Criminal Procedure Code, applies only to mere errors of procedure arising out of mere inadvertence, and not to substantive errors of law, and that that section does not apply to cases of disregard or disobedience of mandatory provisions of the Code. The section has not the effect of curing material irregularities and absolute illegalities. "The errors which can be cured by the section are formal defects of procedure and not substantive errors of law", *vide*, *Subrahmania Iyer* v. *King-Emperor* (1). It has been held in the case of *Moinuddin* v. *Emperor* (2) that if a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. The provisions of s. 137 (1), Criminal Procedure Code, are imperative and the failure of the Magistrate to follow the same vitiates the entire proceedings.

(1) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

(2) 61 Ind. Cas. 794; 2 P. L. T. 455; 22 Cr. L. J. 442.

But the matter does not stop there. The learned Magistrate in disregard of the provisions of s. 539B, Criminal Procedure Code, did not record a memorandum of any relevant facts observed by him at the time of inspection nor did he put on the record any such memorandum. In this respect the learned Magistrate was clearly wrong. The learned Magistrate in his explanation says that he did prepare rough pencil notes at the time of inspection which he destroyed after writing his order. I can discover no justification for this procedure of the learned Magistrate and I must say that it is an action that I can hardly expect from a Magistrate of the First Class. A local inspection by a Magistrate is only permitted by s. 539B, Criminal Procedure Code, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself. As was pointed out in the case of *Ram Sahai Singh* v. *Dwarka Singh* (3) "a local inspection by a Magistrate must be held sparingly and only for the purpose of elucidating and understanding the evidence in the case and it should never be substituted for evidence in the case. The party against whom the result of the local inspection is used, is greatly prejudiced and is put to an irreparable disadvantage in not being able to remove the wrong impression from the mind of the Magistrate, by cross-examining him."

A Magistrate cannot make an order under s. 133, Criminal Procedure Code, absolute without recording evidence and simply on the basis of a local inspection made by him: *vide, Ismail* v. *Bunda* (4) and *Raimohan Karmokar* v. *Emperor* (5).

For the reasons given above I set aside the order of the learned Magistrate, dated the 1st of November, 1926, and order that the case be sent to the learned District Magistrate of Muzaffarnagar with a direction that either he should try the case himself or send the case for trial to some Magistrate other than the Magistrate who passed the order dated the 1st of November, 1926, for trial according to law.

A. N. A. *Order set aside: Case remanded.*

(3) 61 Ind. Cas. 712; 1 P. L. T. 569; 22 Cr. L. J. 424.

(4) 95 Ind. Cas. 944; 20 A. L. J. 657; A. I. R. 1922 All. 265; 27 Cr. L. J. 864.

(5) 35 Ind. Cas. 969; 44 C. 61; 20 C. W. N. 1171; 17 Cr. L. J. 409.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1156 OF 1926.

January 26, 1927.

Present:—Mr. Justice Addison.

SUBE KHAN—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—Prosecution when to be sanctioned.

Prosecution should not be sanctioned under s. 476 of the Criminal Procedure Code, where it is bound to end in failure. [p. 374, col. 1.]

Criminal appeal from the order of the District Judge, Ambala, dated the 28th September, 1926.

Mr. *Barkat Ali*, for the Appellant.

JUDGMENT.—Sube Khan sued Fattan on a mortgage-deed for Rs. 2,000 dated the 6th June, 1910. The suit was instituted on the 18th April, 1923, and was for Rs. 2,000 principal, together with Rs. 500 interest. The defendant Fattan produced a receipt Ex. D-1, bearing date the 22nd October, 1920, to the effect that the plaintiff acknowledged receipt from him of Rs. 1,000 for principal and Rs. 800 for interest. The plaintiff pleaded that this was a forged receipt, but that he did receive Rs. 740 on that day and that he had given a receipt for that amount. He further suggested that the receipt, Ex. D-1 produced by the defendant, had been forged from the receipt he actually gave. Later the plaintiff was able to produce what he alleged to be the original receipt, namely, Ex. P-2, and he explained that he had been able to buy it from a forger of Shahabad, who had traced Ex. D-1 from the proper receipt, Ex. P-2.

The Trial Judge held that Ex. P-2 was the original receipt and the Ex. D 1 was a palpable forgery. He, therefore, decreed the suit, for Rs. 2,500. On appeal the learned District Judge held that Ex. P-2 was the froged document and that Ex. D-1 was the original document. He, therefore, accepted the appeal to the extent of reducing the principal amount to Rs. 1,000 instead of Rs. 2,000 and he also decreed interest on the sum of Rs. 1,000. At the same time he sanctioned the prosecution of the plaintiff Sube Khan, under s. 471 of the Indian Penal Code on the ground that he had fraudulently used as genuine a document, Ex. P-2, knowing or having reason to believe it to be a forged document. Against this order Sube Khan has appealed.

At the suggestion of the defendant Fattan, all the papers were sent to Mr. Stott

the Government Examiner of Questioned Documents. Mr. Stott's opinion is on the record and it is to the effect that Ex. D-1 produced by Fattan, is a traced forgery, from the original receipt, Ex. P-2. He is also positive that all the signatures on Ex. D-1 are traced forgeries, while the signatures on Ex. P-2 are, in his opinion, good signatures. When the defendant saw the report he did not call the expert as his witness and the plaintiff does not seem to have considered it necessary to do so either. In fact the plaintiff's suit was decreed *in toto* by the trial Court.

Exhibit D-1, which the expert stated to be a forgery, is attested by two witnesses, Abdul Majid Khan and Karim Bakhsh. Exhibit P-2, which the expert considers to be a good document, is signed by the same two persons and one Abdul Rahim as witnesses. Abdul Majid has deposed in Court that he signed Ex. P-2 and not Ex. D-1. Karim Bakhsh is dead but his brother Chand Khan has deposed that the signature of his brother on Ex. P-2 is genuine while the other is not. This leaves Abdul Rahim, whose signature is on the document Ex. P-2 but not on Ex. D-1. He stated in Court that the signature on Ex. P-2 is not his. The expert's opinion, however, is that it is a genuine signature.

If this criminal case is allowed to go on against the appellant, it is obvious that the expert's opinion will be in his favour and so will all the witnesses be in his favour except, possibly, Abdul Rahim. It is obvious, therefore, that the prosecution is bound to end in failure. When this is the case, there is a consistent series of rulings that the prosecution should not be sanctioned. I, therefore, accept the appeal and set aside the order of the District Judge, dated the 28th September, 1926, ordering a complaint to be instituted against the appellant, Sube Khan, under s. 471, Indian Penal Code. If a complaint has been instituted proceedings upon it must end at once, and the appellant discharged from any bail-bond he may have put in.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE.

January 4, 1927.

Present:—Mr. Justice Banerji.

ABDUL KARIM—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 137—Nuisance—Order directing plot of land to be vacated—Title, question of—Procedure.

Where a person against whom proceedings are taken under s. 133 of the Criminal Procedure Code sets up a title to a plot of land which he is required to vacate, the Court must proceed in accordance with the provisions of s. 137 of the Code and cannot make a summary order in the matter.

Criminal Reference made by the Sessions Judge, Benares, dated the 5th of September, 1926.

REFERRING ORDER.—This is an application in revision against an order of Pandit Raghunandan Upadhiya, Deputy Magistrate, First Class, ordering the applicant to vacate a certain plot of land. The notice was sent to the applicant on the 4th August for the 12th August. On that day the applicant stated that he was a *perjotdar* of Girdhari Lal for the plot in suit. The lower Court without going into evidence but relying on the report of the Tahsildar made his order absolute. No notice was sent to Girdhari Lal. I am of opinion that the lower Court should have gone further into the matter and not passed an order in such a summary fashion. I have been referred to *Hingu* v. *Emperor* (1) and *Ismail* v. *Bunda* (2) and also *Jassi* v. *Emperor* (3). On the analogy of the rulings I would recommend that the absolute order of the lower Court be set aside and that he should be directed to proceed in accordance with s. 137, Criminal Procedure Code. The lower Court is asked to submit his explanation through the District Magistrate within a week.

Mr. *Mukhtar Ahmad*, for the Appellant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—I accept the Reference.

Z. K. *Reference accepted.*

(1) 3 Ind. Cas. 482; 6 A. L. J. 685; 31 A. 453; 10 Cr. L. J. 297.

(2) 95 Ind. Cas. 944; 20 A. L. J. 657; A. I. R. 1922 All. 265; 27 Cr. L. J. 864.

(3) 76 Ind. Cas. 826; 20 A. L. J. 692; A. I. R. 1922 All. 335; 25 Cr. L. J. 266.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 163 OF 1926.
(CRIMINAL REVISION PETITION No. 145 OF 1926).
October 19, 1926.
Present:—Mr. Justice Curgenven.
In re VALIVELA VENKATA SIVAYYA —ACCUSED—PETITIONER.

Madras District Municipalities Act (V of 1920), ss. 3 (24), 317 (a), (c)—Re-construction, definition of—Conviction under s. 317 (a)—Appeal—Conviction, whether can be altered to one under s. 317 (c).

Where the re-construction of a building is partial only, s. 3 (24) of the Madras District Municipalities Act requires that the "re-erection" in order to constitute "re-construction" should be done after more than one-half of the cubical contents of the building have been taken down or burnt down. A Magistrate, therefore, dealing with a case under s. 317 of the Act has no jurisdiction to frame a definition of his own in order to determine whether there has or has not been "re-construction" within the meaning of the section.

The offence defined in s. 317 (c) of the Madras District Municipalities Act is of quite a different character from that defined in cl. (a) of the section, inasmuch as the essence of an offence under cl. (c) is that after re-construction has been commenced an order is passed to prohibit its carrying on or completion except upon certain terms and that that order is disobeyed. Therefore, where a person is charged with an offence under s. 317 (a) of the Act and is convicted of it, he cannot, in appeal, be convicted of an offence under cl. (c) of the section

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Narasapur, in Cr. A. No. 77 of 1925, preferred against that of the Court of the Stationary, Sub-Magistrate, Narasapur, in C. C. No. 655 of 1925.

Mr. *V. Suryanarayana*, for the Petitioner.
The Public Prosecutor, for the Crown.

ORDER.—The petitioner was convicted by the Stationary Sub-Magistrate of Narasapur of an offence under s. 317 (a) of the District Municipalities Act, Madras Act V of 1920, namely, with commencing the re-construction of a building without the permission of the Chairman, Municipal Council, Palacole, and was sentenced to pay a fine of Rs. 50. In appeal, the learned Joint Magistrate altered the conviction to one under s. 317 (c) of the Act, which renders punishable the carrying on or completion of a construction in contravention of any lawful order, or in breach of any provision contained in the Act or of any rule or bye-law made thereunder, or of any direction or requisition lawfully given or made, and reduced the fine to Rs. 26.

It is now argued that the learned Joint Magistrate has failed to apply the definition of 're-construction' which is contained in s. 3 (24) of the Act. In cases where re-construction is partial only, that definition requires that the "re-erection" to constitute 're-construction' should be done after more than one-half of the cubical contents of the building have been taken down or burnt down. The Joint Magistrate applies what he calls the test of common sense, namely, whether so many walls were re-built and such material alterations made that it can be reasonably said that there was a re-construction of the house. This method of applying the words of the Statute has not been supported before me and I think it is plainly untenable. It should have been found whether the test furnished by the definition had been satisfied in order to find whether a re-construction within the terms of the Act had been undertaken. The Joint Magistrate goes on to remark that at the date fixed for the offence in the charge, namely, 17th June, 1925, it was alleged that part of the re-construction had already been done, so that there was no commencement on that date, and, as I understand his judgment, he accepts this view and a logical conclusion from it was that no conviction under s. 317 (a) could be sustained. Accordingly he altered the finding to one under s. 317 (c), with which the accused was not charged. It appears to me that the offence defined in s. 317 (c) is of quite a different character and that the essence of it is that after re-construction has been commenced an order is passed to prohibit its carrying on or completion except upon certain terms and that that order is disobeyed. The facts of the present case do not substantiate an offence of that kind, and I do not think that the petitioner should have been convicted of it in the circumstances. I must, therefore, set aside the finding and sentence imposed by the Appellate Court.

In view of the length of time which has elapsed since the act forming the subject-matter of the charge was committed, of the somewhat technical character of the alleged offence and of the doubt which still exists whether a prosecution under s. 317 (a) would be successful, I think there are sufficient grounds for not ordering a further trial.

In these circumstances, the accused is acquitted and the fine, if paid, will be refunded.

V. N. V.

Z. K. *Accused acquitted.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 73 OF 1926.

January 7, 1927.

Present :—Mr. Justice Ashworth.

ABDUL HAQ—APPLICANT

versus

SHEO RAM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 476-B—Civil Procedure Code (Act V of 1908), s. 115—Complaint, refusal to make, by Civil Court—Appeal—Order directing complaint to be made—Revision, whether competent.

Where a Civil Court refuses to make a complaint under s. 476 of the Criminal Procedure Code but on appeal the Appellate Court directs the complaint to be made, an application in revision against the order of the Appellate Court can only be maintained if it falls within the purview of s. 115 of the Civil Procedure Code.

Civil revision from an order of the District Judge, Cawnpore, dated the 6th of March, 1926.

Mr. *A. P. Dube*, for the Applicant.

Mr. *U. S. Bajpai*, for the Opposite Party.

JUDGMENT.—This is an application in revision under s. 115 of the Civil Procedure Code, made by one Abdul Haq against an order of Mr. L. S. White District Judge of Cawnpore on the 6th March, 1926, allowing an appeal against an order of the Subordinate Judge of Cawnpore who refused to make a complaint under s. 476 of the Criminal Procedure Code, for the prosecution of the present applicant Abdul Haq on the ground of perjury.

The facts are as follows :—Three brothers claimed certain property. They had not sufficient means to bring and prosecute a suit for the same. Accordingly they made an arrangement with Abdul Haq that he would finance them. The arrangement was recorded in a sale-deed of a share of the interest of the three brothers in the property claimed. There was a stipulation in this deed that Abdul Haq, in the event of the suit being successful, would not be entitled to any share of any costs that might be awarded by the Civil Court. A decree was passed on the 22nd January, 1925, in favour of the three brothers and of Abdul Haq and the decree provided for the plaintiffs getting their costs. No apportionment was made of these costs and no stipulation in the decree was entered that Abdul Haq should not be entitled under the decree to any share in these costs. Subsequently by an application dated the 30th April, 1925, Abdul Haq asked to be allowed to realise the whole of the costs which had been deposited in Court saying that he was himself entitled to one-half of them. Presumably this application must be interpreted to mean that as a joint decree-holder he was entitled under the decree to realise the whole costs but that under some arrangement with the other decree-holders he would only be entitled to retain one-half of those costs and would be bound to pay the other half over to the other decree-holders. The execution Court, whose attention had been drawn by this time to the sale-deed by the three brothers in favour of Abdul Haq which resulted in Abdul Haq being a plaintiff in the Civil Court, asked Abdul Haq to explain how in view of the stipulation in that sale deed he could be entitled to any costs. Apparently his explanation was satisfactory or else the execution Court ultimately considered that it could not go into the matter as an execution Court. Any way, an order was passed allowing abdul Haq to take the costs deposited.

Now one of the three brothers had gone to South Africa. One of the other two put in an application to the Subordinate Judge complaining that Abdul Haq had committed perjury in his application of the 30th April, 1925, which application was verified by an affidavit, in stating that he was entitled to half the costs and asking the Subordinate Judge to make a complaint to the Criminal Court for his prosecution in respect of this perjury. The Subordinate Judge rejected this application but the District Judge of Cawnpore on appeal passed an order allowing the appeal and stating that he would himself make a complaint to the District Magistrate. It is against this order that this application in revision is filed.

Abdul Haq at first brought the matter in revision to this Court under s. 439 of the Criminal Procedure Code. The present Acting Chief Justice by an order dated the 4th May, 1926, expressed an opinion

that the District Judge of Cawnpore should not have made the order that he did in the circumstances but he held that an application in revision did not lie to the High Court on the Criminal Side. He allowed Abdul Haq to represent his application on the Civil Side without any further payment of stamp or fee.

It is incumbent on me to accept the view that the application in revision must be presented on the Civil Side. I would refer to the Full Bench ruling *In the matter of the petition of Bhup Kunwar* (1). I concur with the view of Sulaiman, J., in *Banwari Lal* v. *Jhunka* (2) that the alterations in s. 476 introduced by the Criminal Procedure (Amendment) Act, 1923, have not affected the arguments or the decision in the Full Bench case referred to.

It is clear to me that having regard to the language of s. 115 of the Civil Procedure Code, no revision on the Civil Side of the District Judge's order can be made. I concur with the view of the Acting Chief Justice that in the circumstances of this case it is not proper to order the prosecution for perjury of Abdul Haq, but this opinion must remain a mere *obiter dictum*. The order of the District Judge may have been based on a faulty appreciation of the facts or may have been based on a faulty view of the law. I mean that Abdul Haq in his application, where he stated that he was entitled to realise the costs, may have meant that legally he was entitled as a joint decree-holder to realise the costs under the decree. Be this as it may, the District Judge has not, in my opinion, exercised a jurisdiction not vested in him or failed to exercise a jurisdiction vested in him. Nor again has he acted illegally or with material irregularity in the exercise of his jurisdiction to accept the appeal under s. 439 (*b*) of the Criminal Procedure Code.

It appears to me that some alteration of the law is desirable to obviate the undesirability of such an application as this being dismissed on the ground that it cannot be entertained under s. 115 of the Civil Procedure Code. The real position appears to be this. Section 476 is part of the Criminal Procedure Code, and the Legislature when drafting it doubtless considered that ss. 436 to 439 of the Criminal Procedure Code, would operate to afford means whereby the High Court could set aside such an order now impugned if it thought fit. Unfortunately by reason of the Full Bench decision of this Court it is not ss. 435 to 439 of the Criminal Procedure Code, that will govern such an application in revision but s. 115 of the Civil Procedure Code. The language of s. 115 is too narrow to meet the case where the Judge by his order decides to prosecute the person on insufficient grounds or on wrong grounds. The consequence is that an application like this has to be rejected and what appears likely to be an abortive criminal suit has to be allowed to take place.

For the reasons stated this application is dismissed but in the circumstances I make no order as to costs.

Z. K. *Application rejected.*

(1) 26 A. 249; A. W. N. (1904) 15; 1 Cr. L. J. 73 (F. B.).

(2) 92 Ind. Cas. 454; 24 A. L. J. 217; 27 Cr. L. J. 278; A. I. R. 1926 All. 229; L. R. 7 A. 25 Cr.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 672 OF 1926.

August 24, 1926.

Present:—Sir George Claus Rankin Kt., Chief Justice and Mr. Justice Duval.

BECHU LAL KAYASTHA—ACCUSED—PETITIONER

versus

THE INJURED LADY—OPPOSIT PARTY.

Criminal Procedure Code (Act V of 1898), s. 342—Summons case—Non-compliance with s. 342—Illegality.

Section 342 of the Code of Criminal Procedure applies to summons cases. [p. 380, col. 2.]

Ponnusami Odayar v. *Ramasami Thathan* (1) and *Dharma Singh* v. *Emperor* (2), dissented from.

Criminal Revision against the order of the Additional Chief Presidency Magistrate, Calcutta, dated the 2nd June, 1926.

Mr. *Herambo Chundra Guha* and Babu *Jnan Chandra Roy*, for the Petitioner.

Mr. *Khundkar* (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.

Rankin, J.—The petitioner is a driver in the employ of the Calcutta Tramways Company, Ltd. He has been convicted by the Additional Chief Presidency Magistrate under s. 279 of the Indian Penal Code for rash and negligent driving and has been sentenced to pay a fine of Rs. 100. Half of

the fine has been ordered to be paid to a person injured by the negligence of petitioner.

The present Rule was issued on the sole ground that s. 342 of the Criminal Procedure Code was not complied with. The Magistrate in his explanation states that s. 342 was not complied with because the case was a summons case and cites the decisions of a Full Bench of the Madras High Court [*Ponnusami Odayar* v. *Ramasami Thathan* (1) and *Dharma Singh* v. *Emperor* (2)] for the view that s. 342 does not apply to a summons case whether it be tried summarily or in the ordinary way.

In this Court convictions have in summons cases been set aside for failure to comply with s. 342: *Gulzari Lal* v. *Emperor* (3) and *Surendra Lal Shaha* v. *Isamaddi* (4), but we have not been referred to any case in which the applicability of the section to summons cases has been argued or the Madras decisions canvassed.

The Bombay High Court has in two cases held that the section applies to summons cases: *Fernandez* v. *Emperor* (5), *Emperor* v. *Gulabjap* (6), and this appears to be the prevailing view in Provinces other than Madras.

Section 342 occurs in Ch. XXIV which is headed "General Provisions as to Inquiries and Trials." Some of the sections in this Chapter are not in accordance with a strict interpretation of the heading in respect that they do not deal with matters which either must or may arise in the course of any enquiry or trial (*cf.* ss. 349, 350, 350A). Others deal with questions which are in nature general (*e. g.*, tender of pardon to accomplice, compounding of offences) but permit of the specified procedure in particular cases only (*cf.* ss. 337, 339A, 345). Others, however, appear to be quite general and to be so expressed (exemptions or exceptions being made as necessary). The right to be defended by a Pleader (s. 340), the rights of an accused who cannot be made to understand the proceedings (s. 341), the right to be free of undue influence by threat or promise (s. 343), the power of remand (s. 344), detention of offenders attending Court (s. 351), Courts to be held in public (s. 352)—these are all "General Provisions as to Enquiries and Trials" in the fullest sense of the phrase. The language in several of these sections is of studied generality (*e. g.* any person accused of an offence before a Criminal Court) (s. 340 *cf.* ss. 351, 352) and it is appropriate to the subject-matter. They are intended as general provisions—not merely as miscellaneous provisions.

Taking Ch. XXIV for the moment by itself, it must, I think, be conceded that s. 342 has all the notes of generality. The language is "the Court may, at any stage of any inquiry or trial." The subject-matter of the opening phrase—Power to examine the accused—is undoubtedly general: it asserts a principle which is in marked contrast with a fundamental principle of the Common Law of England under which no Court could examine an accused. It is here and here only that we find it stated that no oath shall be administered to the accused, that he cannot be punished for not answering, that a charge of perjury cannot be brought upon his answers.

The history of the section—if this be relevant—detracts in no way from the force of these considerations. It was given by Jwala Prasad, J, in the case of *Raghu Bhumij* v. *Emperor* (7): "In the earlier Acts, the examination of the accused person was discretionary with the Court: *vide* s. 373 of Act XXV of 1861 and Act VIII of 1869. In Act X of 1872 while the discretionary nature of the examination was retained so far as enquiries and trials of cases other than Sessions cases were concerned, it was made compulsory for Sessions trials. Section 250 of that Act occurred in the Chapter relating to Sessions trials and ran as follows:—

"'The Court may from time to time at any stage of the trial examine the accused person and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.'

(1) 74 Ind. Cas. 945; 46 M. 758; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 24 Cr. L. J. 833; A. I. R. 1924 Mad. 15 (F. B.).

(2) 74 Ind. Cas. 959; 46 M. 766; 45 M. L. J. 230; 18 L. W. 612; (1923) M. W. N. 893; 24 Cr. L. J. 847; A I. R. 1924 Mad. 30.

(3) 71 Ind. Cas. 51; 49 C. 1075; 24 Cr. L. J. 3; A. I. R. 1923 Cal. 164; 39 C. L. J. 31.

(4) 84 Ind. Cas. 325; 51 C. 933; 26 Cr. L. J. 261; A. I. R. 1925 Cal. 480.

(5) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17.

(6) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; A. I. R. 1922 Bom. 290.

(7) 58 Ind. Cas. 49; 5 P. L. J. 430 at pp. 441, 442; 1 P. L. T. 241; 21 Cr. L. J. 705.

In 1882 the provisions relating to the examination of an accused person, which were scattered in different Chapters in the previous Acts, were removed from those Chapters and brought under one Chapter headed 'General Provisions Relating to Enquiries and Trials.' Section 250 of Act X of 1872 was, therefore, removed from the Chapter relating to Sessions trials but its provisions were embodied in their entirety in s. 342 of the Code of 1882 as well as in 1898."

What then is the contention to be? Is it that no part of s. 342 applies to summons cases or merely that the last clause of sub-s. (1) does not apply. I am not quite sure which doctrine is affirmed by the Madras decisions but, I think, it is the former; though the reason given for it is the inapplicability of the closing words of the sub-section.

In either case it appears to me that there is really one argument upon which everything turns, and the other arguments collapse without it. Of a contested summons case, s. 244 says that "the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence." In a warrant case after charge framed and after the last prosecution witness has been cross-examined and re-examined, s. 256 says: "The accused shall then be called upon to enter upon his defence and produce his evidence." Of Sessions cases s. 289 says: "When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence." In sub-s. 4 the Code says that "the Court shall call on the accused to enter on his defence" and the context shows what this means. It means that if he calls no witnesses the accused (or his Pleader) is to make his final address to the Jury: if he is calling witnesses he may open his case and proceed to call them.

It is to these sections that s. 342 has to be applied. Its words are "and shall question him—generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

I do not collect that any shadow of difficulty is imposed to surround the phrase "after the witnesses for the prosecution have been examined." These exact words do not occur in s. 244, s. 256 or s. 289 but they refer without any ambiguity whatever to a definite stage in any kind of trial, and their equivalent in the sections mentioned leaps to the eye. In these circumstances there seems little room for any further difficulty but it is said—if I follow the agrument—that there is a significant precision of language in the words "before he is called on for his defence." This it is said has a definite meaning both in s. 289 and s. 256 but in Ch. XX the expression is not used. "The prisoner in these cases does not enter on his defence" but the Magistrate is bound to "hear the accused" (per Schwabe, C. J.) in *Ponnusami Odayar* v. *Ramasami Thathan* (1).

The argument appears to me to be unsubstantial. There is no such exact identity of phrase as could make s. 342 short circuit with ss. 289 and 256 to the exclusion of s. 244. The phrase is "called on for his defence." The words of s. 256 are "called upon to enter upon his defence"; in s. 289 "call on the accused to enter on his defence." The similarity of phrase is apparent and there is no such similarity in s. 244 but that is all; and there can be no question of significant precision. The Legislature has not hit upon a general expression equidistant from all three sections in point of variation of language. But as Mullick, J., observed in *Raghu Bhumij* v. *Emperor* (7), a case already cited, "if it is argued that in a summons case the accused is never 'called on for his defence,' the reply seems to be that there is no virtue in these particular words and the accused in a summons case is called on for his defence after the prosecution is closed just as much as an accused in any other case." "To call upon an accused person to enter upon his defence is a necessary incident of every trial" per Crump J., in *Fernandez* v. *Emperor* (5). Macleod, C. J., has taken the same view: *Emperor* v. *Gulabjap* (6). There is every reason to suppose that the words are used as ordinary English and there is independent reason to presume that the provision is a general provision. The function of the concluding words of sub-s. 1 of s. 342 is to point to a definite stage of every trial. For this purpose it is natural enough to use rather more informal language than seems to be called for when describing the procedure

in summons cases. Thus, although in summons cases there is no formal charge and Ch. XX says nothing about "plea" or "pleading guilty," the Legislature when in s. 263 (*cf.* s. 262) it has occasion to refer to this stage when dealing with summary trial both of summons cases and of warrant cases, uses the words "the plea of the accused." In the same way s. 342 uses the phrase "called on for his defence"—not only without any special or limited intention but in a Chapter which is expressly devoted to general provisions and in a section which refers to "any stage of any inquiry or trial."

I do not here discuss whether if s. 342 applies to any case a failure to comply with it can be condoned under s. 537. Nor do I discuss whether in warrant cases, or in Sessions cases it is purely discretionary for the Court to examine or not to examine. These questions are concluded by authority binding upon me.

Confining myself to summons cases, I would observe that the argument from the repealed s. 451 has been answered by Oldfield, J., in *Ponnusami Odayar* v. *Ramasami Thathan* (1) that s. 242 applies to a stage and a purpose different from s. 342; and that the words "if he thinks fit" in s. 245 do not necessarily mean more than that an accused can be acquitted without being examined. Section 245 is very similar in language to s. 209 and s. 253 but it has not quite the same purpose. The governing idea is that in summons cases the matter should be finally decided (save in cases under s. 249). It should proceed to a conviction or acquittal—not merely end in a discharge. Apparently s. 245 has been held to mean that a man cannot be acquitted until after he has been heard and after he has produced all his evidence [*Kesri* v. *Muhammad Bakhsh* (8)] which seems a little marvellous. If this be right, (which I take leave to doubt) then when the case against the accused breaks hopelessly down—I presume the really correct procedure must be to tell the accused that if he holds his tongue he will be acquitted but that if he will insist on defending the case further he may be convicted on any charge triable as a summons case that may turn up before the case is over. If "the evidence referred to in s. 244" is not a phrase used by mistake for "the complainant (if any) and all such evidence as may be produced in support of the prosecution" and if it really means that the accused must be asked to call his evidence even though there is no case to answer, then the words "if he thinks fit" do raise a difficulty. But on the common sense of the matter and even on the strict construction of the section it seems reasonably clear that the words "if he thinks fit" have reference in this section to cases in which the Magistrate is prepared to acquit without examining the accused. That he can convict without examining the accused is an inference from the dubious proposition that he cannot acquit without hearing all such evidence as the accused requires him to hear. Sections 209 and 253 may, I think, be looked at to explain what is meant by the words "if he thinks fit" in s. 245. They all refer to cases where it is unnecessary to give an opportunity to an accused to explain any circumstances appearing in the evidence against him because the case against him is going to be stopped then and there. (The effect of the words "if any" in s. 289 is a different question).

My main criticism of the decision in *Ponnusami Odayar* v. *Ramasami Thathan* (1) is that it fails to appreciate that on the face of the Criminal Procedure Code every reference to any examination or possibility of an examination of an accused person by the Court is a reference to s. 342. Before 1882 the Code was different. But now s. 342 is the enabling section—it is the section which explains the purpose for which and the terms on which any accused can be examined by the Court at all. It confers a power which may be exercised at any stage. It is pre supposed in Ch. XX as in Ch. XVIII, Ch. XXI, Ch. XXII and Ch. XXIII, and these are the only Chapters to which its direct reference can be primarily intended. With all respect, I think it impossible to maintain that s. 342 has no reference whatever to summons cases. If the question be as to the applicability of the concluding words of sub-s. (1), then I think the Madras High Court applied a test which is inadequate when it said:—"It must be applied to all cases, unless the special sections dealing with particular cases indicate that it is not intended to apply to them or unless the words of the section itself give such indication." *Ponnusami Odayar* v. *Ramsami Thathan* (1). The concluding words of the sub-section must

(8) 18 A. 221 at p. 223; A. W. N. (1896) 35; 8 Ind. Dec. (N. S.) 854.

have effect like the other words in the absence of an express exception or of an exception to be implied from a specific provision clearly inconsistent therewith unless indeed the words as applied to summons cases are insensible or at least markedly inapt.

In the present case the Rule must be made absolute and the case must be re-tried by a Magistrate to be nominated by the Chief Presidency Magistrate.

The fine, if paid, will be refunded.

Duval, J.—I agree.

A. N. A. *Rule made absolute: Re-trial ordered.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 530 OF 1926.

October 8, 1926.

Present:—Mr. Justice Banerji.

TIRLOKI NATH—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal trial—Decision of case on special oath of complainant, legality of.

It is entirely illegal to decide a criminal case in accordance with a statement made by the accused's father agreeing to the disposal of the case upon the special oath of the complainant.

Criminal Reference made by the Sessions Judge of Meerut, dated the 9th of August, 1926.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—One Banwari Lal complained against Tirloki Nath, under s. 352 of the Indian Penal Code. The case was tried summarily by the District Magistrate of Meerut, but the proceedings adopted by him are curious. What he says in his judgment is:—

"Accused's father says that if complainant swears on Ganges water that he has not abused his father the case is finished."

Neither the accused's father nor the complainant's son were parties to the case and I fail to see how any Magistrate could have acted in the way that this learned Magistrate did. There is no provision of any law, and it seems to me against common sense, to decide a case in the way that this Magistrate did. I accept the Reference. As the case is a trivial one I direct the record to be returned. No further action need be taken in the matter.

A. N. A. *Reference accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 157 OF 1926. (CRIMINAL REVISION PETITION No. 140 OF 1926).

December 2, 1926.

Present:—Mr. Justice Wallace.

DEENADAYULU NAIDU AND OTHERS—ACCUSED—PETITIONERS

versus

RATNA PADAYACHI—COMPLAINANT—RESPONDENT.

Cattle Trespass Act (I of 1871), s. 20—Criminal Procedure Code (Act V of 1898), ss. 4 (o), 29—Offence under s. 20, Cattle Trespass Act—Jurisdiction of Magistrate—Special authorisation, whether necessary—Criminal trial—Joinder of charges under s. 20, Cattle Trespass Act, and s. 504, Penal Code, legality of—'Same transaction.'

The inclusion in s. 4 (o) of the Criminal Procedure Code in the definition of an offence of an "act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act" renders it unnecessary for a Magistrate who is generally empowered under the Criminal Procedure Code to receive complaints of offences, to be specially authorised by the District Magistrate to receive complaints under that section of the Cattle Trespass Act. [p. 381, col. 2.]

Kottalanada v. *Muthaya* (2) and *Emperor* v. *Vishvanath Vsihnu Joshi* (3), followed.

A joinder of charges for offences under s. 20 of the Cattle Trespass Act and s. 504 of the Penal Code is not illegal, where the acts constituting the offences formed part of the same transaction. [p. 382, cols. 1&2.]

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Musiril in Crimina Appeal No. 11 of 1925, preferred against that of the Court of the Stationary Second Class Magistrate of Musiri, in C. C. No. 214 of 1925.

Mr. *B. Pocker*, for the Petitioners.

The Public Prosecutor, for the Crown.

Mr. *M. Damodara Naidu*, for the Complainant.

ORDER.—The main point argued in this Revision Case is whether the inclusion in s. 4 (*o*) of the Criminal Procedure Code in the definition of an offence of an "act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act" renders it unnecessary for a Magistrate who is generally empowered under the Criminal Procedure Code to receive complaints of offences to be specially authorized by the District Magistrate to receive complaints under that section of the Cattle Trespass Act. Section 29 of the Criminal Procedure Code is relied on. So far as sub s. (1) is concerned, it is argued that the offence can only be tried by the Court

mentioned in s. 20 of the Cattle Trespass Act, that is, by the Magistrate authorized to receive and try charges without a reference by the District Magistrate. So far as sub-s. (2) is concerned, it is argued that, as the offence is not punishable with imprisonment or fine as such, it has no place in the 8th column of the Second Schedule and, therefore, that that Schedule does not apply. I am inclined to agree with the second contention although there are cases which have held that the compensation which may be awarded under s. 22 is of the nature of a fine. But I think the first contention does not carry the petitioner so far as he wishes to go. Granted that the only Court which can try the case is a Magistrate authorized in the language of s. 20 of the Cattle Trespass Act, that language appears to me to mean a Magistrate authorized to receive and try complaints generally and not merely complaints under that section. I am not clear why the vague word "charges" is used, but, had the intention of the Legislature been to confine the authorization to charges under that section, I think it would have said so. It is true that, if 'charges' means generally complaints of offences, it was not necessary to amend the definition of 'offence' under the Criminal Procedure Code of 1898, because a Magistrate authorized to try offences generally would under s. 20 have authority to try a complaint under that section. But the amendment was probably due to certain rulings which lay down that an act in respect of which a complaint could be laid under s. 20 was not an offence: see *Pitchi* v. *Ankappa* (1) and *Kottalanada* v. *Muthaya* (2). I hold then that s. 20 means that any Magistrate authorized under the Criminal Procedure Code by the District Magistrate to take cognizance of offence is thereby authorized to take cognizance of an offence under this section. This is the view held in *Emperor* v. *Vishvanath Vishnu Joshi* (3) and derives support from that in *Budhan Mahto* v. *Issur Singh* (4) although the point now taken based on the wording of the section was not specifically raised. There therefore is no lack of jurisdiction and this objection fails.

It has been further urged that a joinder of charges for offences under s. 20 of the Cattle Trespass Act and s. 504 of the Indian Penal Code was illegal. No objection was taken to this joinder until now. The insult complained of was so near in point of time and place that it may reasonably be held to have formed part of the same transaction. I am not prepared to hold the joinder illegal.

I, therefore, dismiss this petition.

V. N. V. *Petition dismissed.*

(1) 6 M. 102; 2 Weir 315; 3 Ind. Dec. (N. S.) 468.
(2) 9 M. 374; 2 Weir 315; 3 Ind. Dec. (N. S.) 656.
(3) 54 Ind. Cas. 495; 44 B. 42; 21 Bom. L. R. 1084; 21 Cr. L. J. 95.
(4) 34 C. 926; 6 Cr. L. J. 363.

LAHORE HIGH COURT.

CRIMINAL CASE No. 1206 OF 1926.

January 24, 1927.

Present:—Mr. Justice Dalip Singh.

KARTAR SINGH *alias* TARA SINGH AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 348, 350—Trial de novo—*Previously recorded evidence, use of.*

It is not competent to a Magistrate to embark upon a trial *de novo* and yet rely upon the evidence recorded previously. [p. 383, col. 1.]

Appeal from the order of the Magistrate, First Class, exercising enhanced powers under s. 30, Criminal Procedure Code, Amritsar, dated the 21st September, 1926.

Mr. *Dev Raj Sawhney*, for the Respondent.

JUDGMENT.—These are three connected appeals. The appellants Kartar Singh *alias* Tara Singh and Haranam Singh have been convicted under s. 392, Indian Penal Code, and sentenced to four years' rigorous imprisonment and Sohan Singh has been convicted under s. 392/75, Indian Penal Code, and sentenced to seven years' rigorous imprisonment. The three appeals following these which are put up by the office as connected appeals are not connected with them at all and relate to different transactions and different accused.

The case has had a remarkable history. The accused were originally tried by Sardar Hardial Singh, Magistrate, First Class, who recorded almost all the prosecution evidence, and then finding that Sohan Singh had some previous convictions he referred the case to the District Magistrate for transfer to a s. 30 Magistrate. The District Magistrate referred the case to Malik Sahib Khan Nun for trial. The learned Magistrate proceeded to take the statements of the accused persons as to whether they wanted *de novo* proceedings. The accused all said that they did not want

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de novo proceedings. The Magistrate then, however, proceeded to re-call and re-examine the whole of the prosecution evidence. Evidently he exercised his option under s. 350 to re-commence the trial. Some of the prosecution evidence which had previously been taken by Sardar Hardial Singh was recorded again and then some of the prosecution evidence was found impossible to secure and the Magistrate proceeded to close the prosecution case. He then proceeded to use both his own record as well as Sardar Hardial Singh's record as evidence in the case.

Counsel for the Crown has referred me to s. 349 of the Criminal Procedure Code and to s. 350 (3). The combined effect of these sections might have entitled the Magistrate to rely on the evidence already recorded but he could not both proceed to re-commence the enquiry and then rely upon the previously recorded evidence. I should like to point out that the records both of Sardar Hardial Singh and of Malik Sahib Khan Nun are almost illegible and it is extremely difficult to make out all the evidence and a great deal of time has been wasted in trying to decipher their hieroglyphics. However, the evidence has been read. The Magistrate is totally wrong in saying that the knife and the small opium box identified by the complainant were recovered from the person of Harnam Singh. The evidence on the record shows that they were recovered from the person of Kartar Singh. There is absolutely no evidence against Harnam Singh on the record at all and I accept his appeal and acquit him.

Against Sohan Singh there is no evidence except that of the complainant who claims to have identified him both in Court in an identification parade held by a Magistrate of the First Class Lala Amar Nath. The evidence of Rai Sahib Amar Nath was recorded by Sardar Hardial Singh and I do not think that it can be treated as evidence in the case. The evidence against Kartar Singh consists of the identification by the complainant as before and of the recovery of certain property from his person. As it was illegal, in my opinion, for the Magistrate to have used both the records I set aside the order passed by him and direct that Kartar Singh and Sohan Singh be re-tried. Their appeals are accepted accordingly to that extent.

R. L. *Appeals accepted in part.*

PATNA HIGH COURT.

CRIMINAL REVISION CASE No. 535 of 1926.

August 26, 1926.

Present:—Mr. Justice Ross.

JAINATH *alias* JAINU OHDAR—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 97—Right of private defence of property—Possession, affirmative evidence of, whether necessary—Presumption of possession.

In order to establish the right of private defence of property it is not necessary for the accused to prove his possession affirmatively; he can rely on the presumption of continuance of possession arising in his favour from the circumstances of the case. [p. 384, col. 1.]

Criminal Revision from an order of the Judicial Commissioner, Chota Nagpur, dated the 1st of July, 1926, modifying that of the Sub-Divisional Officer, Khunti, dated the 6th of May, 1926.

Messrs. *B. N. Mitter* and *A. Barman*, for the Petitioner.

JUDGMENT.—The petitioner Jainath Ohdar and four others were charged with rioting, theft and causing grievous hurt. The case for the prosecution was that they were forcibly cutting the paddy of a certain field in the possession of the complainant. The trial Court convicted them of rioting and of grievous hurt and also under s. 379 of the Indian Penal Code. The learned Judicial Commissioner found that the complainant had not proved his possession.

The facts regarding possession are these. The field is *brahmottar* land belonging to one Chirangu Misser and he had given this field in *zerpeshgi* to the accused Kangali for five years in consideration of Rs. 86 with a stipulation that, if the *zerpeshgi* was not re-paid, the tenant would retain possession of the land until the repayment was made. During the term of the *zerpeshgi* lease, Chirangu Misser gave another *zerpeshgi* lease to the brother of the complainant. The learned Judicial Commissioner found that it had not been proved that Kangali had been paid off and that doubt was thrown on the evidence of the prosecution regarding possession. He, therefore, set aside the conviction under ss. 147 and 379, but he upheld the conviction of Jainath Ohdar under s. 325 on the ground that, although the accused party had at least a *bona fide* claim of right to the field

and it did not seem certain that Bhonra ever had possession, yet in order to establish the right of private defence, the accused must show affirmatively their own possession. Now, there is no doubt that Kangali had possession for several years under the *zerpeshgi* lease. As that *zerpeshgi* was never paid off, possession must be presumed to have continued; and the learned Judicial Commissioner has not found that that possession was determined by possession actually recovered by the complainant. It, therefore, follows that the party of the accused were in possession and, consequently, Jainath Ohdar was protected by the right of private defence.

The application must be allowed, the conviction and sentence set aside and the petitioner acquitted and released from bail. The fine, if paid, will be refunded.

A. N. A. *Conviction set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 686 OF 1926.
(CRIMINAL REVISION PETITION No. 572 OF 1926).
October 18, 1926.
Present:—Mr. Justice Curgenven.
In re AKULA VENKANA—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 259—Discharge of accused on account of complainant's absence—Magistrate, whether competent to restore complaint or entertain fresh complaint.

Where a complainant is absent when a case is taken up and the Magistrate discharges the accused under s. 259, Criminal Procedure Code, it is competent to the Magistrate to entertain a fresh complaint or restore the old complaint on satisfactory cause being shown by the complainant for his absence.

Emperor v. *Chinna Kaliappa Gounden* (1) and *In re Rudra Gowd* (2), followed.

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Nidadavole, in Criminal Appeal No. 26 of 1926 against the judgment of the Court of the Stationary Sub-Magistrate of Januku, in C. C. No. 61 of 1926.

Mr. *V. Suryanarayana*, for the Petitioner.

ORDER.—The complainant preferred a complaint of voluntarily causing simple hurt under s. 323, Indian Penal Code, and being absent on the occasion when the case was taken up, the Sub-Magistrate dismissed it under s. 259, Criminal Procedure Code, and discharged the accused. Subsequently, the complainant filed a fresh complaint in the same terms with an application that it should be restored to file and the Sub-Magistrate deeming the explanation for his absence to be satisfactory took the case on file again and eventually convicted the accused. The contention in this criminal revision case is that he was incompetent so to restore the case after having passed an order of discharge under s. 259, Criminal Procedure Code. This point was not taken either in the trial Court or in appeal and it admittedly does not affect the merits of the conviction; nor, I think, has it any basis in law. It has been held in the Full Bench case, *Emperor* v. *Chinna Kaliappa Gounden* (1), that after dismissing a complaint under s. 203, Criminal Procedure Code, the Magistrate may restore that complaint to file notwithstanding that the order of dismissal has not been set aside by higher Court. Two of the five Judges who composed that Bench expressed the opinion that the same rule would apply to a discharge under s. 259, Criminal Procedure Code, while two were of a contrary opinion; the fifth expressly refraining from deciding the point. Subsequently in *In re Rudra Gowd* (2) a Bench of this Court, following the opinion expressed by Sir Arnold White, C. J., in the afore-mentioned case and in another case in which he was sitting singly, has held that a Magistrate who has discharged an accused person under s. 259, Criminal Procedure Code, is competent to entertain a fresh complaint on the same facts. This would be a direct authority against the present contention were it not that some slight doubt appears as to whether the Magistrate entertained a fresh complaint or restored the old complaint. It appears to me, however, that that makes no substantial difference and indeed the Full Bench decision under s. 203, Criminal Procedure Code, related to a case of the restoration of the original complaint. I consider accordingly that the Sub-Magistrate was competent to act in the manner he did and I dismiss this criminal revision petition.

V. N. V. *Petition dismissed.*

(1) 29 M. 126; 16 M. L. J. 79; 1 M. L. T. 31; 3 Cr. L. J. 274.

(2) 18 M. L. J. 561; 4 M. L. T. 140; 8 Cr. L. J. 208.

MADRAS HIGH COURT.

CIVIL APPEAL No. 68 OF 1922.

September 16, 1925.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Reilly.

KOMIRISETTI SATYANARAYANA—DEFENDANT No. 2—APPELLANT

versus

YEERANKI CHINA VENKATARAO AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 3, 8, 7 AND 9—RESPONDENTS.

Registration Act (XVI of 1908), s. 77—Registration, refusal of, by party—Failure to sue for compulsory registration—Specific performance of agreement to sell, suit for, whether maintainable—Precedents, value of.

Where after execution of a document, the executant refuses to get it registered, and the other party does not avail himself of the remedy provided by s. 77 of the Registration Act by bringing a suit for compulsory registration of the document, he is not entitled afterwards to treat the unregistered sale-deed as an agreement to sell and bring a separate suit for specific performance of the same. [p. 387, col. 2.]

Venkatasami v. *Kristayya* (5), *Thayarammal* v. *Lakshimi Ammal* (7) and *Subbarayya Pillai* v. *Devasahayam Pillai* (8), followed.

Amer Chand v. *Nathu* (1), *Surendra Nath Nag* v. *Gopal Chunder Ghosh* (3) and *Nasiruddin Midda* v. *Sidhoo Mia* (4) not followed.

Chinna Krishna Reddi v. *Dorasami Reddi* (2) and *Nynakka Routhen* v. *Vavana Mahomed Naina* (6), distinguished.

A man who has failed to adopt a remedy expressly provided by the Statute cannot come to Court and ask for an exercise in his favour of a discretionary and equitable remedy. [p. 388, col. 2.]

Although in India the remedy of specific performance is a statutory remedy, it nevertheless is simply a crystallisation into statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. [*ibid.*]

In a matter which is open to divergence of view a High Court should follow its own *cursus curiæ* unless it is of opinion that the former decisions of the Court are clearly wrong. [p. 386, col. 1.]

Appeal against a decree of the Court of the Additional Subordinate Judge, Cocanada, dated the 18th April, 1921, in O. S. No. 10 of 1920.

Messrs. *C. Sydney Smith*, *A. Krishnasami Aiyar* and *P. C. Venkataramanyya*, for the Appellant.

Messrs. *G. Lakshmana* and *A. Satyanarayana*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—This is an appeal from a decree of the Subordinate Judge of Cocanada wherein he gave certain remedies by way of specific relief to the plaintiffs. The plaintiffs' case was that certain sums of money were due to them as debts from various people. It is not material for the purposes of our decision to know how those debts were alleged to have come into existence, what was their nature or what were the relations to the plaintiffs of the various parties to the transactions in question. The transaction was that an agreement was entered into for the sale of certain property in extinguishment of the plaintiffs' claims. The agreement that was entered into by the contracting parties was this: "We shall execute the sale-deed for this as per your draft and give it to you registered within three months from this date," so that undoubtedly under that document it was part of the obligation of the defendants to get the deed that was in contemplation by this agreement drawn up and executed and registered. A deed was drawn up and in due course it came to the stage of registration. One of the persons who executed the agreements, the 3rd defendant in this case, when the time came for registration, objected to the registration of the document and the Registration Authorities after an enquiry into the matter refused to order registration of the document as against the recalcitrant 3rd defendant, plaintiffs' case, of course, being throughout that she was a person against whom the deed ought to have been registered (and that is their case here to-day) and that the Registration Authorities were in error in giving effect to her refusal. In these circumstances they brought this suit for specific performance of the agreement against all the parties to it. We are not really called upon to decide in this case whether this is a matter in which the contemplation of the parties was that all should sign or that the signatures of what I may call the operative persons should be regarded as sufficient, it apparently being the fact that the signatures of others including the recalcitrant 3rd defendant were added *ex majori cautela* in case they should raise objections and claims thereafter. Speaking for myself, I think that even in such a case it must most probably be held that it was the intention that they should execute for the very purposes that I have mentioned. However, in the view that we take, it is unnecessary to decide the matter. And if the other view were to prevail that the signature of this person was otiose and unnecessary, then, of course, the plaintiffs' case would fail equally because the whole agreement would be completed sufficiently to satisfy the contract and there would be nothing for the

suit to operate upon. But taking it that the signature of the 3rd defendant was necessary, what is the position in law.

By s. 77 (1) of the Registration Act it is enacted as follows:—"Where the Registrar refuses to order the document to be registered...any person claiming under such document...may, within 30 days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose Original Jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office." That is a statutory remedy given to a person who stands in the position that he is entitled to have a document registered by somebody else, that that somebody also has refused and the Registrar has upheld the refusal and he wants to have that compulsorily registered as against the other person. It should be observed, and I think this is a most important thing to notice about the section, that it provides a limitation of a short period of 30 days, the object, no doubt, being to ensure that matters of this kind should be gone into when the evidence is fresh in everybody's mind and in all human probability all of it available, whereas if left to an ordinary suit some people might be dead who could throw light on the matter and others might have let it fade from their recollection. I should have thought that looking at the Statute alone it is clear that the object of the Legislature was to provide a remedy of a very short period of limitation for putting right a wrongful refusal to register, and that must be held to be the remedy and the only remedy given by law. But unfortunately the matter is covered with conflicting authority. The authorities in Madras appear to differ from the authorities in other parts of India. In a matter which is open to divergence of view my opinion is that this Court should follow its own *cursus curiæ* unless it is of opinion that the former decisions of the Court are clearly wrong. I do not think, if it agrees with those decisions, that it ought to harass the parties with any argument before a Full Bench merely because of different views in other Courts.

An authority which is directly in favour of the respondents is *Amer Chand* v. *Nathu* (1), a decision to which that very distinguished Judge Stanley, C. J., was a party. A sale-deed was executed, a lady refused to register it, but no suit was brought for compulsory registration; nevertheless it was held that the plaintiff was entitled to a remedy by way of specific performance; and the learned Judge says this: "His (plaintiff's) grounds of appeal are that the substantial relief sought by him was the specific performance of the contract for sale and for possession of the property. We see no answer to this appeal. No defence to the action was disclosed by the defendants and in view of all the facts the Court of first instance, as well as the lower Appellate Court ought, in our opinion, to have granted a decree for specific performance. The Court of first instance was wrong in passing an order (that is no doubt true) for registration of the sale-deed which was executed by the guardian of defendants in view of the provisions of the Registration Act. But it appears to us that the Court has jurisdiction to direct specific performance of the contract and to require that the defendants should do all necessary acts for the purpose of fulfilling the obligation into which through their guardian they had entered, and that the plaintiff is entitled to have a fresh sale-deed executed by all necessary parties and to have the document so executed registered." And then they quote *Chinna Krishna Reddi* v. *Dorasami Reddi* (2) a case which I shall show presently is really no authority for the proposition laid down by the Allahabad High Court at all. The next direct authority in Mr. Lakshmanna's favour is a case in *Surendra Nath Nag* v. *Gopal Chunder Ghosh* (3) a decision of Mukerjee and Carnduff, JJ. There the decision was that "although a document, which has been executed, is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance." That really entails another doctrine as well as the one we are directly concerned with here, namely, that though a lease has for some reason or other become, or was from the first, legally inoperative, yet for the purpose of bringing a suit for specific performance it is open to the Court to

(1) 7 Ind. Cas. 408; 7 A. L. J. 887.

(2) 20 M. 19; 7 Ind. Dec. (N. S.) 13.

(3) 8 Ind. Cas. 794; 12 C. L. J. 464.

treat it as a mere agreement of lease. I should have thought it a very vicious method of construction to say that a document, which purports to be one thing, is to be allowed to be treated when it is found imperfectly to contain what it purports to be as a valid document of a different order altogether. The reasoning of the learned Judges of the Calcutta High Court appears to be this. The undertaking of a person who enters into a contract for the sale of real property is to do everything whereby an operative agreement in law can be effected. He has not done everything if he failed in an instrument where the obligation is cast upon him to obtain its registration and, therefore, a step in the creation of the legal relation of purchaser and vendor being wanting, you can compel the person who has not taken that step to take it. The answer appears to me to be very simple. Section 77 of the Registration Act not only tells you how you are to do that but says that if you want to effect that purpose of having registration forcibly carried out by a decree of the Court, you must do it within 30 days. It seems to me that these decisions in Calcutta and Allahabad in effect take upon themselves by a side wind to get rid of the period of limitation strictly imposed by the express words of the Statute. To my mind no judicial decision has any right to tamper with a thing directly enforced and enjoined by a Statute whose construction is free from possible doubt. The most that can be said is that the remedy given by the Statute is not intended to be the only one. It is almost impossible to believe that the Legislature can have intended that there should be a direct and an indirect way of effecting the same thing and that the period of limitation applicable to them should be entirely different. That is the view that has been taken in more than one case in this Court. But before I deal with them I want to refer to one other case of the Calcutta High Court, *Nasiruddin Midda* v. *Sidhoo Mia* (4) because that is an instructive case. What appears to me to be the policy underlying the Calcutta trend of decisions is, I think, well illustrated by that case decided by Mookerjee and Beachcroft, JJ., in 1917. In that case the plaintiff claimed two things in the alternative. He first put in a claim asking in terms to have the registration of a document enforced and an alternative claim along with it for specific performance. The document was in the same stage as the document here. It had been executed but one of the parties had refused to acknowledge the right to have it registered. The learned Judges say this : " As regards the claim to enforce registration of the document executed in his favour by his vendors he was, no doubt, bound to follow strictly the procedure prescribed by the Indian Registration Act before he could institute a suit under s. 77 to compel registration. But as regards the alternative claim to enforce specific performance of the agreement to sell there was really no answer to the suit. Although the vendors had executed the document, they could not be deemed to have completely performed their part of the agreement. The agreement in essence was not merely to execute a conveyance which until registered, would be inoperative in law, but to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registered instrument; consequently, the execution of the conveyance, not followed by registration could not be regarded as fulfilment of the contract." So that what is taken away by the right hand is immediately replaced by the left and where the Statute has forbidden a special means, another means is promptly devised in order to get round the words of the Act.

In Madras the decisions have been different and having considered them all, I am of opinion that they are quite consistent. The leading case and the most direct authority is *Venkatasami* v. *Kristayya* (5). There the plaintiff sued for specific performance and a decree had been passed in the lower Court directing the defendant to execute and register a deed of transfer. That judgment was upset by Muttuswami Iyer and Handley, JJ., and the reasoning that is directly in point is to be found on the second page of the judgment. It is an interesting case because the judgment contemplates the case not merely of failure by the defendant to procure registration but the case where the plaintiff does not pursue the remedy given him under s. 72 or 76.

(4) 44 Ind. Cas. 361; 27 C. L. J. 538.

(5) 16 M. 341; 3 M. L. J. 169; 5 Ind. Dec. (N. S.) 945.

The learned Judges say this: "If defendant had appeared and admitted execution, the document would have been registered. If he had appeared and denied execution, registration would have been refused and plaintiff would have been entitled to an enquiry before the Registrar under ss. 73 to 76. If defendant did not appear, plaintiff might have proved execution of the document, and on such proof would have been entitled to registration. If the Registering Officer was not satisfied with his evidence of execution and refused to register, an appeal would have lain to the Registrar under s. 72. If the decision of the Registrar under s. 72 or 76 had been adverse to plaintiff, he would have had a remedy by suit under s. 77 of the Act. Plaintiff had, therefore, a complete remedy under the Act, and not having chosen to follow it, has only himself to blame that the efficacy of the document has not been completed by registration". Then they go on to dispose of the other doctrine that you can treat an incomplete conveyance as a complete agreement for a conveyance and negative that. The learned Vakil who appeared for the respondents in this case said: "There is a distinction. The plaintiff was disentitled there, because it was through his own negligence that he failed to get the document registered." I may point out in passing that in terms part of that negligence was considered by the learned Judges to be his failure to adopt the remedy given him under the Registration Act including the remedy by suit under s. 77. But says Mr. Lakshmana: "If you look at some of the later cases you will find that a distinction is drawn and you find that in cases where it has been proved that the defendant was the person to blame, the remedy by the Specific Relief Act has been allowed." When examined, those cases appear to me not in the least to support his contention. In *Chinna Krishna Reddi* v. *Dorasami Reddi* (2) there had been a document of conveyance executed, but before registration the defendant in the suit got hold of the document fraudulently, stole it from the plaintiff and concealed it for the purpose of preventing registration from taking place, because obviously the Registrar cannot register a document which for his purpose is non-existent, and, therefore, the learned Judges say that the plaintiff was clearly entitled to have a fresh document executed and registered just as he would be so entitled if after execution the document had been accidentally lost or destroyed. That, no doubt, is quite true. And it follows a much older decision of this High Court in *Nynakka Routhen* v. *Vavana Mahomed Naina* (6). In that case, soon after execution, the document in question was destroyed by fire before it had been registered. It was held that the plaintiff was entitled to ask the Court to compel the defendant to execute a fresh document. The principle of the decisions in the last two cases is perfectly intelligible but it does not appear to me to touch the present case. Mr. Lakshmanna says: "All those were cases where it had been shown that the defendant was at fault. No doubt, on his own showing the Court ought to give specific performance as a remedy for the plaintiff" it is not in my opinion the true line of reasoning at all. The plaintiff there was entitled to have a decree which, no doubt, included a direction that he should be given an executed and registered instrument, because as things stood at the time of the suit, he had nothing whatever to register. In the one case the document had been destroyed and in the other case it had been abstracted and he could not go to the Registrar and say, "Compel my conveyer to register a document in my favour," because the document to be registered was non-existing. The cases appear to have no bearing on this case. And it must be remembered that although in this country the remedy of specific performance is a statutory remedy, it nevertheless is simply a crystallisation into statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. How it can be said that a man who is given an express statutory remedy by an Act of Legislature under s. 77 of the Registration Act and has failed to take advantage of it has not been guilty of laches and is entirely free from blame, passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the Statute cannot come to this Court and ask for an exercise in his favour of a discretionary and equitable remedy. I ought to add that the decision in *Venkatasami* v. *Kristayya* (5) has been followed in several later decisions of this Court of which I need only instance two, *Thayarammal* v. *Lakshmi*

(6) 5 M. H. C. R. 123.

Ammal (7) and *Subbaraya Pillai* v. *Devasahayam Pillai* (8). This is sufficient to dispose of this appeal, because it is not pretended that unless the respondent can get over this still there is anything arguable in the appeal. That being so, the appeal must be allowed with costs of 2nd defendant throughout and the suit dismissed.

The memorandum of objections is dismissed. No costs.

Reilly, J.—I entirely agree.

V. N. V. *Appeal allowed.*

N. H.

(7) 59 Ind. Cas. 417; 43 M. 822; 12 L. W. 161; (1920) M. W. N. 457; 39 M. L. J. 181.

(8) 100 Ind. Cas. 344; (1922) M. W. N. 70.

SIND JUDICIAL COMMISSIONER'S COURT.

INSOLVENCY No. 122 OF 1925.

November 24, 1926.

Present:—Mr. Rupchand Bilaram, A. J. C.

In the matter of PETITION BY MESSRS. DAVID SASSOON AND CO., LTD. TO HAVE DWARKADAS JADHOMAL AND OTHERS ADJUDICATED INSOLVENTS.

Contract Act (IX of 1872), ss. 246, 264—Provincial Insolvency Act (V of 1920), s. 6—Partnership—Partner, retirement of—Notice, necessary—Insolvency of firm—Partners, whether must be adjudicated insolvents, individually—Act of insolvency committed by one partner, effect of, as against others.

Before the applicability of s. 264 of the Contract Act is attracted in any particular case the claimant must prove that a person whom he wishes to hold liable as partner was ostensibly a partner in the defendant firm at the date of the arising of the cause of action. [p. 396, col, 2; p. 397, col 1.]

The expression "persons dealing with a firm" in s. 264 of the Contract Act applies equally to old and to new customers of the firm, but only to such of them as have dealt with the firm on the assumption that the person whom they wish to hold liable was a partner in that firm. [p. 396, col. 2.]

When a dormant partner retires from the partnership he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or can truly allege that when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith. [*ibid.*]

But when an apparent partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before the change took place are entitled to assume that no change has occurred until they have notice to the contrary. Even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all. [*ibid.*]

So far then as new customers, who rely merely on the evidence of repute, are concerned, the requirements of the section would be sufficiently complied with if the ostensible or the retiring partner, as the case may be, gives public notice of the revocation of his authority to be represented by the other members of the firm. [p. 397, col. 1.]

So far as the old customers are concerned, it is possible for the retiring partner to ascertain their names and to inform them that he has ceased to be a partner and this must, therefore, be done. [*ibid.*]

In order to sustain a joint adjudication of insolvency against two or more persons, it is necessary that some act of insolvency should have been committed by each of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others, or it may be committed by a person who is not a partner but a mere agent and his authority need not be special or explicit. [p. 398, col. 1.]

The act of a partner who gives notice that his firm has suspended or is about to suspend business is *prima facie* a joint act on behalf of all persons who are liable as partners in the firm unless they can show that they are solvent and able to pay the debts of the firm for which they are liable. In such a case a petitioning creditor is not required to prove the express authority of the partner on behalf of the other partners to give notice of suspension. [p. 398, col. 2.]

Mr. *Khanchand Gopaldas*, for the Petitioning Creditors.

Mr. *T. G. Elphinston*, for Insolvent Dwarkadas.

Mr. *Kalumal Pahlumal*, for Insolvent Harkishenlal.

ORDER.—On March 26, 1926, I passed an order adjudicating as insolvents the firm of Javermal Harkishenlal and the individual Harkishenlal son of Javermal who was admittedly either the sole proprietor or one of the proprietors of that firm. The question now for consideration is, whether Dwarkadas Javermal and his son Doulatram or either of them should also be adjudicated as insolvents.

Dwarkadas has admitted that he was a partner in the Karachi firm of Javermal Harkishenlal upto August 16, 1924, or *Bhadrva* 2nd, 1981 but he has denied that he or his father Javermal formed members of a joint Hindu family with Harkishenlal at the time this business was being carried on or that it was a joint Hindu family business.

His case is, that Javermal and his two sons separated about 20 years ago and worked as ordinary partners with equal shares; Javermal having a 4-annas share, Dwarkadas a 5 annas share and Harkishenlal a 7-annas share, both in the business

carried on by them at Amritsar, in the name of Javermal-Doulatram, and at Karachi, in the name of Javermal-Harkishenlal; that he was in charge of the Amritsar business and Harkishenlal of the Karachi business; that Javermal died in June, 1924 and on August 16, 1924 Dwarkadas retired from the Karachi business when Harkishenlal likewise retired from the Amritsar business, and that after that date each was the exclusive proprietor of the business under his management. He has, therefore, denied his liability for the debts of the Karachi firm and has urged that he is not bound by any act of insolvency committed by Harkishenlal.

The petitioning creditors and other creditors who have appeared in support of this application have stoutly contended that the brothers were joint, that there was no dissolution of partnership between them as alleged, and that in any case Dwarkadas having failed to give any notice of dissolution, must be deemed to have continued as a partner in the Karachi firm and is liable for its debts and bound by the act of insolvency committed by Harkishenlal.

For the purposes of the present enquiry it is not necessary either to go into the question whether the brothers were joint or not or into the further question whether their shares were unequal.

The burden of proving that there was a dissolution of partnership between the brothers in August, 1924, was clearly on Dwarkadas, *cf.* section 109, Indian Evidence Act. He has failed to discharge that burden. All the circumstances point to the conclusion that both he and his brother Harkishenlal have conspired to defraud the Karachi creditors by setting up the alleged dissolution of partnership between them and have attempted to support their case by forging certain entries in their books. This evidence does not help them in the least as it will presently appear for even if the evidence was believed, Dwarkadas is estopped by s. 264, Indian Contract Act, from contending that he had ceased to be a partner of Harkishenlal.

Now, it is in evidence that in *Sambat* 1974, *i e*, 1915 A. D. Dwarkadas started first the business at Amritsar in the name of Javermal-Doulatram. His father Javermal was an old man (Harkishenlal line 360) and took very little or no part in its management. At that time Harkishenlal was working as a *gumashta* partner in the firm of Fatehchand-Madangopal of Karachi (Harkishenlal line 312.)

In *Sambat* 1978 or 1919 A. D. Harkishenlal left the firm of Fatehchand-Madangopal and then started the business at Karachi in the name of Javermal-Harkishenlal. The business carried on here was also in piecegoods and of the same kind.

Both the Amritsar and the Karachi firms made extensive purchases from European importing houses at Karachi some of whom have branch offices at Amritsar. In most of the contracts made by either firm delivery of goods was made by the importing Offices at Karachi and in order to enable the Karachi firm to take delivery of goods against contracts made in the name of the Amritsar firm, the Amritsar firm had written letters to the importing office, with whom they had dealings to deliver to the order of the Karachi firm, goods purchased in the name of the Amritsar firm.

It is admitted that upto the date of the present petition the business at both places was carried on by the brothers in the same name as before, and that not only the instructions given to the European offices were not countermanded but the Karachi firm continued to deal with them as before, and Harkishenlal who had authority to sign in the name of the Amritsar firm, continued to sign in the name of that firm upto the insolvency. (See Dwarkadas lines 30, 280 to 290 and line 295). Exhibit 51 a sample of the instructions issued prior to August 1924 and Exs. 52, 1-11 are likewise examples of his having done so after the said date. It is impossible to believe that Harkishenlal would continue to sign in the name of the Amritsar firm after he had ceased to be a partner in that firm or that Dwarkadas should have permitted him to do so. Both the firms appear to have continued to maintain their account, in the same way as prior to August, 1924. Except the few entries, which are challenged as forged, there is no indication in the account books of either firm to show that there was a dissolution of partnership. The same set of books which was kept by the Amritsar firm before August, 1924, was continued to be kept upto the date of the insolvency and likewise the contract books and some other books of the Karachi firm which were not changed every year were continued to be

kept in the same manner upto the date of insolvency.

The petitioning creditors have prepared a statement, Ex. 88, from the books of the Karachi firm showing goods purchased by the Amritsar firm from Messrs. Shaw Wallace & Co., the Bombay Co., Limited and Messrs. Forbes, Forbes Campbell & Co. Ltd., and taken delivery of by the Karachi firm subsequent to August, 1924. The arrival notices were given to and delivery of the goods was taken by and the goods sold by the Karachi firm. The profit and loss on these goods have been entered in the Karachi books. Exhibit 88 has been checked by and on behalf of the brothers and has been admitted to be correct but no satisfactory explanation has been offered why this state of affairs was permitted to continue if the brothers had dissolved their partnership and the Amritsar firm alone was entitled to or responsible for the profit or loss on these purchases. It was finally suggested that the Karachi firm acted as the commission agents of the Amritsar firm for the sale of their goods. But again no commission seems to have been charged or credited on such sales and the entries of such transactions are in no way different from those made prior to August, 1924.

Both before and after that date Harkishenlal seems to have expressly stated to the brokers and other representatives of the importing offices that the Karachi and the Amritsar firms were owned by the same proprietors *vide* Jairam Ex. 16, Doongerao Ex. 17, Hassomal Ex. 37 and Kanyalal Ex. 38. This would have been hardly likely if they had not continued as partners.

Dwarkadas admittedly came down to Karachi on two occasions when the Karachi firm was in difficulties. He has made entries in the firm books and on his return he remitted some money to his brother both before and after his second visit. He has now attempted to explain that his first visit was casual and the second at the request of Harkishenlal and for the purpose of helping him as a brother and not as a partner and has further attempted to explain that the moneys sent by him after the second visit were not his but were sent on behalf of and under the authority of another common relation of the partners. He sent him about Rs. 6,000 before the months of *Akhar* and *Assu*, *vide* Ex. 53, and sent him further sums after *Assu* amounting to Rs. 3,000. These sums were not entered in the Karachi books and were not accounted for by Harkishenlal to the Official Receiver and, therefore, a deliberate attempt has been made to explain these remittances by forging entries and by giving prevaricating replies in explanation of those entries. Notes of Rs. 1,000 were sent by Dwarkadas to the Karachi firm by insured post on 12th August 1925. To this entry the words "to Santbai's mother" have subsequently been added showing that the money belonged to Harkishenlal's wife and was sent to her and, therefore, not accounted for in the Karachi books. Two items of Rs. 1,000 each were sent by Dwarkadas by post on 24th October and 28th October, Exs. 56 and 57, about the time of the present petition which is dated 28th October and both these remittances are said to have been made on behalf of Dalsukhrai Badridas the maternal uncle of the brothers. At first when Harkishenlal was confronted with the entries he pleaded ignorance and when further pressed on the point averred that he had received money from his brother for his wife which he gave to her (lines 520—530). A few days later he attempted to explain the entries by pleading that the money belonged to his wife who had deposited it with Dwarkadas so that it may be useful when he was in difficulties (line 1130) and as Dwarkadas would not part with the money without security, Badridas, the maternal uncle, interceded and offered to be responsible to Dwarkadas in the event of dispute and, therefore, the entries Exs. 56 and 57 were made in the name of the firm of Badridas (line 1130). The books of Amritsar firm show no entry of the alleged deposit by Santbai's mother and no satisfactory explanation has been attempted by Dwarkadas himself to show why he refused to send money if it was due, or, asked for security, especially so when according to his own books he was indebted to Harkishenlal himself. The remittances sent by him are consistent with his having made them as a partner and not as debtor of Santbai's mother.

A deliberate attempt was made to withhold the books from the Court for about two months after the presentation of the petition for insolvency and this period appeared to have been availed of in forging the entries. On October 2?, 1925, the Official Receiver was appointed as *interim*

receiver of the property of the debtor and was empowered to take possession of their books. At the Karachi shop he could not find the ledger, cash books and *khatas pucca* and *kacha* for *Sambats* 1978 to 1980, *i.e*, 1921 to 1923 nor could he find the *kacha* or *pacca khattas* of 1981, *i. e.*, 1924, or the *wasil*, *jama kharach* of 1981. The Nazir of the Amritsar Court failed to seize any of the books of the Amritsar firm. The explanation of Dwarkadas is that his business premises consisted of a ground floor and a first floor that the Nazir sealed his ground floor room which contained nothing but articles worth a few rupees but failed to go to the first floor where his relations were working and where the books were kept. This explanation is hardly believable. Dwarkadas produced his books in January 1926 and Harkishenlal successfully evaded their production for a month or two later by pretending illness and alleging that the books were at his house at Amritsar, and produced only some of the books after the warrant of attachment was ordered to be issued.

During the interval which elapsed the brothers have made a deliberate attempt to alter the entries. In the affidavit filed by Balkishen the attorney of Dwarkadas and Doulatram a person who was admittedly engaged by Dwarkadas to attend to his Court cases at Amritsar, the case set up was, that he had started the Amritsar business alone on his own behalf, that the two brothers had separated on 16th August, 1924, evidently meaning that they had separated as members of a joint family and that at the date of the separation there was *a profit in both the firms* and *both were solvent.* At the hearing both the brothers have given a go-by to this affidavit and have not only asserted that they were partners in the business but have pleaded that in 1924 the Amritsar firm had sustained heavy losses. The case finally set up is that the estimated loss on the Amristar business was Rs. 40,000 and that Javermal shortly before his death expressed that the Amritsar business, which was a losing concern, should be given to Dwarkadas absolutely and that the Karachi firm which was a profitable concern should be taken over by Harkishenlal, who should in return pay to Dwarkadas not only the 5-annas share of the profit of Dwarkadas but also the 4-annas share of the profit of Javermal in the Karachi firm. Two months later the profit of the Karachi firm was adjusted by the brothers and the sum of about Rs. 93,000 representing the 9-annas share of profit found due to Dwarkadas and Javermal credited to Dwarkadas. This settlement was said to have been arrived at by the brothers personally at Amritsar and the entries made by them in their respective books.

Harkishenlal has admitted that the brothers took out "*talpatti*" or balance-sheet every year (line 425). One of these balance-sheets was found by the Official Receiver in the box of Harkishenlal *vide* the evidence of Sanwaldas clerk of the Official Receiver (Ex. 89) and the balance-sheet (Ex. 90). It is for the period between 17th August, 1924, and 23rd June, 1925, and purports to have been drawn on *Sanwan Vade* 15, 1982, *i.e.*, July 20th, 1925, a few days after the first visit of Dwarkadas to Karachi, and at the time when the Karachi firm was tottering. This *potamel* shows on the one hand a sum of Rs. 1,74,769-9-6 as the assets of the Karachi firm credited to the old *vahis* at page 18 of the new books and on the other hand a sum of Rs. 89,132-15-3 due to the Karachi firm by the Amritsar firm, debited at page 31 of the new books. I should have explained earlier the system of the account keeping which was adopted by the brothers at the time when they were admittedly working as partners. In the Karachi books there was a separate *khata* in the name of the Amritsar firm and likewise in the books of the Amritsar firm there was a separate *khata* of the Karachi firm to serve as a guide as to the liability of the firm to the other. There was likewise a *khata* in the books of both the firms in the name of Javherlal-Banvarilal which name as I gather from the tarnished account given by Harkishenlal at lines 730 to 740 was used by the two firms evidently to avoid payment of heavy income tax. If goods were bought at Rs. 5 and sold at Rs. 7 it was convenient for the brothers to buy them in the name of Javhermal-Banvarilal for Rs. 5 and sell to Javharmal-Doulatram for Rs. 6-8-0 and thereby reduce the profits of Javhermal-Doulatram for the purposes of income tax. These accounts have continued in the books in the same way after the alleged dissolution. So far as Ex. 90 goes it was a *potamel* for the personal guidance of the brothers and the name of Javhermal-Banvarilal finds no

place in it and may for a moment be neglected. If this *potamel* is genuine it shows conclusively that in 1925 the Amritsar firm was a debtor to the Karachi firm to the extent of Rs 89,132-15-3. This would not be so if the alleged 9-annas share of profit in the Karachi business had been credited to the Amritsar firm on August 16, 1924, as a result of the dissolution. This document is a complete answer to the case of the brothers. No explanation whatsoever has been offered by Harkishenlal as to this *potamel* finding its way into the box. Though he knows that it has been drawn for him and from his books by his *munim* he has prevaricated and has stated that he is not able to identify the handwriting of his *munim* who worked with him for nearly three years (line 435). Now the debt entry of Rs. 89,132-15-3 finds no place at page 31 of the *khata vahi* (Ex. 41). Both pages 30 and 31 which contain the *khatas* of Javhermal-Doulatram have been substituted by new pages. These two pages are in the handwriting of Harkishenlal, line 940, and in order to avoid any detection of pages having been substituted and the book re-strung pages 21-60 have been numbered twice over and ink has likewise been thrown on the edges of the pages where they are strung together. Page 30 now commences with a credit entry of Rs. 97,700 brought forward from *nakal* page 1. Now if the totals of Ex. 41 are carefully checked they show that the entry of Rs. 97,700-14-3 is the interpolation in the substituted account. The credit total in Ex. 4 is Rs. 2,08,234-1-3 and if Rs. 93,700-14-3 is deducted the total is reduced to Rs. 1,14,533-6-3 and if this sum is deducted from the debit balance of Rs. 2,03,666-5-6 it leaves a balance of Rs. 89,132-15-0 and tallies exactly with the figure in Ex. 90. The entry of Rs. 93,700-14-3 in the *nakal vahi* is Ex. 75/1 and this entry likewise shows the hand of a forgerer. As this credit item was to be necessarily the first entry in the book and it was difficult for Harkishenlal to substitute the first page of a book on which calculations are written and the suspicious mark of "Ganesh" put and which generally contains entries written by servants, Harkishenlal has made bold to insert this entry over the salutation written by his *mehtas* and has inserted his own salutation over his entry to give it the semblance of genuineness and again to avoid detection he has thrown some ink over the salutation written by his servants. He has attempted to explain that it was usual with him to have two salutations noted in his books below the "Ganesh" one in his handwriting and one in that of his *munim* but the books of 1980 contain only one salutation.

The *potamel*, Ex. 90, also shows one item of Rs. 1,74,769-9-6 credited in the old books of the Karachi firm at page 18 which is probably a mistake for page 27. Now again if page 27 of the *khata vahi* of 1980, Ex. 79, is seen it shows that 4 entries on either side have been made subsequent to the drawing up of the *potamel* excluding those entries which are in the handwriting of Harkishenlal (though he admits only 6 out of the 8 entries being his line 960) the net balance of that account is again Rs 1,74,769-9-6 as shown in Ex. 90.

Another valuable book obtained at the search is the interest account book Ex. 87. Entries of the account of Javhermal-Doulatram have been written in this book for calculating interest. It is again a copy to copy of Ex. 41 except the two entries of Rs. 1,000 and Rs. 93,714. Now if this book is genuine it again shows that pages 30 and 31 of the *khatas* which are Ex. 41 have been substituted adding these two new items. This again corroborates the case of the petitioning creditors that Ex. 41 and other entries relating to the distribution of the profits on August 16, 1924, are forgeries. Again no satisfactory explanation has been offered by Harkishenlal as to the two top entries not having been made in the interest book. The only explanation offered by him at line 1060 is that it is not a regular book but a rough calculation book containing entries copies by a *mehta* of the firm at one time or the other from the *khata* and thereby suggested that through oversight he forgot to copy out the most important and the biggest item of Rs. 93,700.

I have so far referred to the entries in the Karachi books of 1981. The books of 1980 which were produced at a much later stage and which were said to have been sent by Harkishenlal to his mother to enable her to recover the outstanding of the Karachi firm at Amritsar (a sample of the several false explanations given by Harkishenlal) again show clear signs of similar forgeries. Exhibit 80 is the account of the firm of Javhermal-Harkishenlal in those books. It is at page 15. The first

debit item is Rs. 8,973-8-9 loss in the business in *Sambat* 1979-80. The second debit item is of Rs. 7,529-10-0 loss in the year 1980-81. The business was admittedly started in the *Sambat* 1978 and Harkishenlal has been forced to admit that his profit, if any, during the first year would not have been more than a few thousand of rupees. (Harkishenlal line 590), and possibly less than the total amount of loss just sufficient to cover it. Under the circumstances, it is absurd for him or for Dwarkadas to contend that there was a profit of Rs. 1,66,579-6-0 which was distributed in the share of 9-annas and 7-annas. There is not an iota of evidence to suggest that this balance which was the nominal capital of the Karachi firm was contributed by his father and the sons in proportion to their alleged shares to allow of the distribution of such profits in the manner suggested. The two debit items of loss in Ex. 80 do not include the estimated loss on certain immoveable properties purchased in 1921 for Rs. 39,000 which was not half of its value then it being a matter of common knowledge that there was a slump in the land market in 1922. This property has now been valued at Rs. 15,000 only. These items also do not include the estimated loss in piecegoods ordered out and not taken delivery of. And if these two items are taken into consideration they further go to show the alleged absurdity of the story of the brothers. Again there is intrinsic evidence in the books to prove conclusively that the account, Ex. 80, which forms the basis of the alleged dissolution could not have been prepared till several months after 16th August, 1924. The item of Rs. 7,529-10-0 loss is the result of the *vatakhata* or the profits and the loss account and Ex. 82A which takes into consideration in the first place the interest item of Rs. 4,707-10-3 from the interest account Ex. 83. Now the item of Rs. 4,707-10-3 does not only include the interest due to the Karachi firm upto 16th August, 1924, but upto a date later than 14th March, 1925 *vide* Ex. 83A, dated 14th March, 1925, which is included in this sum. In the second place the *vatakhata* also takes into account other items like Exs. 84, 85 and 86 which are all items subsequent to 16th August, 1924. The last 4 items Ex. 100 1-4 in the *vatakhata* showing the total of Rs. 4,707-10-3 as interest and Rs. 7,529-10-0 as loss are in the handwriting of Dwarkadas himself. He states that he was in Karachi and was asked to make them (line 835-310). We know that he was in Karachi in *Akhar* or June or July, 1925 (Dwarkadas line 190) about the time Ex. 90 was prepared and the loss of the Karachi firm ascertained. These entries again show conclusively that the balance of Rs. 1,66,570-5-6 (*i. e.*, the difference between Rs. 1,83,082-8-3 and Rs. 16,503-2-9) in Ex. 81 was not ascertained till June or July, 1925 and could not have formed the basis of Rs. 93,700-14-0 being allotted to Dwarkadas on 16th August, 1924. The story that the alleged adjustment of accounts was made at Amritsar on that date is again proved to be false for the following reasons:—

(*a*) New books were kept by Harkishenlal on 17th August 1924 and he admits that he was there on that day (line 540). The latest train which could have brought him to Karachi on that day must have left Amritsar at about 6 A. M. on the 16th August (Harkishenlal line 709). There is no allegation, much less proof, that the brother sat over night and settled these accounts early in the morning at 5 A. M. to enable him to leave Amritsar by the morning train.

(*b*) Entries appear in the Karachi books of expenses incurred by Harkishenlal on his travel to Amritsar. There are no entries showing that he spent money in August 1924 for going to Amritsar (Harkishenlal lines 840—870).

(*c*) Exhibit 70 is an entry in the *sati vahi* in the handwriting of Harkishenlal dated *Badrava* 2nd, 1981 *i. e.*, 16th August 1924 and signed by the brothers and proves that he was here on that day.

(*d*) Exhibit 60 is debit entry on money paid to Harkishenlal, and expenses incurred by him at Karachi and *inter alia* includes items of Rs. 5 and Rs. 30-8-0 cash paid to him on that day.

The account books of Amritsar firm show similar signs of forgery. They were commenced in 1979 and have continued upto date and the only way, therefore, open to Dwarkadas was to substitute pages in the *khata vahi* and to show entries in the *nakal* or day book at such suitable places where he could find room. He has admitted that he has from time to time added pages in his books and each time he has so done, the books have been re-strung (line 312). He was forced to make this admission as entry of Rs. 93,714-0-0 in Ex. 97 was written in such a place that a part of it was below

the string and could not possibly have been written when the book was in its present state. Exhibit 97 is the personal *khata* of Amritsar firm in the Amritsar *khata vahi*. It is at pages 234, 267 and 369. It contains entries transferred from the *nakal* or the day book. Page 234 contains entries from pages 91 to 96 of the *nakal* book, page 267 entries from page 102 to 117 and page 369 entries from pages 116 to 120. The last entry on page 369 is the one in dispute and is transferred not from page 120 but from page 100. It appears that the entry has been shown in at page 100 of the *nakal* but as it could not be transferred at page 234 of the *khatta* where it should ordinarily have been done it has been transferred at page 369. Again if the settlement was made as alleged proper entries should have been made on that day in the account of the Karachi firm in the Amritsar book which appears at page 267 and yet we find that interest has been calculated in that account not upto 16th August, 1924 but upto 17th November, 1924 *vide* Exs. 95/1 and 95/2 and upto that date the Karachi firm is shown as creditors to the extent of Rs. 49,927-8-6 (Dwarkadas line 350 and Ex. 96).

The reason assigned for the alleged settlement is that there was a huge profit in the Karachi business and a huge loss in the Amritsar business. I have shown in para. 19 above that there was no profit in the Karachi business. As a matter of fact the credit item of Rs. 1,66,579-5-6 in Ex. 81 was chiefly invested in and advanced to the Amritsar firm, Rs. 49,927-8 6 being due in the account of Javhermal-Doulatram and Rs. 76,102-4-0 due in the *pesudo* name of Banvarilal-Doulatram. So far as this 2nd item is concerned it was a clear profit to the Amritsar firm for which Dwarkadas had on the contrary to account to Harkishenlal. It is admitted by him that the *watta khatta* (profit and loss account) of the business done in the name of Javhermal-Doulatram shows a loss of only Rs. 12,000 (line 250). His explanation is that the real loss in the business was Rs. 40,000 as there were certain irrecoverable outstandings but these have not been written off upto now. There is no explanation why this has not been done, and no statement has been filed as to what the irrecoverable outstandings are. Even if there was a loss of Rs. 40,000 in the account of Javhermal-Doulatram there was a profit of Rs. 76,000 in the account of Banvarilal-Doultram and so on the whole there was a profit and the whole substratum of the story fails.

Entries have been put in from the Amritsar books showing the distribution of the profits of Rs. 76,000 odd, Ex. 64 is the entry. The distribution purports to have been made in *Kartak Vadi* 15th, 1981 *i. e.* three months later than the alleged settlement and a sum of Rs. 33,513-7-9 credited to the account of the Karachi firm (Ex. 60/1). It is not necessary for me now to consider if these entries are genuine. Their object appears to be to prove that Javhermal and his son were separate and to justify the alleged gift of the family house and other immoveable properties to his widow and to Dwarkadas and thereby to save them from the hands of the Official Receiver. Their genuineness will, therefore, be considered at the proper time. Assuming them to be genuine they disprove that there was a settlement as between the brothers as alleged. As no reason whatsoever has been assigned why at such settlement, he was not given credit for his 7-annas share which was over Rs. 33,000 and why it was not deducted from Rs. 93,000 and odd credited to Dwarkadas, the whole sum of Rs. 76,000 stands to the debit of Banvarilal-Doulatram in the Karachi books upto to-day.

There has again been a deliberate attempt not only to transfer large sum of money to the Amritsar firm as compensation for the loss but all the immoveable property of the family is said to have been disposed of by the old father in favour of either his wife or of Dwarkadas and the nett result of these manipulations is that there is not a penny left for distribution among the Karachi creditors whose claims are said to be about two lacs of rupees. The family house at Amritsar which is worth over Rs. 18,000 is said to have been gifted by Javhermal to his wife and two other properties at Guniana and Govindgar have likewise been gifted to Dwarkadas or to Dwarkadas and his mother. Now it is in evidence that the family house was mortgaged with one Tarachand for Rs. 18,000 to secure the payment of certain losses and the mortgage was discharged from the funds of the Amritsar firm in which Harkishenlal was a partner. Why and how Harkishenlal should have been deprived of the share in the house when it was

redeemed from his own money and why likewise Guniana and Govindgar properties were likewise given to Dwarkadas have not been explained. So far as the provision of Javhermal's wife (who is said to be the step-mother of Dwarkadas and Harkishenlal) is concerned, it is again admitted by the sons that there was another property belonging to Javhermal which had been gifted by him by a regular deed or gift in her favour though that deed had not been produced.

I have deferred passing orders on the application for a commission to examine witnesses filed by Dwarkadas to prove the alleged oral testamentary directions of Javhermal. In view of the disclosure made in the examination of the two brothers I have no doubt that the application was made to cause unnecessary delay in the passing of the adjudication order and is one which should not be allowed. In the first place, the witnesses who were said to have been present are interested in Dwarkadas avoiding his liability as a partner and their evidence taken on commission is not likely to affect my decision in view of the facts that the books show no loss to the Amritsar firm and no profit to the Karachi firm and the whole story is highly improbable. In the second place, even if the deceased expressed a pious wish that the brothers should dissolve their partnership it does not prove that they carried out this wish. Lastly, I am of opinion that even if it be held proved as a fact that the brothers dissolved their partnership as alleged Dwarkadas is precluded from pleading it.

The learned Counsel for Dwarkadas has raised certain interesting points as to the effect of s. 264, Indian Contract Act. He has contended that this section has no application whatsoever to creditors who dealt with the firm for the first time after its dissolution and that in any case it has no application to a dormant partner who has dissolved partnership but has failed to give the required notice.

There has been a slight divergence of judicial opinion as to the effect of this section. It is not necessary for me to enter upon an elaborate discussion on this point or to give any definite finding as to its effect, as whatever view may be adopted, it appears to me that Dwarkadas cannot avoid his liability as an ostensible partner of the Karachi firm. As at present advised I am inclined to the view that this section in no way deviates from the English rule of estoppel applicable to such cases. The expression "persons dealing with a firm" equally applies to old and to new customers of the firm but only to such of them as have dealt with the firm on the assumption that the person whom they wish to hold liable was a partner in that firm.

The English rule has been lucidly stated in the following passage in Lindley on Partnership Book II, Chap. 2, s. 3, page 291, 9th edition:—

"It has been already seen that when a dormant partner retires, he need give no notice of his retirement in order to free himself from liability in respect of acts done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or, truly allege that when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith."

"But when an apparent partner retires, or when a partnership between several known partners is dissolved, the case is very different; for them those who dealt with the firm before a change took place are entitled to assume that no change has occurred until they have notice to the contrary. And even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all."

The principle on which this rule is based is that of the estoppel of a person who has accredited another as his known agent from denying that agency, at a subsequent time, as against the persons to whom he has accredited him, by reason of any secret provocation [*Scarf* v. *Jardine* (1)].

I can see no reason why s. 264, Indian Contract Act, which is based on the same principle should not be so interpreted as to lay down the same rule as in England.

Before the applicability of s. 264 is attracted in any particular case the onus is on the claimant to prove that a person whom he wishes to hold liable as

(1) (1882) 51 L. J. Q. B. 612 at p. 615; 7 A. C. 350; 47 L. T. 258; 30 W. R. 893.

a partner was ostensibly a partner in the defendant firm at the date of the cause of action, when such person was only a dormant partner in the defendant firm or in other words was not known to the public to have been a partner therein before his retirement, it is difficult to see how the claimant can lead evidence to prove that such a person was ostensibly a partner of the defendant's firm at the date of the cause of action.

With all respect I am, therefore, unable to accept the view of Beaman, J., in *Giovani Gorio* v. *Vallabhdas Kalianji* (2) that s. 246 applies equally to dormant partners and agree with the contrary view taken in *Ramasami* v. *Kadar Bibi* (3) and in *Greaves* v. *Purshotam* (4).

It is again clear to me that s. 264 applies in favour of both old and new customers of a defendant firm provided, of course, that in the case of new customers, such customers knew of the existence of the firm by repute and acted on such repute.

The expression "persons dealing with the firm" equally applies to persons dealing with it for the first time after its dissolution. As pointed out by Sanderson, C. J., in *Jagat Chandra Bhattacharyya* v. *Gunny Hajee Ahmed* (5) there is no reason why the words "before its dissolution" should be interpolated in the section.

So far then as new customers, who rely merely on the evidence of repute, are concerned, the requirements of the section would be sufficiently complied with if the ostensible or the retiring partner, as the case may be, gives public notice of the revocation of his authority to be represented by the other members of the firm.

It is not possible to expect him to do more than to give such public notice of revocation of his authority to persons who are not customers of the firm but who become customers for the first time after revocation.

The case of old customers is, however, different. It is possible for the retiring partner to ascertain their names and to inform them that he had ceased to be a partner as pointed out in *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee* (6), a more specific notice is necessary in their case and that so far as they are concerned s. 264 is not intended to be an exhaustive exposition on the question of notice.

My attention has been drawn to the differing judgment of Kincaid, J. C., in the case of *Ghanshamdas Parmanand* v. *E. D. Sassoon & Co.* (7). But that judgment does not, in my opinion, touch the points at issue. In that case the learned Judicial Commissioner refused to go into the question whether the retiring partner was a dormant partner or not; as that point had not been raised at the proper time. The only material point which had been appealed against was whether the application for the issue of commission to examine certain witnesses had been rightly refused by the lower Courts. This evidence was not intended to prove that the retiring partner had given notice to the petitioning creditors of his retirement from the business but that he had given information of his retirement to third persons who had dealings with his firm 300 miles away from Karachi. This evidence was only corroborative proof of the fact of his having retired from the firm and as such irrelevant. It was rightly excluded from consideration in the same way as the evidence of the partners themselves that they had dissolved partnership.

In the present case, however, it is abundantly clear that Dwarkadas was not a dormant partner in the firm and that it was generally known in the Bazar and to the importing offices that both of them were proprietors of the two firms at Amritsar and at Karachi. Harkishenlal signed for the Amritsar firm as its proprietor both before and after the alleged dissolution to the admitted knowledge and with the consent of Dwarkadas and continued to do so up to the date of the insolvency.

It has been proved beyond doubt that both the petitioning creditors and Messrs. Shaw Wallace & Co., who have appeared in support of it had dealings with the brothers before the alleged dissolution. Bhanji Ex. 18 and Kanyalal Ex. 39. The claim of these two firms exceeds Rs. 60,000. There is no allegation much less proof, that any specific notice was given to them. I hold, therefore, that both these forms are not affected by the alleged dissolution of the firm.

(2) 30 Ind. Cas. 864; 17 Bom. L. R. 762.
(3) 9 M. 492; 3 Ind. Dec. (N. S.) 738.
(4) 5 Bom. L. R. 366.
(5) 91 Ind. Cas. 824; A. I. R. 1926 Cal. 271 at p. 275; 30 C. W. N. 11; 53 C. 214.
(6) 8 C. 478; 11 C. L. R. 225; 4 Ind. Dec. (N. S.) 437.
(7) 93 Ind. Cas. 448; A. I. R. 1926 Sind 90.

It is not disputed that Dwarkadas is not in a position to discharge their claims in full and as he is indubitably liable for their claims he is an insolvent. It is, therefore, not necessary for me to consider the further question if some of the other creditors of the Karachi firm were old or new customers and if the latter whether they relied on the information given to them that Dwarkadas was a partner though it may fairly be assumed that it will not be difficult for them to assert without any fear of contradictions that they had so acted and that Dwarkadas was liable for their claims.

The learned Counsel has urged that the mere fact that Dwarkadas is an insolvent is not sufficient and that there should be proof of an act of insolvency committed by him and not by his brother. Now it is, no doubt, true that in order to sustain a joint adjudication against two or more persons it is necessary that some act of insolvency shall have been committed by each of them. *Mills* v. *Bennett* (8), *Allen* v. *Hartley* (9), *Dutton* v. *Morrison* (10) and *Hagg* v. *Bridges* (11). But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others or as a matter of fact it may be committed by a person who is not a partner but a mere agent (Explanation to s. 6 of the Provincial Insolvency Act) and his authority need not be special or explicit; *Kastur Chand Rai* v. *Dhanpat Singh* (12). Whether the act of such an agent is one which binds others is necessarily a question of fact to be decided on the facts of each particular case. *In re Mahomed Hasham and Co.* (13) and *Gopal Naidu* v. *Mohanlal Kanyalal* (14).

Whatever may be said of the effect of one partner absenting himself from the place of business as against other partners who have either never lived in that place or who for other valid reasons have temporarily withdrawn from there, as in the case of ill-health the act as in the present case of a partner who gives notice that his firm has suspended or is about to suspend business stands on a different footing. It is *prima facie* a joint act on behalf of all persons who are liable as partners in that firm unless they can show that they were solvent and able to pay the debts of the firm and for which they were liable. I see no reason why the petitioning creditors should in that case be required to prove express authority of a partner on behalf of others to give notice of suspension. When a managing partner knows that he and his partners are not in a position to pay the debts of their firm as they become due or in full, it is, in my opinion, his duty to suspend the business and to give notice thereof. If he fails to give such notice or makes payment in full to some of his creditors after full knowledge of the state of the affairs of his firm, he runs a serious risk of being charged with having given undue preference to them. His authority to give notice of such suspension on behalf of others may fairly be implied, unless it is rebutted by evidence that the other partners or any of them were not insolvents.

I also see no reason why the same rule should not apply to the case of actual and ostensible partners alike.

I have held that Dwarkadas has failed to prove the alleged dissolution of partnership. There is also evidence to show that the acts done by Harkishenlal in inducing his creditors to accept 3-annas in the rupee were presumably done with the consent and knowledge of Dwarkadas. He had not only visited Karachi twice when the firm was in a tottering condition but had sent remittances to enable Harkishenlal to settle. I hold, therefore, that the acts of Harkishenlal in inducing creditors of the Karachi firm to settle were done on behalf of Dwarkadas as well and were binding on him, whether he be held to be an actual or an ostensible partner. I, therefore, adjudicate Dwarkadas as a partner.

The case of Doulatram is simple. Though an attempt has been made to prove that he was a paid servant of his father by production of certain entries which are said to be forged, it has been proved that he was a minor when the business was being carried on and that he is now about 18 or 19 years of age. He is not, therefore, liable as a partner of the firm and not liable

(8) (1814) 2 M. & S. 556; 105 E. R. 488; 15 R. R. 348.
(9) (1784) 4 Doug. 20; 99 E. R. 746.
(10) (1810) 17 Ves. Jur. 193; 34 E. R. 75; 1 Rose 213; 11 R. R. 56.
(11) (1818) 8 Taunt 200; 2 Moore 122; 129 E. R. 360.
(12) 23 C. 26; 22 I. A. 162; 6 Sar. P. C. J. 617; 5 M. L. J. 269; 12 Ind. Dec. (N. S.) 18 (P. C.).
(13) 75 Ind. Cas. 203; 24 Bom. L. R. 861 at p. 868; A. I. R. 1923 Bom. 107.
(14) 91 Ind. Cas. 874; 49 M. 189; 49 M. L. J. 709; A. I. R. 1926 Mad. 206.

to be adjudicated as an insolvent. I dismiss this application as against him.

In the end I must express my thanks to the learned Pleader for the petitioning creditors who has taken great pains in the conduct of this application and has helped the Court in detecting the forgeries committed by the two brothers.

Z. K. *Order accordingly.*

MADRAS HIGH COURT.

APPEAL SUIT No. 431 OF 1922.

March 5, 1925.

Present:—Justice Sir Charles Gorden Spencer, KT., and Mr. Justice Ramesam.

CHINNA MUNUSWAMI NAYUDU—PLAINTIFF—APPELLANT

versus

SAGALAGUNA NAYUDU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 21, 23 (b)—Specific performance—Agreement by vendee to reconvey on fixed date—Vendor's option to repurchase, assignability of—Right of option, whether mere standing offer or completed contract—Suit for specific performance by assignee from vendor's legal representative—Provision as to option, validity of—Rule as to perpetuities.

A purchaser executed, on the date of sale, a counter-part by which he agreed to reconvey the properties sold on receipt of the same price thirty years from the date of the sale. After the death of the vendor, his son assigned his interest under this agreement. In a suit by the assignee for specific performance of the agreement to reconvey:

Held, (1) that what was assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immoveable property at a certain price, and not merely the benefit of a standing offer which had not ripened into a completed agreement; [p. 399, col. 2; p. 400, col. 2.]

(2) that the right was capable of being assigned; [p. 401, col. 2.]

Nochet Kizhakke Madathil Venkateswara Aiyar v. *Kalloor Illath Raman Nambudri* (3), *Rajah Bahadur Narasingerji Gyanagerji* v. *Raja Panuganti Parthasaradhi Rayanim Garu* (4), *Buckland* v. *Papillon* (6), *Manchester Brewery Co.* v. *Coombs* (7) and *County Hotel & Wine Co.* v. *London & North Western Ry.*, (8), relied on.

(3) that there was no personal element in the transaction which would make the contract incapable of being specifically enforced under s. 21 (*b*) of the Specific Relief Act. [p. 400, col. 1.]

Per *Ramesam, J.*—The term of 30 years made it clear that the option to repurchase given to the vendor was not intended to be personal. [p. 403, col. 2.]

Where a right can be transmitted by a man to his heirs, it is equally assignable, and an option to re-purchase can be assigned even before it matures into an agreement to sell and purchase. [p. 404, col. 1.]

An interest under a contract for re-purchase of land is assignable as a right *ex contractu* if not as a right *in rem.* [*ibid.*]

Such a right intended to be exercised at a stated time by the optionees or their representatives and assigns does not tie up the land and cannot, therefore, offend the rule against perpetuities. [p. 404, col. 2.]

Appeal from a decree of the Subordinate Judge, Chingleput, in O. S. No. 46 of 1920.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.

Spencer, J.—On 28th January, 1891, Venkatasubramania Iyer, on behalf of himself and his minor son Krishnaswami Ayyar, sold the village of Siyatti to Venkatapathi Nayudu for a consideration of Rs. 10,000. On the same day the parties executed what is termed a counter-part document, by which the purchaser Venkatapathi Nayudu agreed to reconvey the village for the same consideration of Rs. 10,000 if the vendor made an application for that purpose in the month of *Ani* 30 years later. Venkatasubramania Iyer died in 1899, leaving Krishnaswami Iyer his only son, surviving him. Krishnaswami Iyer assigned his interest under the counter-part agreement, Ex. B(1), to the plaintiff in this suit for a consideration of Rs. 19,200 out of which Rs. 10,000 were to be paid to get a reconveyance according to the term of that document.

The plaintiff's suit was dismissed in the Court of the Subordinate Judge of Chingleput on the ground that there was no completed agreement, but on a standing offer, the benefit of which could not be assigned to a stranger. I am unable to agree with the learned Subordinate Judge upon this point. In my view Ex. B (1) was a contract containing an undertaking on the part of the purchaser to accept an offer of re-purchase if made by the vendor for a certain amount at a certain future time. In other words what Krishnaswami Iyer assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immoveable property at a certain price. An offer or proposal cannot, of course, be enforced till it is accepted; but here the parties had gone beyond

the stage of proposal and had entered into a contract which was supported by consideration, as was found in the trial Court. As the learned Subordinate Judge observed:—

"Siyatti village was sold by Venkatasubramanya Ayyar for Rs. 10,000 plus the benefit of getting back the village under the conditions mentioned in Ex. B (1)."

The fact that Venkatasubramanya Iyer had sold the village to Venkatapathi Nayudu was the consideration for executing this agreement for a reconveyance. The terms of the agreement between the parties were as follows:—

"As I have this day purchased absolutely for Rs. 10,000 the entire village of Siyatti which belongs to you in the Conjeevaram *Taluk*, Chingleput District, and in which you hold *ekaboga mirasi* right and the right to cultivate, I shall again convey to you the said village after a period of 30 years from this date, *i. e.*, in the *Ani* cultivation season of the 30th year in case you wish to have the village again and on your paying the said sum of Rs. 10,000 to me."

The translation does not exactly reproduce the *tamil*. There is an emphasis on the word "you" where it occurs after the words "I shall convey to," but there is no condition to the effect that the purchaser would reconvey the village only to the vendor and no proviso that both of them should be alive on the date fixed for tendering Rs. 10,000 and writing a deed of reconveyance. In the normal expectation of human life in this Presidency it was improbable that both seller and purchaser should be alive 30 years after the date of contracting. The Subordinate Judge, who knows *tamil*, was of opinion that the word (*thangaluke*) should not, in the contest where it occurs, be interpreted to mean that Venkatapathi Nayudu undertook to reconvey the property to Venkatasubramanya Ayyar personally and not to his heirs or assigns.

I agree with him. I think that there was no personal element in this transaction which would make the contract incapable of being specifically enforced under s. 21 (*b*) of the Specific Relief Act.

In this Court the main contest has raged over the question whether the Ex. B (1) was assignable before the sum of Rs. 10,000 was tendered. Under s. 23 (*b*) of the Specific Relief Act, the representative-in-interest of a party to a contract may ordinarily obtain specific performance of it, provided that no personal quality of any party to the contract is a material ingredient. The Subordinate Judge has been led into some confusion of thought by a consideration of the case of *Helby* v. *Matthews* (1). He has also allowed himself to be led into a discussion of "option contracts", whatever they may be, and his judgment is vitiated by a reference to American authorities, a practice which has been condemned by the Privy Council. The case of *Helby* v. *Matthews* (1) was peculiar in that it dealt with what is known as a hire-purchase contract. Brewster obtained on hire a piano, and, after paying a certain number of monthly instalments, he pawned the piano with the respondents who refused to give it up to the owners (the plaintiffs). It was held by the House of Lords that there was no agreement between Brewster and the appellants that he should buy the piano. Before he paid the 36th and last instalment, there should be no right by purchase in the hirer and he was not bound to keep the piano till he had paid every one of the 36 monthly instalments; and as the owners could not compel him to buy, it was neither a purchase nor an agreement to buy within the words of s. 9 of the Factor's Act of 1889 until the hirer completed the conditions necessary for a sale by making the last payment and exercising his option to purchase the piano. There is no complete analogy between that case and the present one.

The case of *Egala Nagappa Naidu* v. *Muniswamy Ayer* (2), to the decision of which my learned brother was a party, has been cited before us, as it was held that what was agreed upon in that case constituted not a complete agreement but a mere standing offer. The purchaser of certain lands agreed to execute a reconveyance on payment of Rs. 800 within the 30th day of *Vikasi* in any year whatsoever. It appears to me that that agreement was not enforceable, for the simple reason that there was no mutuality and no time fixed for performance. Apparently, the promisor in that case agreed to sell upon demand before a certain date in any year, but as

(1) (1895) A. C. 471; 64 L. J. Q. B. 465; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.

(2) 65 Ind. Cas. 720; 46 M. 30; 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201; A. I. R. 1922 Mad. 16; 42 M. L. J. 432.

there was no time limit and no consideration for keeping the offer open for an indefinite time, the promisor was entitled to withdraw at any time before the promisee applied for performance.

At the end of para. 14 of his judgment the Subordinate Judge has confounded the tender, which was to be made in future, with the proposal or offer which must form the basis of every completed agreement. The real offer and acceptance were made on the same date as the sale. The date upon which the purchaser agreed to accept a tender of Rs. 10,000 for the purpose of reconveying the village of Siyatti to the seller is quite certain, namely, the month of *Ani* in the 30th year after 1891, and there is no vagueness upon the point of time for performance. It is as if Venkatapathi had said to Venkatasubramanya Iyer:

"In consideratation of your having sold me the village of Siyatti this day for Rs. 8,000, I undertake if you come to me in the month of June, 30 years hence and tender me a similar amount of Rs. 8,000 I will accept it and will execute to you a reconveyance of that property".

Upon Subramanya Iyer's acceptance of this offer the contract was put in writing and the contract was then registered. Whether the suit document and the sale-deed executed on the same day should be treated as a mortgage by conditional sale or a sale with a simultaneous but independent agreement for reconveyance is not of material consequence, except upon the point of assignability. The plaintiff says he tendered Rs. 10,000 on 19th June 1920 and upon the defendant hiding himself, he gave him a registered notice of his willingness to pay the amount, to which the defendant replied refusing to receive it. The Subordinate Judge has found that there was a valid tender as alleged in the plaint, and there is no question of limitation, as sometimes arises when it is doubtful whether a particular transaction is a mortgage or an independent agreement for reconveyance.

The decisions in *Nochet Kizhakke Madathil Venkateswara Aiyar* v. *Kalloor Illath Raman Nambudri* (3) and *Rajah Bahadur Narasingerji Gyanagerji* v. *Raja Panuganti Parthasaraddi Rayanim Garu* (4) support the appellant's contention that contracts of this nature are capable of assignment. The last named decision has recently been reversed by the Privy Council, *Vide, Narasingerji Jyanagerji* v. *Panuganti Parthasaradhi Rayanam Garu* (5), but not on the question of the contract being assignable, as their Lordships found the transaction concerned to be of the nature of a mortgage rather than a sale, and there is no difficulty in treating a mortgage interest as being assignable.

The English cases of *Buckland* v. *Papillon* (6), *Manchester Brewery Co.* v. *Coombs* (7), which were quoted as good law by McCardie, J., in *County Hotel & Wine Co.* v. *London & North Western Ry.* (8), are authorities for the proposition that in England options to purchase as well as contracts to sell are capable of assignment.

If the suit contract was a mortgage, the mortgagor's interest was unquestionably transferable.

We have, therefore, allowed the question to be argued whether Ex. B-1 constituted a mortgage by conditional sale or an executory contract. A Bench of this Court has already expressed its opinion that this was a sale rather than a mortgage [see the judgment in S. A. No. 2180 of 1915 exhibited as Ex. 1 (*b*)] but this opinion was given prior to the Privy Council decision in *Narasingerji Jyanagerji* v. *Panuganti Parthasaradhi Rayanam Garu* (5), which reversed the judgment of Wallis, C. J. and Oldfield, J., in *Rajah Bahadur Narasingerji Gyanagerji* v. *Raja Panuganti Parthasaradhi Rayanim Garu* (4), upon which the Subordinate Judge relied for excluding the evidence of surrounding circumstances and deciding that Ex. B-1 was not a mortgage. There is much to be said in favour of either view, but it is unnecessary to pronounce in favour of the view that we have here a transaction in the form of a mortgage by conditional sale.

Again, the insolvency of Venkatasubra-

(3) 33 Ind. Cas. 696; 3 L. W. 435; 19 M. L. T. 329.

(4) (1921) M. W. N. 519; reversed in 82 Ind. Cas. 993.

(5) 82 Ind. Cas. 993; 47 M. 729; A. I. R. 1924 P. C. 226; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481; 27 Bom. L. R. 4; 29 C. W. N. 246; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684; 51 I. A. 305 (P. C.).

(6) (1866) 1 Eq., 477; 12 Jur. (N. S.) 155.

(7) (1901) 2 Ch. 608; 82 L. T. 347; 16 T. L. R. 299; 70 L. J. Ch. 814.

(8) (1918) 2 K. B. 251; 87 L. J. K. B. 849; 119 L. T. 38; 34 T. L. R. 393.

manya Iyer did not affect the right of the plaintiff, seeing that the Official Assignee under an indenture of 22nd February, 1916, Ex. BB, conveyed the father's interest to Krishnaswmi, the insolvent's son, and that Krishnaswami's widow under Ex. BB released her right on 16th February, 1921, in favour of the plaintiff after both the father's interest and the son's interest had become combined in the son.

The appeal must, for the above reasons, be allowed with costs throughout and the suit must be remanded. A preliminary decree will be passed directing the defendants to execute a conveyance in proper form on stamp paper and to register the same within one week from the re-opening of the lower Court after the summer vacation and providing that on their failure to do so the Court will execute a conveyance of the suit properties to the plaintiff on their behalf.

The lower Court will take evidence as to the claim for mesne profits due from date of plaint and will pass a final decree after ascertaining what is due to plaintiff on that account. The plaintiff gives up his claim for damages for cutting of trees and depreciation of buildings etc., covered by the seventh issue. The defendant will be at liberty to draw out the purchase amount deposited in Court.

Ramesam, J.—This appeal arises out of a suit to compel the defendants to execute a conveyance to the plaintiff. The Subordinate Judge dismissed the suit and the plaintiff appeals.

One Venkatasubramanya Iyer and his son Krishnaswami Iyer sold the suit village to Venkatapathi Naidu the father of the defendants, by Ex. B (dated 27th January. 1891) for Rs. 10,000. On the same day Venkatapathi executed the counter-part, Ex. B-1, to his vendors agreeing to reconvey the village for the same amount in the *Ani* month of the 30th year from the date of the agreement, if they wish to have it. The month of *Ani* in the 30th year corresponds to 14th June to 14th July 1920. Venkatasubramanya Iyer became insolvent in 1897, and died in 1899. His properties vested in the Official Assignee of Madras. In 1910 his son Krishnaswami Iyer executed Ex. E to the plaintiff conveying his rights in the suit village. Krishnaswami Iyer also obtained a deed from the Official Assignee (Ex. BB-1) dated 22nd February, 1916, by which the latter conveyed all rights to the suit village vested in him by reason of the insolvency of Venkatasubramanya Iyer. Krishnaswami Iyer died in 1919. His widow executed Ex. BB-1 (dated 16th February, 1921), releasing her rights in favour of the plaintiff. The Subordinate Judge has found (and the finding has not been questioned before us) that the plaintiff tendered the amount of Rs. 10,000 in the month of June, 1920. The present suit was filed on 12th July, 1920. The Subordinate Judge found on issue 2 (*b*) that the effect of Ex. B-1 was that there was a standing offer to Venkatasubramanya Iyer which ceased to have operation after his death and dismissed the suit.

The plaintiff appeals.

The main points argued at great length before us relate to the effect of Ex. B-1. Exhibits B and B-1 formed part of a single transaction and Ex. B-1 is certainly supported by consideration. The respondent contended that the right created under it in favour of Venkatasubramanya Iyer and Krishnaswami Iyer was purely personal and could not be assigned (issue 2*b*). He also contended that it was an option to accept or refuse in June, 1920, and could be assigned only after the offer was accepted by the tender of the amount and thus ripened into a contract to sell and buy. He argues that before 14th June, 1920, there was no agreement for sale and purchase and, therefore, there was nothing to assign; neither Subramanya Iyer nor Krishnaswami Iyer lived up to that date, and no one else can accept an offer made to them. In other words, the option which an offeree has to refuse or accept an offer made to him, even if it can be called a right, is not such a right as can be assigned, so as to enable the assignee to accept the offer. The two aspects of the questions are to a certain extent connected.

It is true that, in cases of sale and an agreement to re-sell and other similar cases such as a lease with covenant for sale or a hire with an agreement for purchase, the second part of the transaction, where the vendee has an option, does not amount to an agreement for sale and purchase [*vide*, *Lord Ranelagh* v. *Melton* (9) which was a case of lease with an

(9) (1864) 2 Dr. & Sm. 278; 5 N. R. 101; 34 L. J. Ch. 227; 10 Jur. (N. S.) 1141; 11 L. T. 409; 13 W. R. 150; 62 E. R. 627; 143 R. R. 115.

option to purchase ; *Helby* v. *Matthews* (1) which was followed and applied by Ayling, J., and myself in *Egala Nagappa Naidu Muniswami Iyer* (2) where there was no time fixed for the exercise of the option]. In all these cases, such a pre-contract [see per Lord Watson in *Helby* v. *Matthews* (1)] is, if not supported by consideration, a *nudum pactum*, but if it is supported by consideration (as in this case) it amounts to an undertaking on the part of the offerer not to withdraw the offer, *i. e*, it is a contract, not a contract for sale and purchase, but one not to withdraw an offer. It is a contract precedent to the agreement for sale and purchase. If the time fixed for the exercise of the option is any time within a certain date, the option may be exercised at any time within that date and will mature into a contract to buy and sell. But if the option is to be exercised at a certain stated time, *i. e.*, after the expiration of a certain period [as in *Lord Ranelagh* v. *Melton* (9)] or between certain points of time as in this case, it would seem that the option cannot be irrevocably exercised earlier than the stated time. This seems to be the opinion of Kindersley, V. C., in *Lord Ranelagh* v. *Melton* (9). But the question of assignability of the right of the optionee did not arise in any of these cases. They do not throw any light on that question.

Primâ facie, the rights of the parties to a contract are assignable; *Tolhurst* v. *Associated Portland Cement Manufacturers* (10), *Tolhurst* v. *Associated Portland Cement Manufacturers* (11). The same principle is embodied in s. 23 (*b*) of the Specific Relief Act unless " the personal quality of such a party is a material ingredient in the contract". These words of the Indian Act seem to me exactly the same as the words used by Fry, L. J., in his Specific Performance, s. 225. See also *Tolhurst* v. *Associated Portland Cement Manufacturers* (12) where Lord Macnaghten uses the words " personal elements". But he proceeds to state in s. 229:

" Where though the relation established by the contract may have in it nothing personal, some previous personal relation of favour or otherwise, between the contracting parties, has been a material motive to the contract, it can be enforced by that person only."

Mr. Varadachari relies on this tatement of Fry, L. J., and on the previous relation between the parties to attract its application. But I do not find anything in s. 23 (*b*) of the Specific Relief Act (which corresponds to s. 225 of Fry, L. J., only) justifying an extension of it, so as to cover a case to which s. 229 of Fry, L. J., could apply. The learned Vakil referred to *Vithoba Madhav* v. *Madhav Damodar* (13), *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (14) and *Toomey* v. *Rama Saki* (15), as examples of the application of this principle. There is no resemblance between this case and the cases *Toomey* v. *Rama Sahi* (15) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (14). Even the case *Vithoba Madhav* v. *Madhav Damodar* (13) is distinguishable. The term of 30 years, in my opinion, makes it clear that the option was not intended to be personal. The parties could not have been so certain of the life of Subramania Iyer and Krishnaswami Iyer upto the end of this time and could only have meant that the option might be exercised by them or their heirs. I may observe that the translation of Ex. B at page 15 is not quite correct. The vernacular word "*Thangalukkai*" is a merely emphatic form of saying "you" and though if it occurs by itself, it may be translated as "you only"; in this case it represents the vernacular idiom, the emphatic form being sometimes used when the word is repeated in the same sentence. There is no word for "only". Mr. Varadachari also contended that even if there is nothing personal in the contract still the offeree only can accept an offer. This proposition is true of mere offers. But, in this case, we have an offer which is irrevocable under a contract and only the offeree has an option to accept or refuse. This does not stand in the same footing as a bare offer. To say that the rights of an offeree in a case of this kind do not descend to his heirs seems to me a repetition of the argument about personal element in another guise and the term of 30 years seems to afford an answer to this argument as well. Mr. Varadachari has

(10) (1901) 2 K. B. 811.
(11) (1902) 2 K. B. 660; 71 L. J. K. B. 949; 51 W. R. 81; 87 L. T. 465; 18 T. L. R. 827.
(12) (1903) A. C. 414 at p. 417; 72 L. J. K. B. 834; 89 L. T. 196; 19 T. L. R. 677; 52 W. R. 143.
(13) 46 Ind. Cas. 734 42 B. 314; 20 Bom. L. R. 654
(14) 30 C. 265; 7 C. W. N. 220.
(15) 17 C. 115; 8 Ind. Dec. (N. S.) 614.

conceded that the family of Subramania Iyer was the object of Venkatapathi Nayudu's bounty and the option may be exercised by the heirs, but argued that it is not assignable. But this seems to be a distinction without any principle to support it. If a right can be transmitted to heirs, it is equally assignable. I, therefore, think that the option can be assigned even before it matures into an agreement to sell and purchase. In England it was so held in *Buckland* v. *Papillon* (6). Romilly, M. R., held that it was an interest under an agreement and vested in the assigns in bankruptcy (at page 483*). On appeal Lord Chemsford, L. C., in *Buckland* v. *Papillon* (16), said at page 71†:—"I see no reason why an option to take a lease should not be an interest in land" and lower down "it cannot be contended successfully that a person who may call for a lease at his own will and pleasure may not be looked upon as entitled to an agreement for a lease".

Under s. 54 of the Transfer of Property Act an agreement to sell, by itself, cannot create an interest in land much less can an option even if it is made irrevocable by reason of a contract. But I do not see why the interest under the contract is not assignable as a right *ex contractu* if not as a right *in rem*. The case in *Buckland* v. *Papillon* (6), was referred to with approval by Lord Lindley in *Tolhurst* v. *Associated Portland Cement Manufacturers* (12) and in *County Hotel & Wine Co.* v. *London & North-Western Ry.* (8), by McCardie, J., (see also Fry on Specific Performance, s. 1105, and Redman's Landlord and Tenant, page 28, and Leake on Contracts, page 919), *Manchester Brewery Co.* v. *Coombs* (7). In this Court the assignability of an option was recognized in *Nochet Kizhakke Madathil Venkateswara Aiyar* v. *Kalloor Illath Raman Nambudri* (3) and *Rajah Bahadur Narasingerji Gyanagerji* v. *Raja Panuganti Parthasaradhi Rayanim Garu* (4), modified by the Privy Council on another ground in *Narasingerji Gayanagerji* v. *Panuganti Parthasaradhi Rayanam Garu* (5).

The leared Vakil for the respondent also contended that the option is void as offending the rule against perpetuities. If it created an interest in land, this contention is correct. But, in India, it cannot create an interest in land, whatever the rule in England may be. As a right *ex contractu* intended to be exercised at a stated time (ranging within one month) by the optionees or their representative and assigns, it does not tie up the land and cannot offend the rule against perpetuities [see *Avula Charamudi* v. *Marriboyina Raghavalu* (17), followed in *Raja of Karvetnagar* v. *Velayuda Reddi* (18).]

The assignment to the plaintiff is, therefore, valid. The further question argued by the appellant's Vakil that Exs. B and B-1, on their true construction, amount to a mortgage does not arise. The fact of a long term is in favour of the appellant. [See *Swaminatha Aiyar* v. *Appasami Aiyar* (19), *Madhab Charan Das* v. *Rajani Mohon Das* (20) and *Modhu Sudan Das* v. *Rhidoy Moni Baistabi* (21).] The oral evidence as to the produce of the lands also seems to be in his favour, but there is no evidence as to the prices of grains in 1890. On the other hand Exs. II, III, III (*a*) and IV suggest that the lands are of poor quality and, on a former occasian, this High Court held that the documents do not amount to a mortgage Ex. 1 (*b*). This judgment does not constitute *res judicata*. It is not necessary to pursue this point further.

In the result, I agree with my learned brother that the appeal should be allowed and with the order proposed by him.

V. N. V. *Appeal allowed.*

(16) (1867) 2 Ch. A. 67; 36 L. J. Ch. 81; 12 Jur. (N. S.) 992; 15 L. T. 378; 15 W. R. 92.

*Page of (1867) 1 Eq.—[*Ed.*]

†Page of (1867) 1 Ch. A.—[*Ed.*]

(17) 28 Ind. Cas. 871; 39 M. 462; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M W. N. 596.

(18) 29 Ind. Cas. 435; 18 M. L. T. 83.

(19) 27 Ind. Cas. 305; 27 M. L. J. 686; (1914) M. W. N. 906.

(20) 64 Ind. Cas. 583.

(21) 6 C. W. N. 192.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 6 OF 1926.

December 1, 1926.

Present:—Sir George Claus Rankin, Kt., Chief Justice, and Justice Sir Charu Chunder Ghose, Kt.

CHUNI LAL DUTT AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPIRAM BHOTICA—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17—Agreement to lease—Memorandum containing proposed terms—

Registration—Verbal lease, validity of—Transfer of Property Act (IV of 1882), ss. 105, 107.

The terms of an agreement relating to a lease having been settled by the parties they repaired to an assistant of the plaintiff's Solicitor who drew up a letter addressed to the plaintiff's Solicitor containing the terms agreed upon by the parties. The letter was taken by the parties to the plaintiff's Solicitor who, after explaining it to them added a few more clauses and took the defendant's signature to the same:

Held, that the letter was not an embodiment of an agreement between the parties but only a letter of instruction written by the defendant to the plaintiff's Solicitor as to the terms on which a formal lease was to be executed, and was not, therefore, compulsorily registrable. [p. 406, col. 1.]

A verbal agreement of lease notwithstanding the fact that the parties were intending to execute a formal lease-deed does not contravene the provisions of ss. 105 and 107 of the Transfer of Property Act and is not, therefore, a nullity. [*ibid.*]

Appeal against the decision of Mr. Justice Pearson, in Original Civil Suit No. 742 of 1925, dated the 18th November, 1925, reported as 93 Ind. Cas. 81.

Messrs. *N. N. Sircar* and *R. N. Sircar*, for the Appellants.

Sir *B. C. Mitter* and Mr. *A. K. Roy*, for the Respondent.

JUDGMENT.

Rankin, C. J.—In this case two questions have been argued on behalf of the appellant. It appears that the plaintiff and the defendant-appellant were in treaty for letting out to the defendant certain premises 176, Harrison Road, belonging to the plaintiff. The first document with which we have to deal is a document which came into existence on the 22nd of March, 1922, and it is contended by the appellant that the learned Judge should have excluded that document from evidence altogether. It is also contended by the appellant that the agreement founded on by the plaintiff is not proved and that the parties have not shown to have been *ad idem* as to the question whether or not anything in the way of carrying on business was to be allowed to the defendant on these premises.

The question arose by reason of the fact that although according to the plaintiff the defendant was in possession having taken these premises for three years he suddenly vacated them altogether and refused any further to carry out the covenants. Accordingly the learned Judge has at the instance of the plaintiff awarded certain damages against him.

We are not concerned in this appeal save with the two points to which I have already referred.

It was contended by Mr. Sircar on behalf of the appellant that the letter of the 22nd of March although only signed by the defendant's son and although addressed to Mr. N. C. Bose—a Solicitor—was really a document which was an agreement for a lease operating to transfer a present interest in the premises and that consequently it was hit by s. 49 of the Registration Act.

Upon the evidence the learned Judge has not taken that view. The learned Judge has dealt with the letter on this basis that the plaintiff and the defendant's son on behalf of his father made a verbal agreement with regard to the terms upon which a formal lease should be given to the defendant by the plaintiff. Having come to this verbal agreement and concluded it to that extent they then went together to the plaintiff's Solicitor to see that necessary instructions were given him for the drawing up of a lease.

It appears when one looks to the pleadings that the defendant was making all sorts of defences which have now been held to be unfounded, but he said that he was a monthly tenant of these premises.

Leaving the pleadings aside, however, we come to the correspondence and it is clear that the moment he was challenged the plaintiff made the case that the agreement upon which he was relying was a verbal agreement and he took a view of this letter according to which, no doubt, it was very valuable evidence of what the agreement between the parties had been but according to which it was not the intention of the parties by this letter to effect or embody an agreement between themselves.

When one comes to the evidence one finds that the parties first of all went to Chandi Babu an Assistant in the plaintiff's Solicitor's office and himself an Attorney, and according to his evidence it certainly looks as if the parties had completely effected an agreement between themselves and accordingly came to him to give instructions to draw up a lease.

It appears, however, that there was one complication. Having written out a letter stating in the form of instruction to Mr. N. C. Bose what sort of a lease the parties wanted him to draw up, Chandi Babu sent the parties to Mr. A. C. Bose. Mr. A. C. Bose seems to have asked something about the rights of the defendant to sub-let.

Whether the two new clauses that were then put in were really new terms or not does not seem to me to matter because the question must turn upon whether this letter was intended by the parties to be the embodiment or repository of an agreement between themselves or whether it was drafted on the basis that the parties had themselves concluded an agreement but that as it was an agreement for execution of a lease they desired to give instructions about a lease to the Solicitor in a way that would prevent disputes or trouble and enable the transaction to go on.

I am not of opinion upon the evidence that this Court should interfere with the findings of the learned Judge to the effect that the letter was intended as a letter of instruction to the Solicitor and was not intended as an agreement between the parties. That disposes of the first question.

On the question whether the parties were *ad idem* or not I see nothing whatever to quarrel with in the view taken by the learned Judge. But it is contended by Mr. Sircar that if this letter of the 22nd of March is regarded as a mere letter of instruction to the Solicitor any verbal agreement to the same effect as this letter would be a verbal agreement intending to operate as passing a present interest in the land for three years. Accordingly, he says that being so, even a verbal arrangement would be nugatory in spite of the fact that it provided for the arrangement being subsequently embodied in the terms of a formal lease. It is said that such an oral arrangement would be intended to pass an immediate interest in the property and is by itself a lease within a meaning of the Transfer of Property Act, and although naturally an oral agreement cannot be hit by the Registration Act it would be entirely void because it would attempt to operate as such within the meaning of ss. 105 and 107 of the Transfer of Property Act. In my judgment, that is an argument wich is not to be accepted at all and there are a great many cases in which oral agreements and terms such as these for leases have been specifically enforced in this Court, and I am not prepared to say that an oral agreement to the effect in the present case would be a mere nullity notwithstanding the fact that the parties were intending a lease to be executed. In point of fact, it appears that the defendant, some little time after, paid a deposit and was allowed into possession on the strength of this verbal agreement.

In my judgment, the contentions that have been so ably urged on behalf of the defendant in this case come to nothing and the appeal must be dismissed with costs.

C. C. Ghose, J.—I agree.

A. N. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 88-B OF 1926.

November 30, 1926.

Present:—Mr. Kinkhede, A. J. C.

HARAKCHAND BHATEY—PLAINTIFF—APPLICANT

versus

G. I. P. RAILWAY COMPANY—DEFENDANT—NON-APPLICANT.

Railways Act (IX of 1890), ss. 54, 55, 77—Under-charge or overcharge of freight—Re-weighing, right to—Refusal to re-weigh, effect of—Loss, liability for—Provincial Small Cause Courts Act (IX of 1887), s. 25—Duty of Small Cause Court—Revision.

A Railway Company is entitled to re-weigh a consignment carried by it and collect excess charges for excess weight at the destination and sell the goods if the excess charge is not paid and credit the sale-proceeds thereof towards the excess charge and demurrage, if any, due from the defaulter. As a necessary counter-part of such right of the Company is the right of the consignor or consignee of the goods to claim a refund of any over-charge recovered from him by the Company, and as in the case of determining and collecting an under-charge, so in the case of refunding an over-charge, a right to re-measure, re-weighment or re-calculation must necessarily be implied. [p. 409, col. 2; p. 410, col. 1.]

Where a consignee has *prima facie* good reasons to think that an incorrect weight has been entered in the Railway receipt and he demands, before taking delivery of the goods, that the goods should be re-weighed, the failure of the Railway Company to comply with such demand amounts to misconduct and if as the result of such failure delivery is delayed and loss is caused to the consignee, the Railway Company is liable for such loss. [p. 410, cols. 1 & 2.]

A Judge of a Small Cause Court fills a very important position of responsibility and owes a duty to the litigant world to dispose of cases in a proper and judicial manner disclosing a proper appreciation of the evidence, much of which is heard rather than recorded by him. It is on this account that a Court of Revision is reluctant to interfere with his findings unless they are based on a misinterpretation of evidence. Where, however, he fails to properly appreciate the evidence and to give sufficient attention to matters apparent upon the record the High Court has no alternative in revision but to ignore his findings and to decide the case for itself on the material on record. [p. 412, col. 2.]

Revision against the decision of the Small Cause Court Judge, Akola, dated the 1st April, 1926, in Civil Suit No. 1217 of 1925.

Mr. *G. G. Hatwalne*, for the Applicant.

Mr. *K. K. Gande*, for the Non-Applicant.

ORDER.—The firm of Velsi Karsonji of Bombay consigned to the plaintiff's firm known as Harakchand Hemchand of Akola 12 bags of wet betel-nuts known as Calcutta *supari* from Wadi Bunder on 24th February, 1925, under a *to pay* consignment note (Ex. D-1) accompanied by a Risk Note in Form A. Exhibit D-1 shows the weight as 23 maunds and Rs. 28-6 as the amount of freight. It reached Akola on 2nd March, 1925. The consignee received a *bijak* (Ex. P-13) from the Bombay firm which showed the weight of the twelve packages to be less than 23 maunds. Plaintiff's son Mohanlal (P. W. No. 1) went to the Akola Railway Station to take delivery on the 2nd March, 1925; in view of the discrepancy he naturally requested the Goods Clerk to re-weigh the goods before effecting delivery, but the latter declined to comply with the request. The consignee refused to surrender the Railway receipt and take delivery. The question, therefore, is whether the Railway Company's servants were under any legal liability to re-weigh the consignment and to allow or make any note in the Railway Book about the same. Each party blames the other as being in the wrong. The goods thus remained in the custody of the Railway Company from 2nd March, 1925, until 3rd April, 1925, when the delivery was given as per Ex. P-9, whereon P. W. No. 1 made the following endorsement:—

"Bags received intact re-weighed maunds 15 seers 10 only against Invoice 23 maunds on 3rd April, 1925.

Mohanlal
for Harakchand Hemchand."

During this interval the goods deteriorated. Plaintiff, therefore, sues the Company for Rs. 403 on account of damages.

During the interval between 2nd March, 1925, and 3rd April, 1925, a lot of correspondence passed between the parties. Suffice it to say at this stage that until the Station Master, Akola, was ordered by the Divisional Traffic Manager, Nagpur, "to effect delivery of the bags by allowing re-weighment" as stated in his letter dated the 27th March, 1925, (Ex. P-6) the Company was not willing to re-weigh the goods. Accordingly after some more correspondence (Exs. D-6, P-8 and P-7) the Station Master gave delivery after re-weighment as we find from Ex. P-9 above referred to.

The main question for trial was whether the plaintiff or the defendant was in the right. The Judge of the Small Cause Court, Akola, thinking the plaintiff to be in the wrong in refusing to take delivery on 2nd March, 1925, and that Risk Note A exonerated the Company from liability, dismissed the suit. He, however, found that some damage was suffered and the goods had deteriorated; but held that plaintiff's refusal was wrongful and as there was no sufficient evidence to base any estimate of the damage he left it unestimated. In depriving the Company of its costs he, however, observed that the Company had invited this suit by non-compliance with the plaintiff's simple request for re-weighment and taking a note of the result in a delivery book or elsewhere which "could and should have been done without any trouble to the defendant's servants at Akola." The defendant is apparently satisfied with this order as to costs; but the plaintiff who is aggrieved by the decision has applied in revision against it.

I think the decision of the Small Cause Court Judge cannot be accepted as being in accordance with law. The Judge does not appear to have duly considered the several letters which passed between the parties in connection with the question at issue. A perusal thereof discloses that the plaintiff at once addressed a letter dated the 2nd March, 1925, (Ex. D-7-P-1) to the Station Master, Akola, asking him to give a quick delivery on weighing the goods as he thought that there was some mistake in mentioning the weight of R/R in the consignment and giving him strictly to understand that he will hold him responsible for delaying the delivery. The Station Master ordered the Goods Clerk to 'do the needful' as one can see from the endorsement in green ink under that date on that Exhibit, but he did not care to see that his order was actually carried out. Plaintiff's next step was that on 5th March, 1925, he addressed (Ex. D-2) to the Agent, G. I. P. Railway, Bombay, informing him that the forwarding station (Wadi Bunder) entered wrong weight in the Railway receipt in excess of that in the *bijak* and requested for necessary instructions being issued to the Station Master, Akola, to

deliver the consignment on actual re-weighment within 48 hours of the receipt of the notice. He complained that the Station Master, Akola, took no action on his repeated demands to give delivery of goods on actual re-weighment and pointed out that they were deteriorating and the market had gone down and intimated that he will hold the Company responsible for further damages, deterioration and fall of market and loss of interest, etc., in case the said consignment was not delivered to him on actual re-weighment within the time specified. This notice reached the Bombay Office on 6th March, 1925, and time limit expired on the 8th March, 1925. The usual sterotyped reply was given that a further reply will be sent in due course as per Ex. D-5-P-2, dated Bombay the 10th March, 1925, but apparently not issued till 16th. The Divisional Traffic Manager, Nagpur, by his letter dated the 18th March, 1925, (Ex. P-3) informed plaintiff that the goods were lying on the Railway premises at his risk incurring wharfage thereon every day, and that the Railway would not be liable for any delay in delivery and consequent loss, damage or deterioration of goods. He called upon plaintiff to surrender the Railway receipt and take delivery paying all the charges due within a fortnight from the receipt of the letter failing which he threatened to dispose of the bags under ss. 55 and 56 of the Indian Railways Act IX of 1890. Plaintiff got this letter on 24th March, 1925. He naturally placed the matter in the hands of a Pleader who addressed a letter dated the 25th March, 1925, (Ex. P-4-D-3) to the Agent, G. I. P. Railway Company, Bombay, setting forth previous correspondence and the circumstances under which the request for re-weighment was made to the Company but refused, and asserting that the Company will be held liable in damages, and if necessary, will be sued for the same. The plaintiff had given two days' time for a reply to this notice which reached Bombay Office on 28th March, 1925, (Ex. P-5). In the meantime the Station Master, Akola, sent the letter dated 27th March, 1925, (Ex. P-6) above referred to asking plaintiff to take delivery as per orders of the Divisional Traffic Manager, Nagpur, after re-weighment and the delivery was given on 3rd April, 1925.

On re-weighment made on 3rd April, 1925, it was found that the actual weight was 15 maunds 10 seers and not 23 maunds as the consignment receipt (Ex. D-1) wrongly showed. Thus there was an overcharge for 7 maunds and 30 seers. The plaintiff had, however, to pay the full freight entered in the consignment (Ex. D-1), *viz.*, Rs. 28-6 before he could get delivery on 3rd April, 1925. Plaintiff immediately sold the goods for Rs. 65-7-3 at the Railway Station itself which clearly shows that the goods had suffered immensely in quality and consequently could not fetch proper value. Plaintiff attributes this loss to the delay caused by the Company's refusal to re-weigh. After serving notices of suit dated the 4th April, 1925, (Ex. D-4-P-10) on the Agent of the Company who got it on 6th April, 1925 (Ex. P-11) but gave no reply to it, the present suit was instituted on 6th May, 1925, for the recovery of Rs. 403-14-9. During the pendency of the suit the Company sent a memo. (Ex. P-12), dated 9th June, 1925, to plaintiff offering to refund the over-charge of Rs. 9-9, but plaintiff could not accept it at that date in view of the suit.

The above correspondence clearly shows that while plaintiff was anxious to expedite the delivery of the goods to him on re-weighment, the Company and its servants were taking matters very coolly and gave no prompt attention to his repeated demands. I cannot help remarking that what the Station Master did on 3rd April, 1925, *viz.*, re-weigh the goods in pursuance of the Divisional Traffic Manager's aforesaid order could and should have been done or caused to be done by him with a little exercise of prudence on 2nd March, 1925, and had he cared to see that his order to "do the needful" endorsed on Ex. D-7 was carried out, he would have saved the parties from all the bother of this litigation. Even if the Station Master had taken care to do this 'without prejudice' as item No. 9 on Ex. P-7, dated the 1st April, 1925, shows it would have served the plaintiff's purpose and also safeguarded the Company's interest and he would have been in a position to detect and report to the Goods Superintendent that there was an over-charge in respect of the consignment.

Had the Judge the patience to read through the correspondence, he would not have failed to notice a very important disclosure relevant to the case, made by the marginal note on Ex. D-4 which would

have convinced him that the liability of the Company to re-weigh the goods was all the greater in this than in other cases. To refuse to re-weigh goods and to ask the consignee to take delivery without re-weighing or verifying the weight was, under the above circumstances, nothing short of a demand by the Railway Company for an excess freight or a charge of more than what was permitted by law and for a complete and unconditional discharge from plaintiff in respect of booked weight while actually delivering short weight. As the actual re-weighment made on 3rd April, 1925, has clearly proved that the goods only weighed 15 maunds and 10 seers, there was clearly an over-charge for 7 maunds and 30 seers and in spite of it the Company actually realised Rs. 28-6 charged at Wadi Bunder for the goods booked. The marginal endorsement dated the 11th April, 1925, on Ex. D-4 showed that this was one of the several 'cases of incorrect weight from Wadi Bunder.' The defendant Company ought to realise and take early steps if they have not yet taken them to see that in keeping a defective weighing machine which when anything is weighed by it showed the weight more than what it really weighed renders it liable to conviction for possessing a weighing machine which on examination is found to be incorrect or otherwise unjust. It may, if it likes, charge for the use of weighing machines but can have no justification to refuse re-weighing goods if as the result of possessing defective weighing machines it realises excess freights not permitted by law.

In the matter of the administration of the law relating to Railways, the law vests any amount of discretion in the Railway Administration and its staff. One cannot expect every contingency to be exhaustively provided for in a Legislative enactment and there is always scope for the exercise of discretion on the part of the officers whose duty it is to carry out the provisions of law. In short, prudence and discretion play a very important part in the administration of justice, and much more so in the several Departments of the Railway Administration which has often to deal with the commercial world, or if I may say so, is a necessary concomitant of commercial activities. But for the facilities to the constituents and in particular to the merchants as a class, which the Railway Administration shows, trade would have been at its lowest ebb. It may sometimes happen that what is not strictly one's legal obligations may be the dictates of expediency which plays a very important part in the administration of the affairs of a Railway Company which owes so much to the commercial world. If the underlying principle of the several provisions of the Railways Act is carefully examined, it will be seen that it is to afford every facility to trade and intercommunication between several parts of the world rather than hamper it. A provision for a refund of over-charge enacted in s. 77 of the Indian Railways Act is an instance in kind. It, no doubt, lays down certain limitations subject to which the liability of Railway Company to refund over-charge to the person entitled to claim it is enforceable; those provisions must be regarded not by way of negation of a constituent's right to a refund of an over-charge but as a positive recognition of that right in cases where the conditions are fulfilled. An over-charge as we all know is a charge of more than is permitted by law. As such it is not confined to an over-charge recovered before the delivery of the goods to the consignee at destination, but must necessarily cover a case of an over-charge which might be discovered on re-weighment, or in other words which the Company is not permitted by law to keep to itself in good conscience whenever recovered.

Section 54 of the Indian Railways Act gives the Railway Administration a power to impose conditions not inconsistent with the Act or with any general rules thereunder with respect to the receiving, forwarding or delivering of any animals or goods. Section 55 thereof gives it a lien on the goods for any rate, terminal or other charge due to it so as to entitle it to detain the whole or any of the goods for enforcing such payments and even to sell the same for their recovery. This obligation or liability to refund an over-charge, and power to levy under-charge, by necessary implication involves the necessary liability or right to re-weigh the goods for the due enforcement of the principal obligation or right as between the parties to any contract of consignment. In short the Railway Company is entitled to re-weigh the consignment and collect the excess charge for the excess

weight at the destination and to detain and sell the goods, if the under-charge is not paid and credit the sale-proceeds towards the under-charge and demurrage if then due by the defaulter. As a necessary counter-part of such right of the Company is the right of the consignor or consignee to claim a refund of any over-charge recovered from him, as expressly provided for in s. 77 of the Act. As in the case of determining and collecting an under-charge, so, in the case of refunding an over-charge, a right to re-measurement, re-weighment and re-calculation must necessarily be implied. If a right to re-weigh goods is as I hold an accessory to the substantive right of the Company to calculate an under-charge, same is the case with the right of a party entitled to a refund of an over charge. It necessarily follows that if a consignee has *prima facie* good reasons to think, before he is actually called upon to surrender his Railway receipt and to pay the over-charge, that an incorrect weight has been entered in the consignment and that he must have it ascertained to the knowledge of the Company, I do not see any justification on the part of the Company or its servants to shut its eyes to the actual facts and to say that it is being subjected to the performance of an obligation outside the scope of his contract with it or the provisions of the Indian Railways Act to be called upon to re-weigh the goods before delivery.

The Railway Company has in its custody the Railway receipt surrendered by plaintiff but the same has not been produced as an exhibit in the case. In all probability it has printed on its back several conditions subject to which the consignment was accepted, and I think it will not be too much to presume that there is a condition which reserves the Railway Company's right of re-measurement, re-weighment and re-calculation of the goods and charge rate, terminal or other charge due to it at the place of the destination as contemplated by ss. 54 and 55 of the Act. This reservation necessarily involved a reciprocal reservation in favour of the consignor and consignee of the latter's right of similar re-measurement, re-weighment and re-calculation of the goods and could not have given the Company the power to refuse such re-measurment, re-weighment and re-calculation of the goods at the place of destination and thus alter or depart from its contract either express or implied. The cases of *Chunni Lal* v. *Nizam Gauranteed State Ry. Co., Ltd.* (1) and *Bombay, Baroda & Central India Railway Co.* v. *Firm Budh Sen-Pusp Chand* (2) are instructive in a way in connection with this question of re-measurement, re-weighment and re-calculation.

Exhibit D-1 and the Risk Note in Form A attached to it held the Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway Company's servants. The conditions on the back of Form A made it impossible for the plaintiff to hold the Company liable to pay in case of damage, leakage or wastage occurred *in transit* owing to goods not being securely packed. It appears from the evidence of P. W. No. 1 that the goods were in good condition when they arrived at Akola. It is not also the plaintiff's case that any portion of the goods booked were pilfered or stolen or that there was any damage, leakage or wastage while *in transit* by reason of the bags not being securely packed. The loss due to deterioration was in consequence of the delay in delivering the goods after their arrival at the destination which in its turn was due to the failure of the Company to re-weigh the goods. This failure was a default which amounted to misconduct on the part of the Railway Company's servants within the meaning of the contract above referred to as embodied in the Risk Note Form A.

In connection with the points involved in this case it may be remarked that the case of *Rohilkhand & Kumaun Ry. Co.* v. *Ismail Khan* (3) is very instructive. There the right of the consignee of goods similarly covered by Risk Note in Form A 'to have the goods re-weighed then and there before he surrendered the Railway receipt' was confirmed. It was also held that when this had been done "he was entitled to endorse on the back of the Railway receipt a statement that he accepted delivery of the consignment as it stood, while taking note of the fact that its actual weight was

(1) 29 A. 228; 2 M. L. T. 42; A. W. N. (1907) 21; 4 A. L. J. 80.
(2) 79 Ind. Cas. 562; 46 A. 55; 21 A. L. J. 830; 9 O. & A. L. R. 1074; A. I. R. 1924 All. 180.
(3) 29 Ind. Cas. 207; 13 A. L. J. 417.

only so much and not the full weight as given in the Railway receipt itself" and that "* * the Station Master or other local officials of the Railway Company at the delivery station were bound to offer to the consignee reasonable facilities for weighing the goods on the spot." As pointed out above the defendant Railway Company did not offer reasonable facilities to the plaintiff consignee; on the contrary, it called upon him as per letter Ex. P-3 to take delivery, and surrender Railway receipt in token of the release of all claim for damages to which he may be entitled by reason of the failure of the Company to re-weigh the goods and the delay caused thereby and the necessary consequential deterioration of the goods, and even threatened to exercise its rights under s. 55 of the Act. I have absolutely no doubt that the attitude taken up by the Company at the stage of the correspondence, as also at the stage of the pleadings, and no less in its arguments before this Court, was one intended to make this a test case on the question of the Company's legal obligation to re-weigh the goods. I must say that there was a clear misapprehension of its legal duty and obligation on the part of the Railway Administration and its servants The great delay which has taken place before the Company decided to give delivery on re-weighment, is solely attributable to this misapprehension. The Company's learned Pleader who argued the case before me drew my attention to the following cases:

Ramjash Agarwala v. *Indian General Navigation & Railway Co., Ld.* (4), *Jagan Nath Marwari* v. *East Indian Railway Co.* (5) and *Janki Das* v. *Bengal-Nagpur Railway Co.* (6) as supporting his contention that there was no legal obligation to re-weigh or to certify a shortage and that a refusal of the Company to re-weigh did not entitle the consignee to refuse to take delivery. I have gone through those cases and I am of opinion that every one of them is distinguishable from the facts of the present case.

The report of the case of *Janki Das* v. *Bengal-Nagpur Railway Co.* (6) does not show that the question of the Company's liability to re-weigh the goods was expressly decided in its favour. In *Ramjash Agarwala* v. *Indian General Navigation & Railway Co., Ld.* (4) it was pointed out that a practice prevailed in that Company to allow inspection and re-weighment but that the consignee did not avail himself of it, and granted a clear receipt. He did not even weigh them himself. It was remarked that the matters were made easy for the consignee in a suit if re-weighment is made by the Company before removal of the goods by the consignee. But that it was a matter of evidence only and the refusal of the Company to re-weigh did not in any way affect the consignee's right who might weigh the goods himself and claim the price of the shortage in weight. It was further remarked that whether the consignee was entitled to refuse to take delivery in case of short delivery, or the broad proposition that the consignee is not entitled to have goods entrusted to a common carrier, re-weighed *need not be considered in the present case.* This case is, therefore, no authority for the proposition for which it is cited as the underlined (italicised) words show. In *Jagan Nath Marwari* v. *East Indian Railway Co.* (5) the consignee looking to the torn condition of the bags suspected a shortage and, therefore, demanded re weighment not on the Company's weigh-bridge but on his own scale and insisted upon a certificate of shortage. It was observed by the learned Judges that no authority was cited to them by the plaintiff showing that the Railway Company were under a liability to re-weigh the goods or to give a certificate of shortage, and thinking that the previous cases in *Janki Das* v. *Bengal-Nagpur Railway Co.* (6) and *Ramjash Agarwala* v. *Indian General Navigation & Railway Co., Ld.* (4) were authorities in favour of the Company's non-liability to re-weigh, they proceeded to hold that the Company was not liable. With due respect to the Judges who decided these cases I am constrained to say that the view taken in them is opposed not merely to the provisions of the Railways Act but also to the very spirit underlying them. I, therefore, prefer the view taken by the Allahabad High Court in *Rohilkhand & Kumaun Railway Co.* v. *Ismail Khan* (3) and hold that the defendant Company is liable to the plaintiff in damages for not giving him the necessary facilities to re-weigh the goods.

From the point of view of fact as well as of law, it would thus be clearly seen that

(4) 41 Ind. Cas. 387; 22 C. W. N. 310.
(5) 45 Ind. Cas. 933; 22 C. W. N. 902.
(6) 13 Ind. Cas. 509; 16 C. W. N. 356; 15 C. L. J. 211.

the Railway Company had placed itself under an obligation to re-weigh the goods at the request of the consignee. I may add that the word 'obligation' includes every duty enforceable by law as defined in the Specific Relief Act. It is a tie or bond which constrains a person to do or suffer something. It implies a right in another person to which it is correlated, and it restricts the freedom of the obligee with reference to definite acts and forbearances. The Indian Legislature has used the term in its wider juristic sense which is limited to duties arising either *ex contractu* or *ex delicto*. In short the word 'obligation' is intended to be enumerative and not exhaustive. The failure to re-weigh the goods thus amounts to misconduct on the part of the Company's servants and makes the Company liable both from the point of view of the contract express or implied, as also of the Indian Railways Act.

I am not consequently prepared to uphold the decision of the Court below exonerating the Company from liability. Neither the Company's refusal to re-weigh was proper nor did the Risk Note afford any protection to it from such liability, especially as it is found as a fact by the Court below that the goods were in a deteriorated condition on the day of their delivery. This deterioration having been fully established by the evidence adduced in the case as the direct and natural consequence of the wrongful withholding of delivery of goods unless taken without re-weighment, made the Company liable in damages to the plaintiff. The Small Cause Court Judge unnecessarily suspected the evidence of plaintiff and his witnesses Nos. 1 and 2 as having been given in concert to make out an exaggerated claim against the defendant. He failed to see that plaintiff rightly chose the Akola Station itself as the proper place for the sale of the damaged goods, as it could practically bring the knowledge of the actual sale-proceeds home to the station staff then and there. If the Judge had cared to examine the details of the claim for damages as given by P. W. No. 1 in his deposition he would have found that (*i*) Rs. 388-12-9 represented the debit to him by the Bombay firm on account of the value of betel-nuts exclusive of *bardana* and other charges, Ex. P-13, (*ii*) Rs. 10-1-9 was the cost of *bardana* and other charges, (*iii*) Rs. 28-6-paid as Railway freight to the Company; (*iv*) Re. 1 paid on account of coolie charges, and (*v*) Rs. 36 was charged by him on account of profits on the 12 bags, total Rs. 494-4-6. Deducting from this the amount which he actually realised Rs. 65-7-3 proved by P. W. No. 1, P. W. No. 2 and Ex. P-14, a round sum of about Rs. 400 represented the actual loss sustained by the plaintiff. I cannot make out what difficulty the Judge could have experienced in assessing this damage. I fail to see how the Judge observes that it is not possible to estimate damage properly for want of sufficient evidence. If there was any objectionable item it was the 5th one of Rs. 36 on account of profits. But even assuming that that very small margin of Rs. 3 per bag which plaintiff claimed was not allowable the claim could well have been decreed to the extent of the balance. I do not see my way to deprive plaintiff of that small margin. I, therefore, hold the plaintiff's claim as proved to the extent of Rs. 400.

I cannot help remarking that a Judge of a Small Cause Court fills a very important position of responsibility and owes a duty to the litigant world to dispose of cases in proper and judicial manner disclosing proper appreciation of evidence much of which is heard rather than recorded by him. It is on this account that a Court of Revision is reluctant to interfere with his findings unless they are based on misinterpretation of evidence as pointed out by this Court in *Padamsi* v. *Sheshrao* (7). The Judge of the Court below having failed to properly appreciate the evidence or give sufficient attention to the several matters apparent from the record this Court has no alternative but to ignore his findings and decide the case for itself on the material on record. If, as I understand it, the case was fought out by the Company as a test case, I dare say it ought to have received much greater attention at the hands of the Judge than he has actually given to it.

I, therefore, reverse the lower Court's decision and pass a decree for Rs. 400 against the defendant-non-applicant; as regards costs I direct that plaintiff's costs of both the Courts shall be paid by defendant-Company who will bear its own.

As by his notice dated 5th March, 1925, (Ex. D-2) plaintiff notified to the Company that it

(7) 73 Ind. Cas. 1055; 19 N. L. R. 72; A. I. R. 1923 Nag. 292.

will be held responsible for loss of interest, and as the plaintiff has claimed future interest at a moderate rate of Re. 1 per cent. per mensem, from the date of the suit, I think this is a fit case for awarding such interest. I accordingly direct that the decree shall carry future interest from such date 6th May, 1925, until satisfaction. Pleader's fee will be Rs. 40 for this Court and Rs. 25 for the Court below.

Z K. *Decree modified.*

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 289 AND 290 OF 1924.

November 30, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Panton.

Raja JANAKI NATH ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Nawab Khajeh HABIBULLAH SAHEB—DEFENDANT—RESPONDENT.

*Precedents, value of—Construction of document, whether question of law—*Waqf*—Suit challenging* waqf*—Agreement surrendering rights in favour of* mutwalli *in return for payment of allowances, effect of—*Waqf *declared invalid, effect of.*

Every judgment must be read as applicable to the particular facts proved or assumed to be proved in the case in which the judgment was delivered, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case. The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him. [p. 416, col. 2; p. 417, col. 1.]

The effect, however, of a document is a matter of construction and is a question of law and once this question has been decided in a certain way by the highest tribunal, its decision is binding upon subordinate Courts in any subsequent proceeding in which the construction of that document may be in dispute. [p. 417, col. 1.]

A *waqf* was declared of certain immoveable properties by their owners and the defendant was appointed *mutwalli* of the *waqf*. Certain members of the family of the *waqif* instituted a suit challenging the validity of the *waqf*. During the pendency of the suit an agreement was arrived at by the parties under which the plaintiffs specifically surrendered all their rights and interests in the properties in dispute in favour of the defendant, accepted the validity of the *waqf* and reserved to themselves the right to receive certain allowances charged upon the income of the *waqf* property and payable by the defendant as *mutwalli*. These allowances were to be continued in favour of the plaintiffs' heirs. Later on, the defendant refused to pay such allowances and on the matter being taken to Court, it was decided finally by the Privy Council that the *waqf* was invalid but that the allowances were nevertheless to be paid to the plaintiffs. Subsequently the plaintiffs mortgaged their interests in the *waqf* property and the mortgagees instituted the present suit against the defendant to recover possession of the shares of their mortgagors in the mortgaged properties:

Held, (1) that the interpretation by the Privy Council of the agreement arrived at during the pendency of the suit to challenge the validity of the *waqf* was binding upon the Courts in the present suit; [p. 417, col. 1.]

(2) that the effect of the agreement was to make the defendant the absolute owner of the properties in dispute subject only to a charge for the payment of the allowances specified in the agreement; [p. 417, col. 2.]

(3) that, therefore, the mortgagees had no title to the properties in dispute and their suit for possession must be dismissed; [*ibid*]

(4) that nevertheless, however, the mortgagees were entitled to a decree for possession of the allowances payable to their mortgagors. [p. 418, col. 1.]

Appeals against the decrees of the Officiating Subordinate Judge, Fourth Court, Dacca, dated the 12th of September, 1924.

Babu *Dwarka Nath Chakravarti*, Dr. *Sarat Chandra Basak*, Babus *Promode Kumar Ghose*, *Indu Prokas Chatterji*, *Surendra Nath Bose* and *Jatin Mohan Bose*, for the Appellants.

Messrs. *Pugh*, *Meyers*, Babu *Surendra Nath Guha*, and Mr. *Sisir Kumar Ghoshal*, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—These two appeals arise out of two suits which were dismissed by the Subordinate Judge of Dacca on the 12th of September, 1924. The plaintiffs sued for possession of 17 *gandas* 6 *dantis* 4 *jobs* and 34½ *renus* share of four *zemindaries* on the allegation that they had purchased that share on July 9, 1913, in execution of a mortgage-decree obtained by them against their mortgagors. Two suits were brought in two Districts as the properties were situated in different Districts and one of the suits was transferred to Dacca under the orders of this Court. The questions involved in the two suits being the same they were tried together and were governed by the same judgment. The two appeals have also been heard together and will be disposed of by one judgment. The mortgage in favour of the plaintiffs was executed in May, 1906, and the suits out of which these appeals arise were brought in May, 1916. There were four mortgagors but the mortgage suit against one of the legal representatives of one of them named Abdul Majid *alias* Hola Mia had abated and the decree was with regard to the shares which the three other mortgagors

and the shares of the other legal representatives of Hola Mia purported to have in the mortgaged properties. There is no question before us as to the validity of the mortgage-decree or the sale thereunder. Those persons who purported to mortgage their shares in the properties in suit to the plaintiffs will henceforth be described as the mortgagors. After the execution purchase the plaintiffs endeavoured to take possession of the share sold but they were resisted by the defendant. There were certain intermediate proceedings, which it is unnecessary now to state, in which the defendant was successful. Ultimately the plaintiffs brought the present suits.

The Subordinate Judge has given an elaborate statement of the facts which gave rise to the controversy in the suits in question. The material facts as to the dealings with the property before the mortgage would also appear in the judgment of the Judicial Committee in the case of *Solehman Quadir* v. *Salimullah Bahadur* (1) to which it will be necessary for me to refer fully hereafter. I need only give a brief summary of the facts.

On May 8, 1846, corresponding to 27th *Baisakh* 1253 *B. S.* certain persons belonging to the same family, among whom were the ancestors of the mortgagors, executed a deed by which they purported to create a *waqf* of certain properties including the properties now in dispute for the benefit of themselves and their descendants generation after generation and ultimately for the poor and destitute. They appointed Abdul Gani to be *mutwalli* of the properties and directed him to pay certain allowances to the grantors who were members of the family. On September 11, 1868, Abdul Gani appointed his son Ahsanulla to be *mutwalli* in his place and on the same date Abdul Gani executed another deed also purporting to make *waqf* of certain other properties of which he claimed to be the sole owner and appointed his son *mutwalli* of those properties, also directed him to pay certain allowances to members of the family described in that deed. The mortgagors did not get any interest under the provisions of this deed of 1868.

In the year 1880 some members of the family brought a suit for accounts against Sir Abdul Gani and his son Nawab Ahsanulla. The relevant portions of the plaint are as follows:—"3. The said Alimullah (father of Sir Abdul Gani) prevailed upon the plaintiffs Nos. 20 and 21 and the ancestors of the remaining plaintiffs and of the co-sharer defendants and with their consent placed on the 27th *Baisakh* 1253 *B. S.* the said management in the hands of the defendant No. 1 and entrusted him with the management and preservation of all descriptions of properties of the plaintiffs and the co-sharer defendants; and thus the defendant No. 1 continued to do the management. . . . . 6. The document of 27th *Baisakh* 1253 *B. S.* propounded by defendants Nos. 1 and 2, is, as a matter of fact, not a *towliatnamah*. It is only an instrument by which the management of the estate was made over. At that time most of the members of the plaintiffs' family were minors and females. . . . . and even if he (defendant No. 1) has fraudulently inserted into it the terms "*mutwalli*" "*waqf*" (endowment) etc., without the knowledge (of the parties concerned) the said instrument cannot be regarded as a *towliatnamah* nor are the plaintiffs bound by it. Besides it was not executed according to the Regulation and the Muhammadan Law." In the schedules to the plaint the properties comprised in the deed of 1868 were also included as having been acquired with the income of the properties in the deed of 1846. The defendant No. 1 was Abdul Gani and defendant No. 2 was Ahsanulla. The question as to the validity of the *waqf* of 1846 was thus distinctly raised in the suit. Three of the mortgagors and the father of the four were plaintiffs in that suit.

The case was heard by the Subordinate Judge but before judgment was pronounced some friends of the family, including men in very high position, intervened and brought about a compromise. Two documents were executed, one dated August 26, 1881, signed by all the members of the family except Sir Abdul Gani and Nawab Ahsanulla and the other dated September 17, 1881, signed by Ahsanulla alone. The main controversy in these appeals is with regard to the effect of the document of August 26, 1881. By reason of the agreement made by the document of August 26, 1881, all the defendants in the suit other than Sir Abdul Gani and Nawab Ahsan-

(1) 69 Ind. Cas. 138; 49 I. A. 153 at p. 166; A. I. R. 1922 P. C. 107; 31 M. L. T. 79; 4 U. P. L. R. (P. C.) 70; 43 M. L. J. 385; 24 Bom. L. R. 1257; 49 C. 820; 27 C. W. N. 101; 21 A. L. J. 1; 37 C. L. J. 56 (P. C.).

ulla were transferred to the category of plaintiffs and they made an application to the Court for withdrawing the suit on the same day, reciting some of the provisions of the agreement and admitting the validity of the *waqfnama* of the 27th *Baisakh* 1253. The prayer in the application runs thus:—

"On these terms we beg to file this petition and pray that this suit be allowed to be withdrawn without any right of instituting a fresh suit on any causes of action which form the subject matter of this suit." The suit was thus withdrawn.

By a series of decisions from the year 1889 the Privy Council held that a *waqf* such as was sought to be made under the deeds of 1846 and 1868 was void under the Muhammadan Law. *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (2), *Abdul Gafur* v. *Nizam-ud-din* (3), *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur Chowdhuri* (4) and *Maulvi Saiyid Muhammad Munawwar* v. *Razia Bibi* (5). In January 1895, Sir Abdul Gani executed a *heba bil-ewaz* in favour of his son Ahsanulla and his heirs, of the properties included in the *waqfnama* of 1868, as he was advised that the *waqf* was invalid by reason of the decision of the Privy Council. In that deed, he stated that he was bound by the provisions of the agreement of August 26, 1881, and that the donees would hold the properties subject to the legal effect of that agreement.

Shortly afterwards Ahsanulla stopped payment of the allowances to some of the members of the family on which they brought a suit against him for their allowances in 1914, which was carried up to the Privy Council, and the argument before us has been mainly with regard to the effect of that decision.

One other fact need be mentioned. Subsequent to the decision of the Privy Council as to the invalidity of such *waqfs* Ahsanulla or his successor began to purchase or take leases of what was described as *maliki* interest, from various members of the family in the properties comprised in the deed of 1846. They thus acquired about 11-annas share of those properties. The shares of the mortgagors were not included in those transactions.

I shall now quote some of the principal terms of the agreement of August 26, 1881, which have been recited fully in the judgment of the Subordinate Judge. Clause 3. "The persons signing this memorandum admit that save as hereinafter provided neither they or any of them have or has any claim to or interest in any of the properties in the possession of Nawabs Abdul Gani and Ahsanulla or either of them or belonging to them or either of them and registered whether in their or either of their names or in the names of others. Clause 4. The persons signing this memorandum of agreement admit that the two deeds of 1253 and 1275 (1846 and 1868) are valid and binding deeds of *waqf*." Under cl. 5 it was admitted that properties constituted *waqf* by the deed of 1846 consisted of those described in Schedule A and those so constituted by the deed of 1868 consisted of the properties in Schedule B and no other properties were to be held as *waqf*. By this clause of the agreement 161 items of property were released from all claims of the plaintiffs in the suit of 1880. Clause 6 recited that Nawab Ahsanulla consented to pay certain allowances to members of the family who were placed in two groups in Schedules C and D of the memorandum. Those who were included in Schedule C were to get their allowances out of the properties in Schedule A which were included in the deed of 1846 and those placed in Schedule D were to get their allowances out of the income of properties in Schedule B which comprised the properties in the deed of 1868. For the purpose of the present appeals it is not necessary to recite any other terms of the agreement. The memorandum was registered and was signed amongst others by three of the mortgagors and the father of the fourth. Nawab Ahsanulla alone signed the agreement of September 17, 1881 by which he agreed to pay the allowances.

The defendant in this case is the successor-in interest of Nawab Sir Ahsanulla. His main defence was that the *waqf* of 1846 was valid and the allowances mentioned in the memorandum of agreement of 1881 were purely compassionate allowances and were not payable to the descendants of the signatories or their transferees,

(2) 17 I. A. 28; 17 C. 498; 5 Sar. P. C. J. 476; 8 Ind. Dec. (N. S.) 871 (P. C.).

(3) 19 I. A. 170; 17 B. 1; 6 Sar. P. C. J. 238; 9 Ind. Dec. (N. S.) 1 (P. C.).

(4) 22 I. A. 76; 22 C. 619; 6 Sar. P. C. J. 572; 11 Ind. Dec. (N. S.) 412 (P. C.).

(5) 32 I. A. 86; 9 C. W. N. 625; 2 A. L. J. 513; 2 C. L. J. 179; 27 A. 320; 15 M. L. J. 261; 8 Sar. P. C. J. 788 (P. C.).

It was also urged that the suits were barred by limitation. Various other questions were raised in the Court below, many of which were not urged before us. The Subordinate Judge dismissed the suits on the ground that by the two deeds of 1881 the title of the mortgagors to the disputed properties ceased save for the annuities referred to, and that the mortgagors had no title which they could mortgage or which could pass to the purchasers. He purported to base his decision on the judgment of the Privy Council in the case of *Solehman Quadir* v. *Salimullah Bahadur* (1) already referred to.

There is no question before us that the *waqfs* purported to have been created by the deeds of 1846 and 1868 are invalid. It has been so held by the Privy Council in the case already referred to. The main argument of the appellants is that the *waqfs* having been declared invalid no title to the property was conveyed to Ahsanulla by the document of August 26, 1881. The ultimate gift for *waqf* (or, as it was put, the gift to God) having failed the title remained in the grantors and the effect of the document is that it merely gave authority to Ahsanulla for the management of the properties for and on behalf of the grantors. This being a deed of management could not operate as an assignment of the right of the grantors in perpetuity but it was a personal agreement which is not binding on their assignees. The plaintiffs, therefore, are entitled to recover possession of the shares of the mortgagors by virtue of their execution purchase.

Even if I were inclined to accept that argument as sound, which I am not, I do not think I would be free to give effect to it, having regard to the decision of the Privy Council. What their Lordships say with regard to the agreements is this:—"The principal purpose of those agreements was to secure to living and named persons certain fixed allowances which were to become payable immediately and were to be continued to their heirs. It is true that the agreements purported to confirm the *waqfnamas*, and that the allowances were made payable by the hand of the *mutwalli* of the *waqfnamas* out of the income accruing to him from the properties thereby settled; but the allowances were intended to take effect as immediate and heritable charges on such incomes, taking priority of all the limitations contained in the settlement, and they may, therefore, be supported, although those limitations fail. The direction to pay the allowances 'out of the income' of the settled properties, which appears in both agreements, shows an intention to create a charge, and this intention was not frustrated by the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements.....By those agreements the members of the family other than Sir Abdul Gani and his son Ahsanulla surrendered their claims to property of considerable value and stayed their suit in consideration of a firm contract securing to them annuities to an amount exceeding Rs. 1,30,000 and continuing such annuities to their heirs:" [see *Solehman Quadir* v. *Salimullah Bahadur* (1).] It is, however, contended on behalf of the appellants that although the language used by their Lordships is wide enough it was used with reference to the facts of the case. It is urged that in that case the plaintiffs did not seek for possession of the property but only to recover their allowances, the right to which was denied by Ahsanulla. The plaintiffs there were included among the co-sharers placed in Schedule D and the properties out of the income of which they had to get their allowances were comprised in the deed of 1868 and their right to such allowances was recognised in the *heba-bil-ewaz* of Sir Abdul Gani of 1895. When they claimed their allowances the right to which was denied, their Lordships had only to consider the question whether they were entitled to recover their allowances. The decision of their Lordships should not be extended so as to construe it to have laid down that the title to the properties passed to the grantee by those agreements. Reliance is placed in support of this argument to the observation of Lord Halsbury, L. C., in *Quinn* v. *Leathem* (6) that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. Bearing this in mind, as also the observation of Jessel,

(6) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 6 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749.

M. R., in *In re Hallett's Estate* (7) that the only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him, can it be said that we can disregard the observations of the Judicial Committee above cited in deciding this case? The point argued is with regard to the effect of the agreements of 1881. The effect of the deeds was decided to be settlement of properties on the grantee reserving a charge for allowances for the grantors and their heirs on the properties in question. I think that this question as to the effect of the agreements having been determined by the Judicial Committee it is not open to further consideration by this Court. The construction of the documents did not depend upon the facts of the case. The effect of a document is a matter of construction and is a question of law and this question of law having been decided in a certain way by the highest tribunal is as much binding on us as the other decision in that case that the *waqfs* of 1846 and 1868 are invalid. Further, if the question were open to us I do not think that language could be plainer than what was used in cl. 3 of the agreement, to extinguish the title to the properties of the persons who signed the document of August 26, 1881, subject to the reservation for allowances in cl. 6. If those persons executed the document under any mistake or misapprehension they might possibly ask for its cancellation, but that step was never taken. There is no reason to suppose that the relinquishment of title on certain considerations should be invalid because of "the ineffectual attempt to keep alive the subsequent and invalid limitations of the settlements." In my opinion, therefore, the claim of the appellants for possession of the properties must fail. It was also urged that the defendants' predecessors themselves acknowledged that the co-sharers had subsisting title to the properties and they acquired the interests of other co-sharers to the extent of 11-annas and we should also put the same construction on the documents. But it is not urged that there is any estoppel, and I think we should give effect to the true construction of the documents.

In my judgment there is another ground on which the plaintiffs' claim for possession should fail. I have pointed out that the validity of the *waqf* of 1846 was directly questioned by the mortgagors in the suit of 1880 and they withdrew their suit without any permission to bring a fresh suit. They are precluded from bringing a fresh suit in respect of the same subject-matter under O. XXIII, r. 1 (3) of the Civil Procedure Code which is practically the same in this respect as s. 97 of Act VIII of 1859, the Code then in force. The plaintiffs as their assignees are under the same disability. The fact that the *waqfs* have been decided to be invalid by the Judicial Committee does not help the plaintiffs. The result of that decision is that the defendant will not be able to set up the validity of the *waqf* as against third persons and the property in his hands will be considered as his personal property and liable to attachment and sale in execution of decrees against the defendant subject to the charges. But so far as the mortgagors are concerned and their assignees they are bound by the effect of the withdrawal of their suit of 1880 without permission to bring a fresh suit on the same matter.

On behalf of the respondent it was urged that the suits were barred by limitation. The Subordinate Judge decided that question against the defendant. If there had been no suit in 1880 and the agreements of 1881, I should have held that the right of the mortgagors to the property was not barred on the authority of *Maulvi Saiyid Muhammad Munawwar* v. *Razia Bibi* (5) which affirmed the decision of the Allahabad High Court reported as *Muhammad Munawar Ali* v. *Rasulan Bibi* (8) as the Subordinate Judge has held. But as I hold that the plaintiffs have no right to recovery of possession, the question of limitation becomes immaterial.

The next question that is urged for the appellants is that if the plaintiffs are not entitled to recover possession of the properties they are at any rate entitled to enforce the charge for the allowances payable to the mortgagors as they are purchasers of the right, title and interest of the mortgagors at the execution sale. The respondent meets this contention on the grounds (1) that no charge was claimed in the plaint and no issue was raised on the question, (2) the allowances are not permanently fixed but liable to fluctuation and may

(7) (1880) 13 Ch. D. 696 at p. 712; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

(8) 21 A. 329; A. W. N. (1899) 106; 9 Ind. Dec. (N. S.) 919.

even be discontinued under certain circumstances. With regard to the first objection it seems to me that because the plaintiffs asked for too much we cannot refuse to grant them a decree for less if they are found to be entitled to it. The claim to enforce a charge on the property does not rest upon any new facts but upon a consideration of what the plaintiffs got by the purchase of the right, title and interest of the mortgagors. The mortgagors professed to mortgage their interest as owners of the property. It is found that they had merely a charge on the property for allowances and that they were not full owners. The charge is an interest in immoveable property and transferable as such. The plaintiffs by their purchase stepped into the shoes of the mortgagors with regard to the property. They can, therefore, claim a right in the charge created on the properties in favour of their mortgagors if the greater claim is not allowed. The fact of their not placing this question before the Court below may be a matter of costs. With regard to the second objection I need only point out from the judgment of the Privy Council that the provision contained in the agreements with regard to the distribution of the annuity and proportions to be determined by the *punchayet* may be disregarded. [See *Solahman Quadir* v. *Salimullah Bahadur* (1)]. It seems to me that there is no valid answer to the claim of the plaintiffs to the annuities which were payable to their mortgagors and charged on the properties in question.

No other point was argued on behalf of the appellants before us. But the respondent urged that the suits were defective for want of parties. I do not think it is so. It was also urged on behalf of the respondent that the shares of the mortgagors were not as found by the Subordinate Judge, but nothing has been said which shows that that finding is erroneous. The respondent also relied on the case of *Mahomed Musa* v. *Aghore Kumar Ganguli* (9) and certain other cases. I do not see what application the case of Musa has to this case. There is no formal defect in the agreement which was a registered instrument.

I am of opinion that the dismissal of the suits would defeat the justice of the case.

(9) 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.).

I would, therefore, modify the decree of the Subordinate Judge thus: The plaintiffs' claim for possession of the property is dismissed. It is declared that the plaintiffs are entitled to the allowances charged on 17 *gandas* 6 *dantis* 4 *jobs* 34½ *renus* share of the properties described in the plaint which were payable to Syed Karimulla, Khajeh Abdul Rashid and Khajeh Abdul Khalek *alias* Bechu Mia and their heirs and legal representatives and the legal representatives of Hola Mia except the person named Hafeza Bibi against whom the mortgage suit had abated under the agreements dated August 26, 1881, and September 17, 1881, the amount of such allowances being left undetermined in these suits.

As to costs—I think the order of the Subordinate Judge should be left undisturbed, but in this Court as both the parties placed their case too high there should be no order as to costs to either party.

Panton, J.—I agree.

Z. K. *Decree modified.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 564 OF 1920.

December 6, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Agha Haidar.

MUHAMMAD HASSAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

INAYAT HUSSAIN AND ANOTHER—PLAINTIFFS AND MUHAMMAD HUSSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 11—Appeal—Death of appellant—Legal representatives, all, not brought on record, effect of—Abatement.

When a party dies during the pendency of a suit or an appeal, then, in order that the suit or appeal may proceed it is necessary that his legal representatives should be brought on the record within the prescribed period of limitation, and the expression 'legal representatives', in such a case, means and includes all those persons whose presence on the record is necessary in order to completely represent the estate of the deceased. Where any of such persons is not brought on the record, the suit or appeal, as the case may be, remains imperfectly constituted and cannot proceed. [p. 419, col. 2; p. 420, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Delhi, dated the 28th November, 1919.

Messrs. *Niaz Muhammad* and *Umar Bakhsh*, for the Appellants.

Messrs. *Oertel* and *Muhammad Amin*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by a lady *Musammat* Amir Begam, in which she prayed that a declaratory decree may be passed in her favour against the defendants and she may be held entitled to 16 *siham* out of a total of 96 *siham* in the income accruing from the Dargah Hazrat Syed Hassan Rasual Numa situated in *Mouza* Banskoli in the District of Delhi. The principal defendant was one Ahmad Hassan who contested the suit. There were also other defendants among whom we need mention only Nazir Husain. Under an order dated the 6th March, 1918, Nazir Husain was transposed from the array of the defendants and was made a plaintiff in the suit. Ahmad Hassan in his written statement traversed the pleas contained in the plaint and further pleaded that the plaintiff and her ancestors were not entitled to the income of the Dargah and that her suit was barred under the provisions of s. 11 of the Civil Procedure Code. He also pleaded that the income of the Dargah was *waqf* and, therefore, incapable of enjoyment in separate shares. There was the further plea that the combined office of *sajjadanashin* and *mutwalli* had all along devolved upon the eldest male descendant of the *mutwalli* and that the defendant was a *mutwalli* and *sajjadanashin* of the Dargah. A plea as to the jurisdiction of the Court was also taken. A number of issues were framed by the learned Senior Subordinate Judge and they were all decided against the defendant and the suit of the plaintiffs was decreed in the following terms:—"It is ordered and hereby declared that the plaintiffs have a right to share in the offerings at the Dargah Hazrat Sayed Hassan Rasul Numa, their shares being respectively 16/96 and $18\frac{3}{4}/96$," that is to say, the share of *Musammat* Amir Begam was 16/96 and that of Nazir Husain was $18\frac{3}{4}/96$.

It appears that Ahmad Hassan, the contesting defendant died sometime after the decree of the trial Court was passed. An appeal was preferred by his son Muhammad Hassan and his nephew Ali Hassan. Ahmad Hassan, however, had a daughter named Saida Begam, and we find that she was not impleaded in the appeal. *Musammat* Amir Begam, the plaintiff-respondent, died during the pendency of the appeal, and the appellants' Counsel says that he put in an application for the substitution of the names of her legal representatives on the 23rd October, 1920. We do not know when this lady died, and the application mentioned by the appellants' learned Counsel in his arguments could not be traced on the file. He, however, filed in the office on the 25th November, 1926, a document which purports to be a duplicate copy of the said application dated the 23rd October, 1920. This copy is not accompanied by any affidavit, and we cannot accept it at this stage several years after the death of *Musammat* Amir Begum. We find, however, the name of Inayat Hussain, one of the legal representatives of *Musammat* Amir Begum, in the title of the present appeal, but as stated above we do not know when and under what circumstances the name of Inayat Hussain was brought upon the record. Under these circumstances we hold that so far as *Musammat* Amir Begum was concerned the present appeal abates. The result is that the decree of the Court below in favour of *Musammat* Amir Begum in respect of 16/96 share stands and has become final.

Now remains the question as to whether or not the present appeal abates against Nazir Husain, plaintiff-respondent, having regard to the fact that only two out of three legal representatives of Ahmad Hassan, defendant in the Court below, are before the Court as appellants. We have to look into the provisions of O. XXII, r. 3 of the Civil Procedure Code read with r. 11 of the same Order. Now, when a party dies, then, in order that the suit or the appeal may proceed it is necessary that his legal representatives should be brought on the record within the prescribed period of limitation. The question is about the meaning of the expression 'legal representative'. These words mean the representation before the Court of the plenary interest of the deceased party. Sometimes that interest may be represented by a single individual, but it may also be represented by number of persons as the case may be. But there should be a complete representation of the interests of the deceased person whether through a single individual or through a number of persons; so that there cannot be a partial representation of that interest. In other words, the expression 'legal representative' means and includes one person as well as several persons according as they represent the whole interest of the deceased person. This view is supported by at least three reported

cases of the Allahabad High Court, namely, *Ghamandi Lal* v. *Amir Begam* (1), *Haidar Husain* v. *Abdul Ahad* (2) and *Fazal Muhammad Khan* v. *Habibullah Khan* (3). It may also be noted that this view is not opposed to the law as laid down in the cases of *Abdul Rahman* v. *Shahab-ud din* (4) and *Mallapragadu* v. *Lingam Viraragava Rao* (5).

In this view of the case we find that the full and complete interest of Ahmad Hassan deceased was not represented in the appeal before the Court in that the name of *Musammat* Saida Begum, his daughter, is not included in the array of appellants. If she was unwilling to appear as a party appellant it was open to the two legal representatives, who appear as appellants, to implead her as a respondent. This has not been done.

The result is that one of the legal representatives not having been impleaded and the whole interest of Ahmad Hassan not having been represented by the two appellants before this Court the whole appeal abates against Nazir Husain also. We accordingly dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 16 A. 211; A. W. N. (1894) 22; 8 Ind. Dec. (N. S.) 136.
(2) 30 A. 117; 5 A. L. J. 62; A. W. N. (1908) 41; 3 M. L. T. 207.
(3) 20 Ind. Cas. 366; 11 A. L. J. 719.
(4) 55 Ind. Cas. 883; 1 L. 481; 85 P. W. R. 1920.
(5) 5 Ind. Cas. 514; 7 M. L. T. 43; 20 M. L. J. 398.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 884 OF 1924.

July 5, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Cammiade.

BHAGABAN CHANDRA KUNDU - PLAINTIFF—APPELLANT

versus

TARAK CHANDRA BASAK AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Suit by mortgagee—Part owner of equity of redemption not made party—Sale, effect of—Rights of mortgagee-auction-purchaser and part owner not impleaded—Mortgagee obtaining possession—Ejectment suit, whether lies—Redemption.

The purchaser of a portion of mortgaged property from the mortgagor subsequent to the mortgage who was not made a party to a suit on the mortgage but who has been ousted from the possession of the mortgaged property by the purchaser in execution of the mortgage-decree is not entitled to recover possession on the basis that the execution purchaser is a trespasser. [p. 421, col. 1.]

The general principle in such cases is that the absent party has a right to redeem and to recover possession on redemption of the mortgage but cannot sue in ejectment. [p. 421, col. 2.]

Kalu Sharif v. *Abhoy Charan Karmokar* (3) and *Umes Chunder Sircar* v. *Zahur Fatima* (4), followed.

Grish Chunder Mondul v. *Iswar Chunder Rai* (1) and *Habibullah* v. *Jugdeo Singh* (2), not followed.

Appeal with cross-objection against the decree of the Subordinate Judge, Bogra, dated the 17th January, 1924, affirming that of the Munsif, Third Court, Bogra, dated the 22nd June, 1923.

Babu *Manindra Nath Roy*, for the Appellant.

Babu *Jatindra Nath Sanyal*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff which arises out of a suit by the plaintiff for recovery of possession of certain lands. His case shortly stated may be summed up in this way. In 1308 *B. S.* defendants Nos. 4 to 8 gave the land in dispute with other lands in usufructuary mortgage to the plaintiff for 15 years, which was to remain in force till the end of 1322 *B. S.* In the year 1317 *B. S.* those defendants gave a second mortgage of those lands to defendant No. 3 who was their landlord. The mortgagors after the execution of the usufructuary mortgage in favour of the plaintiff remained in possession of the property as lessees under the plaintiff. The mortgagors defaulted in payment of the rent due to the plaintiff who obtained some rent-decrees as against them. In the year 1321 *B. S.* the plaintiff purchased $4\frac{3}{4}$ *bighas* out of the mortgaged lands in satisfaction of his rent-decrees and for some outstanding rent due to him for the previous period. In 1326 *B. S.* defendant No. 3 brought a suit on his mortgage but in that suit he did not implead the plaintiff as party defendant. Defendant No. 3 obtained a mortgage-decree and purchased the entire 9 *bighas* of land himself in execution of that decree. In the year 1328 the defendants Nos. 1 and 2 dispossessed the plaintiff from the suit land, as lessees of defendant No. 3. The plaintiff now seeks to recover possession of the land on the ground that he was not bound by the mortgage-decree or the sale thereunder and those defendants had no right to dispossess him. In the Court of first instance the plaintiff was asked whether he was willing to redeem the defendant No. 3. He declined to do so and it seems that

in the lower Appellate Court he also persisted in retaining that position. In this Court also the learned Vakil for the appellant, who has argued his case very carefully, has informed us that his client is not willing to redeem the defendant No. 3. The trial Court made a decree which is somewhat difficult to understand. He made a decree in favour of the plaintiff directing the defendant No. 3 to redeem the plaintiff for what is said to be the unexpired term of the usufructuary mortgage. From that decree the plaintiff appealed and the defendants preferred cross-objections. The learned Subordinate Judge dismissed the appeal of the plaintiff and also the cross-objections and affirmed the decision of the Munsif. The plaintiff appeals to this Court and the position taken on his behalf is that he was entitled to the present possession of the property and having been wrongfully dispossessed by the principal defendants, he was entitled to be put into possession. The defendants have also advanced cross-objections against the decree of the Subordinate Judge and their position is that the plaintiff had no subsisting right to recover possession and his suit should be dismissed.

We have now to consider whether the plaintiff, who repudiates his liability to redeem the defendants, is entitled to recover possession on the strength of his purchase of the equity of redemption in a portion of the property in the year 1321 *B. S.* The plaintiff denied the validity or the *bona fides* of the mortgage under which defendant No. 3 claimed. But it has been found by both the Courts below that the transaction is valid and binding on the parties to it. The question then is whether a purchaser of a portion of the mortgaged property from the mortgagor subsequent to the mortgage, who was not made a party to the mortgage-suit but who has been ousted from the possession of the mortgaged property by the purchaser in execution of the mortgage-decree, is entitled to recover possession on the basis that the execution purchaser is a trespasser. There has been some divergence of opinion in this Court on the question. The contention of the learned Vakil for the appellant finds support in two cases, *Grish Chunder Mondul* v. *Iswar Chunder Rai* and *Habibullah* v. *Jugdeo Singh* (2). Those cases, however, are not in accordance with the previous decisions of this Court and have been doubted subsequently. The cases taking the contrary view are numerous and many of them are referred to in the case of *Kalu Sharif* v. *Abhoy Charan Karmokar* (3) in which the two cases mentioned above were not followed. Certain other cases have been cited before us on behalf of the appellant, but those do not directly touch the question as in those cases the purchaser in execution of a mortgage-decree obtained in the absence of a necessary party sued in ejectment the absent party who was in possession. It was argued that the same reasoning on which those cases were decided may be applied to the present case. But the position of a person in possession whose right to redeem is subsisting and unaffected by a decree when sued in ejectment as a trespasser by a mortgagee or a purchaser in execution of an imperfect decree, is not the same as that of the plaintiff in this case who sues in ejectment. The general principle in such cases is that the absent party has a right to redeem, and to recover possession on redemption of the mortgage, but cannot sue in ejectment. The true principle is thus stated in Jones on Mortgages, s. 1395: "When a party in interest other than the owner of the equity of redemption is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have a sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption." This principle has been followed in various cases, and is also supported by the decision of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima* (4), where an absent party, who was the plaintiff in the suit, was given the right to redeem the purchaser in execution of a mortgage-decree in which the plaintiff was not made a party although he had an interest in the equity of redemption. In our opinion, therefore, the plaint-

(1) 4 C. W. N. 452.
(2) 6 C. L. J. 609.
(3) 62 Ind. Cas. 445; 25 C. W. N. 253.
(4) 17 I. A. 201; 18 C. 164; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. s.) 110 (P. C.).

iff is not entitled to get a decree in ejectment as against the defendants on the basis that he is not bound to redeem the mortgage of defendant No. 3. As the plaintiff has not asked for redemption and in fact he has taken the attitude that he is not bound to redeem the defendant, his suit for ejectment must fail.

With regard to the cross-objection it is difficult to understand on what ground the defendant No. 3 was asked to redeem the plaintiff. The plaintiff's prior mortgage expired by efflux of time in the year 1322 *B. S.* The plaintiff was only entitled to remain in possession of the 4 and ¾ *bighas* of the property by virtue of his purchase in 1321 *B. S.* of the interest of the mortgagor for the rents due to him and after 1322 *B. S.* he had no other right in the land. The principal defendants took possession in 1328 *B. S.* when there was no mortgage in favour of the plaintiff which was subsisting and which they were bound to redeem. The cross-objection must, therefore, succeed.

The result is that the plaintiff's suit must be dismissed with costs in all the Courts.

A. N. A. *Appeal dismissed: Cross-objection allowed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1283 OF 1922.
December 13, 1926.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Agha Haidar.

RADHA KISHAN KAUL—DEFENDANT—APPELLANT

versus

SHANKAR DAS—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 73—Breach of contract—Agreement to sell immoveable property—Benami *transaction—Document, formal, to be drawn up, effect of—Completed contract—Further negotiations, effect of—Hindu Law—Contract to sell by manager—Damages, liability for—Damages, measure of.*

It is a common practice in this country that people, while paying money from their own pockets, purchase property for various reasons, in the names of the members of their families. Such transactions are well-known as *benami* transactions and their validity is recognized by the Courts. Where, therefore, a person enters into an agreement for the purchase of immoveable property in the name of his wife, he is not debarred from maintaining a suit for specific performance of the agreement or for damages for its breach by reasons of the fact that the property was intended to be conveyed in the name of his wife and not of himself. [p. 423, col.1.]

A contract may be a completed and binding contract although a document in which its terms are to be embodied is to be executed and registered later on. The real test in such cases is the intention of the parties as to whether or not there is to be no binding contract till the document is executed or whether the document is merely to commemorate in the manner required by law the terms of a bargain already completed. [p. 423, col. 2.]

Where during the course of a correspondence which passes between the parties a certain stage is reached when they are *ad idem*, there is a completed contract between them and the mere fact that there are subsequent negotiations between them cannot be relied upon to defeat a claim for specific performance based upon the completed contract. In other words, when once it is shown that there is a completed contract, it is impossible that further negotiations between the parties can, without the consent of both, get rid of what may be called the crystallised contract already arrived at and contained in the letters which have passed between the parties. [p. 424, col. 1.]

A manager of a joint Hindu family who has agreed to sell immoveable property belonging to himself and the other members of the family is personally liable under s. 73 of the Contract Act, for damages for failure to perform the contract, when it is found that the contract is not binding upon the other members of the family. [p. 424, col. 2.]

The measure of damages in a case of a breach of a contract to sell immoveable property is the difference between the price agreed upon between the parties and the price at which the defendant actually sold the property to a third person instead of selling it to the plaintiff. [p. 425, col. 1.]

First appeal from the decree of the Subordinate Judge, First Class, Amritsar, dated the 1st March, 1922.

Pandit *Sheo Narain*, R. B., and Mr. *Kishan Dial*, for the Appellant.

Lala *Badri Das*, R. B. and Messrs. *Gobind Ram Khanna* and *Jamna Das*, for Mr. *Gobind Ram*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for damages for the breach of a contract to sell a certain house situate in Amritsar. The plaintiff came into Court on the allegation that, as a result of the correspondence that passed between the 19th July, 1916, and the 23rd February, 1917, between the parties, the defendant had agreed to sell his house at Amritsar to the plaintiff for a sum of Rs. 9,000 and that in violation of the terms of that contract, the defendant eventually agreed to sell the house to one Gokal Chand on the 4th March, 1917, for Rs. 15,500 and ultimately on the 21st March, 1917, executed and registered a sale-deed in Gokal Chand's favour. The plaintiff, therefore, prays that a decree may be passed in his favour for damages for the breach of the contract

for a sum of Rs. 6,500 being the difference between the price at which the defendant had agreed to sell the house to him and the price for which he ultimately sold the house to Gokal Chand. The defendant pleaded that the plaintiff had no right to bring the suit inasmuch as the sale had been negotiated by him for and on behalf of his wife. It was further pleaded that there was no completed agreement between the parties which could give rise to a suit for breach of contract, and finally that even if there was a completed contract it was broken by the plaintiff himself and not by the defendant. The learned Judge of the Court below decreed the plaintiff's suit in full, holding that the defendant had agreed to sell the house to the plaintiff and that there was a completed contract which is contained in P-4, dated the 11th December, 1916, and that it was the defendant who had been guilty of breach of contract. He also refers to P-5 and P-6 as further showing that the contract between the parties was complete.

The defendant has come up in appeal and his learned Counsel argued his case at a very considerable length. He repeated the plea which had been raised on behalf of the defendant in the Court below that the plaintiff was not competent to bring the suit inasmuch as the real agreement, if any, was between the plaintiff's wife and the defendant. There is no force in this argument. It is a common practice in this country that people, while paying money from their own pockets, purchase property for various reasons in the name of the members of their families. Such transactions are well-known as *benami* transactions and their validity has been recognised by the highest Courts of Justice.

The learned Counsel for the appellant has strongly argued that the letter P-4 dated the 11th December, 1916, could not be treated as the acceptance by the defendant of the plaintiff's offer, in that this letter itself mentions that the defendant will have to consult the other members of his family in order to obtain their consent and that, furthermore, there is a reference to a draft of the sale-deed which was to be prepared later on by a certain Vakil of Amritsar and that the document was to be registered at a later date. It is also argued that the plaintiff in a subsequent letter and draft which accompanied it referred to certain indemnity clauses which he wished to incorporate into the sale-deed and that there was also a certain dispute as to who shall pay the costs of the stamp, etc. Now, as regards the argument that the consent of the other members of the defendant's family had not been obtained and that, therefore, there was no contract, we may point out that throughout the correspondence which passed between the parties the defendant never mentioned that any member of his family had any objection to the sale. As to the argument that the document had to be executed and registered at a subsequent date and that before this there was no binding contract we have the authority of *Bijoya Kanta Lahiry Chowdhury* v. *Kailash Chandra Bhowmik* (1) which lays down that the real test in such cases is the intention of the parties as to whether or not there is to be no binding contract till the document is executed or whether the document is merely to commemorate in the manner required by law the terms of a bargain already completed. A contract may be a completed and binding contract although a document in which its terms are to be embodied is to be executed and registered later on. On a perusal of the record we do not find any such intention on the part of the parties that the completion of the contract depended upon the execution and registration of the sale-deed at a subsequent date. There is, therefore, no force in this contention.

But a more serious contention which was raised on behalf of the appellant was that the correspondence as a whole should be considered and that if, in spite of the fact that there were certain letters which can be pointed out as the repositories of the contract, there were subsequent communications which passed between the parties about other matters connected with it, the contract cannot be taken to have become a completed contract. There are observations in three English cases: *Hussey* v. *Horne Payne* (2), *Bristol Aerated Bread Co.* v *Maggs* (3) and *Rummens* v. *Robins* (4) which seem to support the contention of the appellant to a certain extent. The case reported in *Bristol Aerated Bread Co.* v. *Maggs* (3) explains the law as laid down in *Hussey* v.

(1) 52 Ind. Cas. 575; 46 C. 771; 23 C. W. N. 563.

(2) (1879) 4 A. C. 311; 48 L. J. Ch. 846; 41 L. T. 1; 27 W. R. 585.

(3) (1890) 44 Ch. D. 616; 59 L. J. Ch. 472; 62 L. T. 416; 38 W. R. 393.

(4) (1865) 3 De G. J. & S. 88; 14 L. T. 717; 11 Jur. (N. S.) 631; 13 W. R. 979; 46 E. R. 571.

Horne Payne (2). It says that although two letters standing alone might be evidence of a sufficient contract, yet a negotiation for an important term of purchase and sale carried on afterwards is enough to show that the contract was not complete, and that the parties were really in the stage of negotiations. But we find that in *Bellamy* v. *Debenham* (5) North, J., has adversely criticised the law as laid down in these earlier cases. The learned Judge considers that *Hussey* v. *Horne Payne* (2) and *Bristol Aerated Bread Co.* v. *Maggs* (3) went too far. He held that when during the course of correspondence which passed between the parties a certain stage was reached when they were *ad idem* there was a completed contract between them and the mere fact of there being subsequent negotiations cannot be relied upon to defeat the claim for specific performance. In other words, "when once it is shown that there is a completed contract it is impossible that further negotiations between the parties can, without the consent of both, get rid of what may be called the crystallised contract already arrived at and contained in the letters." It may be noted here that this case went up in appeal and the judgment of North, J., was affirmed although on a different point. But a case came up before the Court of Appeal, *Perry* v. *Suffields* (6). In this case which was an appeal from the judgment of Sargant, J., their Lordships of the Court of Appeal accepted and approved of the statement of law enunciated by North, J., and they also agreed with him in his criticism of the two earlier cases, *Hussey* v. *Horne Payne* (2) and *Bristol Aerated Bread Co.* v. *Maggs* (3). Their Lordships held that when once it is shown that there is a completed contract further negotiations between the parties cannot, without the consent of the both, get rid of the contract already completed. Subsequent negotiations first commenced on new points after a completed contract had been arrived at and signed cannot be regarded as constituting part of the negotiations going on at the time when it was signed.

Applying the principle thus laid down by these later authorities we hold that there was a completed contract in the letter P-4 and subsequently repeated in P-5 and P-6. The fact that the defendant wanted to graft some other terms upon the original contract in order to secure his position would not have the effect of wiping out the contract itself. We also find that the defendant did not in so many words decline to accept these terms which were subsequently sought to be introduced by the plaintiff and, furthermore, that the plaintiff himself abandoned these terms and did not insist upon them.

A further argument was also put forward that the plaintiff was guilty of breach in that he was not in a position to perform his part of the contract and had not ready money to pay the price. There is no force in this argument. We have the evidence on behalf of the plaintiff that in order to pay the price of the sale of the house in dispute the plaintiff had shown his earnestness by selling some of his own property and depositing the proceeds in a Bank in his floating account, so that the plaintiff had done all that he was expected to do in order to show his readiness to carry out on his part the terms of the contract.

It was argued on behalf of the defendant-appellant that there was other members of the joint family interested in this property and, therefore, the plaintiff could not ask the defendant to transfer the house to him and as the defendant could not convey the house to the plaintiff so the plaintiff cannot maintain this suit for damages. This argument has no force. It was the plaintiff's lookout if he was prepared to be satisfied with what may be characterised as a defective title. The sale-deed had to be completed according to the terms of the contract by the defendant and it was not open to the defendant to commit the breach on the pretext that there were other persons interested in it. We have the authority of the Full Bench of the Madras High Court in *Adikesavan Naidu* v. *Gurunath Chetti* (7) that a Manager of a joint Hindu family who had agreed to sell immoveable property belonging to himself and the minor members of the family was personally liable under s. 73 of the Indian Contract Act for damages for failure to perform the contract when it was found that it was not binding on the minors. In this view the defendant cannot possibly seek the protection of the Hindu Law relating to co-parcenary body in order to defeat the plaintiff's claim.

(5) (1890) 45 Ch. D. 481 at p. 488; 60 L. J. Ch. 166; 63 L. T. 220; 39 W. R. 257.

(6) (1916) 2 Ch. 187; 85 L. J. Ch. 460; 115 L. T. 4; 60 S. J. 494.

(7) 39 Ind. Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 425; 22 M. L. T. 300.

We may here point out that, as a matter of fact, in the sale-deed actually executed by the defendant in favour of Gokal Chand on the 21st March, 1917, the solitary name of Pandit Radha Kishan Kaul, defendant, appears as the vendor. This is borne out by the evidence of Gokal Chand himself, the purchaser from the defendant.

Some argument was addressed to us assailing the principle on which the Court below assessed damages. We think that the principle laid down in *Nabin Chandra Saha Pramanik* v. *Krishna Baroni Dassee* (8) and several other cases is perfectly correct and the measure of damages in a case like the present is the difference between the price Rs. 9,000 agreed upon between the parties (*vide* P-4) and the price at which the defendant actually sold the house to Gokal Chand on the 21st March, 1917. On a perusal of the whole record we have come to the conclusion that it was the defendant who was guilty of the breach of contract. He received the offer of a larger sum of money from Gokal Chand and succumbed to the temptation with the result that he broke his contract with the plaintiff.

We, therefore, affirm the decree of the Court below and dismiss the defendant's appeal with costs.

Z. K. *Appeal dismissed.*

(8) 9 Ind. Cas. 525; 38 C. 458; 15 C. W. N. 420.

OUDH CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 76 OF 1925.

AND

CIVIL REVISION No. 19 OF 1926.

April 30, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza

MUHAMMAD HADI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SADIQ HUSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLII, r. 1—Review—Admission of review on particular ground—Decision on other grounds, legality of.

Even though a Court determining a review is not necessarily confined to the grounds upon which the review is granted, yet, where a review is granted upon one ground it cannot be argued and decided upon a totally distinct and unconnected ground in a case where the actual officer who hears the review would have no authority to admit the review upon the latter ground. [p. 426, col. 1.]

Appeal against an order of the Second Additional Subordinate Judge, Lucknow, dated the 15th September, 1925.

Messrs. *Ali Zaheer* and *Wasi Hasan*, for the Appellants.

Mr. *Harkaran Nath Misra*, for the Respondents.

JUDGMENT.—The circumstances out of which this appeal and revision have arisen are these. A suit was instituted before the Munsif which was dismissed. It was appealed to Mr. Saiyed Ali Hamid who decreed the appeal on the 30th April, 1925. He gave a declaratory relief for the whole claim. The grant of the whole amount claimed was clearly a clerical error, for upon the showing of the appellants themselves they were not entitled to more than 19-25ths. On the 9th May, 1925, the defendant Sadiq Husain filed an application for a review clearly stating in that application that he wished this clerical error corrected, and Mr. Saiyed Ali Hamid ordered notice to issue under the provisions of O. XLVII, r. 4 (2), of the Code of Civil Procedure. Now, it is clear upon the grounds taken in the application of the 9th May, 1925, that Mr. Saiyed Ali Hamid was only asked to review his order on the ground of there being a clerical error and he issued notice to show cause why the review should not be granted on this ground alone. There was no suggestion made in the original application of any desire to obtain a review on the merits. Mr. Saiyed Ali Hamid was then transferred. If he had not already issued notice his successor could have issued notice on the ground of the existence of a clerical error, but his successor was not authorised to admit an application for review upon the merits. After Mr. Saiyed Ali Hamid had left, a second application was put in on the 14th May, 1925, in which Sadiq Husain endeavoured to challenge the order on the merits. It is to be noted that Mr. Saiyed Ali Hamid had decided the appeal on a question of fact and that thus no second appeal lay. If Sadiq Husain was permitted to get a re hearing on a question of fact he had an opportunity of getting Mr. Saiyed Ali Hamid's decision reversed with the additional advantage that, as the question was question of fact, no second appeal could lie. The learned Subordinate Judge who has tried the appeal considered him-

self justified in re-trying the case upon the merits and arrived at a different conclusion from the conclusion arrived at by Mr. Saiyed Ali Hamid. We are of opinion that he had no justification in going into the question on the merits in the peculiar circumstances of the case. There, no doubt, is authority for the proposition that a Court determining a review is not necessarily confined to the grounds upon which the review is being granted. It is only reasonable that considerable latitude should be allowed in the matter, but where, as here, a review is granted upon one ground, and then has been argued upon a totally distinct and unconnected ground, in a case where the actual officer, who heard the review, would not have authority to admit the review upon the ground upon which it was argued and decided, we consider that the course adopted cannot be supported. And, we go further and consider that the learned Subordinate Judge who decided the review acted without jurisdiction in the matter, and that he had no jurisdiction to determine the case in the way in which he determined it. In our opinion no miscellaneous appeal lies and we dismiss Miscellaneous Appeal No. 76 of 1925, but we consider that we are justified in taking action under our revisional power, and in Civil Revision No. 19 of 1926 we alter the decree so as to make it a declaration in respect of 19-25ths of the property in other words, we allow the grounds which were taken in the application for review of the 9th May, 1925. In view of the circumstances of the case we direct Sadiq Husain to pay his own costs and those of the other side both in the proceedings of this Court and the proceedings of the Court of the Subordinate Judge.

A. N. A. *Appeal dismissed; Revision accepted.*

LAHORE HIGH COURT.

CIVIL APPEAL No. 1619 OF 1926.

November 1, 1926.

Present:—Mr. Justice Addison.

Lala ISHAR DAS—PLAINTIFF—APPELLANT

versus

MUNICIPAL COMMITTEE NOTIFIED AREA—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 61, 62, 242—Punjab Government Notification No. 27909 of 1922—Imposition of taxes described in s. 61 (3)—Sanction of Governor-General in Council, necessity of—Presumption under s. 62 (9), whether applies to Notified Areas.

Sanction of the Governor-General in Council is an indispensable preliminary condition for the imposition of taxes described in s. 61 (3) of the Punjab Municipal Act. [p. 426, col. 2.]

Notified Area Committee, Una v. *Amar Singh* (1), followed.

The provision contained in s. 62 (9) of the Punjab Municipal Act to the effect that a notification of the imposition of tax under the Act shall be conclusive evidence that the tax has been imposed does not apply to the notified areas in view of the express provision in the Punjab Government Notification No. 27909 of 1922 extending only sub-ss. (1) to (4) of s. 62 to such areas. [p. 427, col. 1.]

Appeal from the decree of the District Judge, Hoshiarpur, dated the 23rd December, 1925.

Mr. *M. L. Puri*, for the Appellant.

Mr. *J. N. Aggarwal*, for the Respondent.

JUDGMENT.—By Notification No. 11419 dated the 28th April, 1919, the Punjab Government imposed a tax on residence within the notified area of Garhdewala in the Hoshiarpur District under the provisions of s. 242 (1) (*a*) of the Punjab Municipal Act. The plaintiff, who is a resident of the notified area, brought a suit for an injunction restraining the notified area from realising the tax from him as it was illegal and he also claimed the release of a mare which had been attached in order to satisfy the demand of the notified area. The two Courts below have held that the plaintiff was not competent to question the legality of the tax and dismissed his suit. Against these decisions this second appeal has been preferred.

Under s. 242 (1) (*a*) the Local Government has power to impose, in any notified area, any tax which could be imposed there by the Committee if the notified area were a Municipality, subject to a proviso. It has, however, been held by a Full Bench of this Court in *Notified Area Committee, Una* v. *Amar Singh* (1) that "the powers conferred on a Local Government by s. 242 of the Punjab Municipal Act, with regard to notified areas, are limited to the imposition of taxes described in s. 61 (B) of the Punjab Municipal Act. The sanction of the Governor-General in Council is an indispensable preliminary condition for the imposition of taxes described in s. 61 (A)." The Act has been amended and s. 61 (A) now corresponds to s. 61 (3). It is admitted that the tax, imposed by the notification referred to, falls within s. 61 (A) or (3) of the Act and that the sanction of the Governor General in Council was neces

(1) 75 Ind. Cas. 903; 4 Lah. 442; A. I. R. 1924 Lah. 361.

sary and that this sanction was not obtained *prima facie*, therefore, the tex is illegal.

Further, under s. 242 (*i*) (*f*) of the Act the Local Government may extend to any notified area the provisions of any section of this Act subject to such restrictions and modifications, if any, as the Local Government may think fit. Now, by Notification No. 27909, dated the 11th November, 1922, the Punjab Government extended s. 62 (1) to (4) to all notified areas in the Punjab. It did not, however, extend s. 62 (6) to (9). The lower Appellate Court held that s. 62 (9) must have been extended by implication, but I am unable to agree to this contention. When certain sub-sections are explicitly extended, it must be held that the other sub-sections were not intended to be extended. Sub-s. (9) of s. 62, therefore, which is to the effect that a notification of the imposition of a tax under this Act shall be conclusive evidence that the tax has been imposed in accordance with the provisions of the Act cannot be held to have been extended to this notified area. On the contrary, it must be held that its application was not extended.

There is another consideration. Section 242 gives the Local Government power to impose in any notified area any tax which a Municipal Committee could have imposed. But nowhere in the Act it is said that a notification to this effect must issue. For example, the wording of s. 244 is noteworthy in this connection. The Local Government seems to have power to impose the tax without a notification. Now, therefore, can it be said that a notification which does not seem to be necessary under the Act, shall be conclusive evidence that the tax was imposed in occordance with the provisions of the Act? The case is in fact on all fours with *Notified Area Committee, Una* v. *Amar Singh* (1) and no question of s. 62 (9) comes in.

I must accept the appeal and grant the plaintiff an injunction restraining the notified area from collecting any tax from him under the notification in question and also ordering the notified area to release his attached mare. I understand that there is now a new notification imposing the tax afresh. The decree will not apply to it.

It is clear that the notified area is not to blame but the Punjab Government. In these circumstances I only allow the appellant his costs here and in the lower Appellate Court. Parties will bear their own costs in the trial Court.

A. N. A. *Appeal accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 120 OF 1925.

December 2, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Graham.

KHETRA MOHAN SAHA SARDAR AND OTHERS—FIRST & SECOND PARTY DEFENDANTS—APPELLANTS

versus

AKHIL CHANDRA DAS BHOWMIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 149—Civil Procedure Code (Act V of 1908), s. 11—Landlord and tenant—Rent claimed by third party—Deposit in Court—Suit claiming rent—Title, question of, decision of—Res judicata.

Sub-s. (3) of s. 149 of the Bengal Tenancy Act contemplates a suit which culminates not in a decree but an order of a limited kind, an order restraining payment out of the money deposited under sub-s. (1) of the section. It is, therefore, an order not finally decisive of the substantive rights of the parties but providing a machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment. [p. 428, col. 1.]

Where in such a suit the Court incidentally goes into the question of title as regards the land the rent of which is in dispute, any finding of this kind will not operate as *res judicata* on the question of title between the parties in any subsequent litigation. [p. 428, col. 2; p. 429, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, First Court, Tipperah, dated the 20th of May, 1924, affirming that of the Munsif, Second Court at Comilla, dated the 19th of April, 1923.

Babu *Chandra Sekhar Sen*, for the Appellant.

JUDGMENT.

Mukerji, J.—The first party defendants are the appellants in this appeal.

The appeal arises out of a suit which purports to have been instituted as one under s. 149, sub-s. (3) of the Bengal Tenancy Act. A suit was instituted by the appellants, the first party defendants, against the second party defendants for recovery of arrears of rent. The latter denied relationship of landlord and tenant in that suit and contended that the money payable by them was payable not to the first party defendants but to a third party, namely, the plaintiffs, and they deposited the money under the provision of s. 149, sub-s. (1) of

the Bengal Tenancy Act. Notice of such deposit was served upon the plaintiffs and the latter then instituted the present suit out of which this appeal has arisen.

The suit has been decreed by both the Courts below and the substantial ground upon which the decisions of the said Courts have been challenged before us is that if the suit be treated as one under s. 149, sub-s. (3) of the Bengal Tenancy Act the reliefs asked for in the plaint in the suit as well as those granted by the Courts below to the plaintiffs therein go far beyond the scope of the said suit and if the suit is treated as one for declaration of title to land then the subject-matter of the suit exceeds the pecuniary jurisdiction of the Court by which it was tried. The suit is under s. 149, sub-s. (3) of the Bengal Tenancy Act and the circumstances under which the suit was instituted are also circumstances which are contemplated as being requisite for a suit instituted under that sub-section. The reliefs sought for in the plaint were, a declaration of title to Rs.28-1-0 which was in deposit in Court in favour of the plaintiffs, a declaration that the first party defendants were not entitled to the said amount, an order that the said amount should not be paid out to the first party defendants and a direction that if the first party defendants had withdrawn the said amount then a decree might be passed in favour of the plaintiffs for recovery of the same from them. The reliefs that were granted by the Court of first instance and were confirmed by the lower Appellate Court are substantially those that were claimed in the suit. Having regard to the prayers in the plaint and the decree that has been passed in favour of the plaintiffs it is quite clear that the reliefs go far beyond the scope of a suit which legitimately falls within the purview of sub s. (3) of s. 149 of the Bengal Tenancy Act. As has been pointed out by this Court in the case of *Tirthabasi Singh Rai* v. *Purna Chandra Nag* (1). Sub-s. (3) contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money and it is, therefore, an order not finally decisive of the substantial rights of the parties but providing a machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment.

(1) 14 Ind. Cas. 230; 16 C. W. N. 558; 15 C. L. J. 501.

The Courts below have proceeded on the view that the suit was one which fell legitimately within the purview of this sub-section. The appellants, in my opinion, are perfectly right in the contention which they put forward that the view which the Courts below have taken of this matter is erroneous. The question then is whether we should set aside the decree which has been passed in this suit and order a fresh trial thereof. From a perusal of the allegations contained in the plaint, the prayers which the plaintiffs sought for therein and the reliefs that have been granted to them it is clear to my mind that the suit may very well be regarded as one for declaration of title to Rs. 28-1-0 and for certain consequential reliefs. It does not necessarily mean that the suit was for declaration of title to the land in respect of which the money was deposited in Court. If it was a suit for declaration of title to the land itself it would certainly not have been within the jurisdiction of the Court in which it was instituted. But if, as I have said, the suit is regarded as one for declaration of title to the money and for consequential reliefs, and, in my opinion, it may be properly regarded as such, the reliefs which the plaintiffs have obtained therein are pertinent to the allegations that were made in the suit. There was no want of jurisdiction in the Courts, as far as I have been able to see, in having treated the suit as one of the nature referred to above and the decree passed therein need not, therefore, be touched.

An objection has been raised on behalf of the appellants to the effect that if it is regarded as a suit for declaration of title to the money the observations and findings at which the Courts below have arrived may in any future proceeding that may arise between the parties be regarded as having finally determined the question of title to the land as between the parties. This objection is a grave one and needs serious consideration. I have, therefore, carefully examined the findings at which the learned Subordinate Judge has arrived and I am clearly of opinion that although the learned Subordinate Judge incidentally went into the question of title as regards the land he has made it clear in his judgment that he was not deciding any question of title to the land itself and he has expressly stated in several passages in his judgment that the suit was not one

for declaration of title to the land and towards the end of his judgment he has also said that the declaration with regard to the money was made by him on a determination of the question as to who was in possession of the land by receiving rent from the second party defendants. The findings and observations in the judgment of the learned Subordinate Judge, therefore, cannot by any stretch of imagination operate as *res judicata* on the question of title as between the parties in any future litigation.

The appeal, therefore, in my opinion, fails and must be dismissed. There is no appearance on behalf of the respondents and there will be no order as to costs.

Graham, J.—I agree.

Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

REVIEW APPLICATION No. 5 OF 1926.

March 17, 1926.

Present:—Mr. Justice Misra.

SHYAM LAL—APPLICANT

versus

CHANDRIKA DAT RAM PANDEY AND ANOTHER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLVII, r. 1—Arbitration pending suit—Award—Order setting aside award—Revision—Review—Preliminary objection not raised before hearing, whether can be heard in review.

An order setting aside an award of an arbitrator in a reference pending a suit is a final order so far as the parties are concerned even though the case has not been finally decided and can, therefore, be revised under s. 115 of the Civil Procedure Code. [p. 429, col. 2.]

Riasat Ali v. *Rae Rajeshar Bali* (1) and *Allahabad Bank* v. *Muhammad Raza Khan* (2), followed.

Rudra Prasad Pande v. *Mathura Prasad Pande* (3), not followed.

A preliminary objection as to the maintainability of a revision petition should be raised before the commencement of the hearing of the petition, and if no such objection is raised at that time it cannot be heard in an application for review of the order in revision. [p. 430, col. 1.]

Application for review against an order of Mr. Justice Ashworth, in Civil Revision No. 15 of 1926, dated the 18th February, 1926, and printed as 94 Ind. Cas. 162.

Mr. *L. S. Misra*, for the Applicant.

JUDGMENT.—This is an application for review of a judgment of Mr. Justice Ashworth, a Judge of this Court, passed on the 18th of February 1926*. A suit, which was pending in the Court of the Munsif of Gonda on the Small Cause Court side, was referred by the parties to arbitration. The arbitrator, who was a Pleader of the Court, decided the case in favour of the plaintiffs. Objection was taken against his award on the ground that it was vitiated by legal misconduct on the part of the arbitrator. The learned Munsif allowed this objection and set aside the award on the ground of legal misconduct and directed that the trial of the suit should proceed in the ordinary course.

An application for revision against the order of the Munsif, setting aside the arbitration-award, was lodged in this Court and it came up for hearing before Mr Justice Ashworth, a Judge of this Court. He heard the parties and ultimately came to the conclusion that the arbitrator's award was not in any way vitiated by legal misconduct on his part. He, therefore, allowed the application in revision, directing the Munsif to treat the award delivered by the arbitrator appointed in the case as an effective award.

The present application for review has been filed against the judgment of Mr. Justice Ashworth. In support of the present application it has been urged by the learned Counsel for the applicant that this Court had no jurisdiction to hear an application for revision against an order which was passed before the case had been finally decided. The application for revision, it was contended, did not lie either under s. 115 of the Code of Civil Procedure or under s. 25 of the Provincial Small Cause Courts Act (IX of 1887).

In my opinion the application for review must fail for the following reasons:—

Firstly, that the order of the learned Munsif, so far as it superseded the arbitration was a final order so far as the parties to the case are concerned. Such an order has been considered by the late Court of the Judicial Commissioner of Oudh as "a case decided by a Court." *Vide* the decision of Chamier, J. C., and Evans, A. J.C., in *Riasat Ali* v. *Rae Rajeshar Bali* (1), and the decision of Lindsay, J. C., and Stuart, A. J. C., in *Allahabad Bank* v. *Muhammad Raza Khan* (2). So far as I am aware this has been the law consistently followed in the Province of Oudh. My attention was drawn to a recent decision of the Allahabad High

*See 94 Ind. Cas. 162—[*Ed.*]

(1) 6 Ind. Cas. 977; 13 O. C. 109.
(2) 16 Ind. Cas. 592; 15 O. C. 304

Court reported in *Rudra Prasad Pande* v. *Mathura Prasad Pande* (3). With great respect for the learned Judges who decided the case I must say that I am not prepared to follow that decision and to set aside the law which has been consistently followed in this Province for a number of years. The case was, therefore, rightly taken up by Mr. Justice Ashworth in revision against the order complained of, and I am not prepared to admit this application for review on the ground that a view different from that taken in this Court and which has prevailed here for a number of years, has been taken in the Allahabad High Court.

Secondly, I am not inclined to admit this application on the ground that this point was never taken before the learned Judge who heard the application for revision. It was the bounden duty of the Counsel, who appeared on behalf of the respondent in this Court, to have put forward such an objection in the form of a preliminary objection before the commencement of the hearing of the application in revision. If no such objection was raised at that time it cannot be heard now in an application for review against that order. I should like to state clearly that it is most unfair to the Judges of the Court to file application for review against their judgments on grounds not raised before them at the time of the hearing. Such a course cannot obviously be permitted.

I reject this application.

A. N. A. *Application rejected.*

(3) 89 Ind. Cas. 173; 47 A. 916; 23 A. L. J. 656; A. I. R. 1925 All. 566; L. R. 6 A. 459 Civ.]

BOMBAY HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 884 OF 1925.
August 16, 1926.

Present:—Justice Sir Lallubhai Shah, KT., Mr. Justice Fawcett and Mr. Justice Madgavkar.

SHANKAR BAJI JOSHI—DEFENDANT—APPELLANT

versus

KASHINATH GANESH PURANIK—PLAINTIFF—RESPONDENT.

Hindu Law—Inheritance—Uncles of the whole blood, whether exclude uncles of the half blood.

The distinction between the whole blood and the half blood observed in the case of brothers and their sons according to the Hindu Law does not, under the Mitakshara Law as administered in the Bombay Presidency, extend to the uncles of the deceased, that is, the sons of his grandfather. Paternal uncles of the whole blood do not, therefore, exclude paternal uncles of the half blood in the Bombay Presidency. [p. 435, col. 2; p. 437, col. 2.]

The decision in *Vithalrao* v. *Ramrao* is not overruled by the ruling of the Privy Council in *Ganga Sahai* v. *Kesri*. [p. 432, col. 2.]

Vithalrao v. *Ramrao* (1), followed,

Samat v. *Amra* (4), explained.

Second appeal from the decision of the District Judge, Ratnagiri, in Appeal No. 172 of 1924, confirming that of the First Class Subordinate Judge, Ratnagiri, in Suit No. 165 of 1923.

ORDER OF REFERENCE TO A FULL BENCH.

Shah and Fawcett, JJ.—(*August 6, 1926*).—In this second appeal it is conceded by the learned Pleader for the appellant that there is no sustainable point of limitation. He rightly confines his contention to the question whether the plaintiffs who represent the interests of the uncles of half-blood of the deceased Vithalrao can inherit the property along with the uncles of whole blood.

Both the lower Courts have decreed the plaintiffs' claim following the decision in *Vithalrao* v. *Ramrao* (1). After a careful consideration of this question this Court dissented from the Full Bench ruling in *Suba Singh* v. *Sarafaraz Kunwar* (2) on a similar point. Since the decision in *Vithalrao* v. *Ramrao* (1) the view taken in that case has been followed in this Court consistently. But it has been urged that the decision in *Ganga Sahai* v. *Kesri* (3) in effect dissents from that view. It would appear that the point to be decided in *Ganga Sahai's case* (3) was different from the point which arose in *Vithalrao* v. *Ramrao* (1) and which arises in this case.

However, it appears that at the time this appeal was admitted, the admitting Bench consisting of Macleod, C. J., and Coyajee, J., directed that the appeal should be heard by a Full Bench. The Full Bench has been constituted by the Chief Justice, and the appeal is placed before us to decide the point of limitation and then, if necessary, to formulate the question to be referred to the Full Bench. We formulate that question as follows :—

(1) 24 B. 317; 2 Bom. L. R. 139; 12 Ind. Dec. (N. S. 746.

(2) 19 A. 215; A. W. N. (1897) 53; 9 Ind. Dec. (N. S. 142 (F. B.).

(3) 30 Ind. Cas. 265; 42 I. A. 177; 17 Bom. L. R. 998; 19 C. W. N. 1175; 18 M. L. T. 203; 29 M. L. J. 329; 2 L. W. 837; 13 A. L. J. 999; 37 A. 545; 22 C. L. J. 508; (1915) M. W. N. 713 (P. C.).

"Does the distinction between the whole blood and the half blood observed in the case of brothers and their sons according to Hindu Law extend to the uncles of the deceased, that is, the sons of his grandfather, in this Presidency ?"

The necessary relationship is indicated in the table given in the judgment of the lower Appellate Court ; and the facts are not in dispute. The answer to the question will, to a large extent, depend upon the view which is taken of the effect of the decision in *Ganga Sahai* v. *Kesri* (3) on the decision in *Vithalrao* v. *Ramrao* (1).

We direct that this case may be placed before the Full Bench as constituted by the learned Chief Justice on August 16.

Mr. *V. D. Limaye*, for the Appellant.

Mr. *G. B. Chitale*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Shah, J.—After hearing arguments on both sides in this case, we have come to the conclusion that the question referred to the Full Bench should be answered in the negative.

I shall state my reasons for this conclusion briefly. So far as this Court is concerned this very question was considered very fully in *Vithalrao* v. *Ramrao* (1). Jenkins, C. J., and Ranade, J., who decided the case came to the conclusion that the opinion expressed by Westropp, C. J., in the earlier decision of *Samat* v. *Amra* (4) should be accepted, and that the preference of the whole blood over the half blood should be confined to the brothers and their sons as expressly mentioned by Vijnaneshvara in the Mitakshara and by Nilakantha in the Vyavahara Mayukha and could not be extended to the case of uncles and more distant *gotraja sapindas*. They had before them the view taken by the Full Bench of the Allahabad High Court with reference to a similar point in *Suba Singh* v. *Sarafaraz Kunwar* (2). The learned Judges differed from the view taken by the Full Bench of the Allahabad High Court, and came to the conclusion that the distinction between the whole blood and half blood was confined to brothers and their sons, and did not extend to uncles and more distant *gotraja sapindas*.

Since then their Lordships of the Privy Council have held in *Ganga Sahai* v. *Kesri* (3) which went up to the Privy Council by way of appeal from the High Court of Allahabad, that "Under the Mitakshara Law a paternal uncle of the half blood is entitled to inherit in preference to the son of a paternal uncle of the whole blood." Their Lordships observed in the judgment that "the preference given to the whole blood over the half blood is confined to *sapindas* of the same degrees of descent from the common ancestor."

The question has been referred to the Full Bench in this case in consequence of the contention of the appellant that the observations in the judgment in *Ganga Sdhai* v. *Kesri* (3) are to the effect that so far as the *gotrajas* of the same degrees of relationship are concerned, the rule as to preference of whole blood over half-blood should be given effect to. It is contended that the decision in *Ganga Sahai's case* (3) has the effect of overruling the view taken by this Court in *Vithalrao* v. *Ramrao* (1). It is further contended in support of the view that the uncles of the whole blood should be preferred to uncles of the half-blood, that the reason given by Vijnaneshvara for preferring brothers of whole blood over brothers of half blood would equally apply to the more distant agnates of the same degrees of descent from the common ancestor.

As regards the first point it must be remembered that in *Ganga Sahai* v. *Kesri* (3) the competition was between an uncle of the half-blood and sons of an uncle of the whole blood. That is clearly pointed out in the following passage at page 183* of the report :—

"The question then arises who among the two sets of plaintiffs are entitled to the inheritance of Bahadur Singh. At the time of his widow's death in 1894, when the succession passed to the collaterals, Rajaram, his uncle by the half blood, was alive ; and he claimed the properties in preference to Kalka Pershad and Jian Lal, the sons of a full paternal uncle named Gunga Pershad. Rajaram has since died and is now represented by his sons and grandsons who are plaintiffs in one of the suits and respondents before this Board. Jian Lal has also died, and his son, Munshi Lal, now stands in his place. Kalka Pershad and Munshi Lal were the plaintiffs in the second suit, and they claimed in opposition to Rajaram to be the heirs of Bahadur Singh by virtue of their relationship to him being of the whole blood."

(4) 6 B. 394; 6 Ind. Jur. 537; 3 Ind. Dec. (N. S.) 718.

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With reference to the argument that was advanced before them their Lordships observe as follows at page 184* of the report:—

"This argument, in their Lordships' opinion, would apply with equal force to the case of half brothers and the sons of brothers of the whole blood. But it is conceded that the author of the Mitakshara has expressly declared that brothers of the half blood come before nephews of the whole blood, and in principle they see no reason to differentiate between the brothers of the *propositus* and the brothers of his father. Having regard to the general scheme of the Mitakshara, their Lordships think that the preference of the whole blood to the half-blood is confined to members of the same class, or, to use the language of the Judges of the High Court in *Suba Singh* v. *Sarafaraz Kunwar* (2) to '*sapindas* of the same degrees of descent from the common ancestor,' and that, therefore, on the death of Lachman Kuer, Rajaram as uncle of the half-blood became entitled to the inheritance of Bahadur Singh to the exclusion of his cousins."

These observations, no doubt, if read without reference to the point which came up for decision before their Lordships, would appear to support the contention of the appellant that their Lordships decided that the preference of the whole blood over the half blood under the Mitakshara was not confined to brothers and their sons, but extended to more distant agnates who come under the terms *gotrajas* as used in Yajnavalkya's text or the expression *samangotraja sapindas* used by Vijnaneshvara in his commentary.

It may be noted that, though the case of *Vithalrao* v. *Ramrao* (1) was referred to in the argument before their Lordships, there is no reference to that case in the judgment, and it is not unreasonable to assume that if their Lordships intended to decide the question as to whether among *gotraja sapindas* of the same degrees the relations of the whole blood should be preferred to relations of the half-blood under the Mitakshara generally, they would have referred to this case in terms to express their dissent from it. As, however, their Lordships were not concerned to decide that question, even taking the general scheme of the Mitakshara to be as stated in that judgment, their Lordships hold that it could not apply to relations who were more distant in degrees but would apply to relations of the same degrees of descent from the common ancestor. No doubt, the observations are general, and they are capable of being read in the sense in which the learned Pleader for the appellant has asked us to read them. But it seems to me that these observations must be read with reference to the facts of that case and the point which was before their Lordships for decision. Their Lordships did not state whether, in the case of *gotraja sapindas* of the half blood and whole blood of equal degrees, the view taken by this Court was or was not correct according to the true reading of the Mitakshara and the Vyavahara Mayukha, which would be the prevailing authorities in this Presidency on questions of Hindu Law. As that case is not referred to in the judgment and that was not the point before their Lordships, it seems to me that we cannot allow the appellant's contention that that view is dissented from or overruled by their Lordships of the Privy Council.

It is urged, however, that, apart from the decisions, the view taken by the Full Bench of the Allahabad High Court is to be preferred to the view taken by this Court in *Vithalrao* v. *Ramrao* (1) and that, as the matter is before us as a Full Bench, we should reconsider the view taken by this Court in *Vithalrao* v. *Ramrao* (1). Taking that argument at its best, it really comes to this, that because in the Mitakshara Vijnaneshvara in dealing with the case of brothers has made this distinction between brothers of the whole blood and brothers of the half blood, and as he has given as a reason that "to the nearest *sapinda*, the inheritance next belongs," which is a quotation from the verse of Manu (Chap. IX, Verse 187) the same reasoning should be applied to uncles and more distant agnates and uncles of the whole blood should be preferred to uncles of the half blood. The argument involves this that the distinction which Vijnaneshvara makes as regards brothers explicitly should be read as applying to all the *gotraja sapindas* of the same degree referred to as heirs under the general term "*gotraja sapindas*." Considering this argument, with reference to the texts quite apart from the decisions, it seems to me that, after referring to the compact series of heirs, Vijnaneshvara pro-

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ceeds to lay down the general order of succession; and after referring to the grandmother he proceeds to lay down by way of commentary on the text of Yajnavalkya as follows:—

"On failure of the paternal grandmother, the (*gotraja*) kinsmen sprung from the same family with the deceased and (*sapinda*) connected by funeral oblations, namely, the paternal grandfather and the rest, inherit the estate.....

"Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit."

[See Mitakshara, Chap. II, sec. V, paras. 3, 4 and 5]—Stokes Hindu Law Books, pp. 446-447.

It is to be noted that in this section where he deals with the order of succession among the agnates, Vijnaneshvara does not say a word with reference to the distinction between the whole blood and the half-blood. In the original text the expression used is that in the absence of the grandmother "*samanagotraja sapindas*" will inherit. Then he refers to uncles and their sons, and the word used is "*kramena*" "in order" *i. e.*, in the order mentioned there. It means that the grandfather excludes the uncles and the uncles exclude the sons of the uncles. This indicates nearness or propinquity by degrees of relationship without any reference to the distinction of the whole blood and half blood in any one of these groups. If Vijnaneshwara really was of opinion that the distinction which he had made as regards brothers was to be extended to distant agnates of the same degrees, it seems to me that he would have expressly said so. In interpreting the Mitakshara it is rather an unsafe and treacherous ground to take, that because the reason given with reference to the distinction between brothers of the whole blood and brothers of the half blood is generally stated, it should generally apply to other relations also. At least it seems to me that that is not the scheme of the Mitakshara, and with respect I agree on this point with the view taken by Mr. Justice Ranade in his judgment where this point has been dealt with, and where other reasons also are given for adopting that view

It is perfectly accurate to say, as Westropp, C.J., said in *Samat* v. *Amra* (4), that neither in the Mitakshara nor in the Vyavahara Mayukha there is any reference to the distinction between the whole blood and the half blood as regards the succession among *gotraja sapindas*. Mr. Limaye for the appellant has not been able to find anything in any other original work on Hindu Law having any authority in this Presidency in which the distinction, which has been made expressly as between brothers of the whole blood and brothers of the half blood has been made with reference to uncles or more distant agnates. In the absence of any such distinction made in any such book, it seems to me that the view taken by this Court in *Vithalrao* v. *Ramrao* (1), affirming the opinion of Westropp, C. J., in *Samat* v. *Amra* (4), is the correct view to be adopted at least so far as this Presidency is concerned.

Then there is the further consideration that this rule of inheritance as interpreted in *Vithalrao* v. *Ramrao* (1) has been in force in this Presidency for over forty years ever since 1882 when the case of *Samat* v. *Amra* (4) was decided. It is quite true that in that case the competing heirs were more distant agnates, and not of the same degree. But the opinion was definitely expressed and in *Vithalrao* v. *Ramrao* (1) the competition was between uncles of the whole blood and uncles of the half blood just as in the present case.

I am conscious of the divergence of judicial opinion on this point as also of the weighty opinions in favour of the other view. In Allahabad, Bengal and Madras, the Mitakshara has been interpreted in the sense that the distinction between the whole blood and the half blood expressly accepted by Vijnaneshvara with reference to brothers applies to all *gotraja sapindas* of the same degree. The Allahabad case is already referred to and the decisions in *Sham Singh* v. *Kishun Sahai* (5) and *Nachiappa Gounden* v. *Rangasami Gounden* (6) represent the Bengal and Madras views.

I may add that in the Madras case which went up to the Privy Council, see *Rangasami Gounden* v. *Nachiappa Gounden* (7),

(5) 6 C. L. J. 190.

(6) 26 Ind. Cas. 757; 28 M. L. J. 1; 17 M. L. T. 87; 2 L. W. 69; (1915) M. W. N. 53 (F. B.).

(7) 50 Ind. Cas. 498; 46 I. A. 72; 21 Bom. L. R. 640; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 5[illegible]9; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

High Court on the question discussed in *Vithalrao* v. *Ramrao* (1) was not really before the Privy Council. Having regard to the care always taken by the Privy Council to decide only the exact point or points before them, it seems clear that they did not intend to decide on this difference of opinion. Speaking only for myself, I think the utmost that can be said is that the view taken by this Court is to some extent weakened, in so far as the Privy Council have approved the application of a principle, which, if extended, to the present question about whole blood and half blood, would favour the Allahabad view. They have allowed the principle laid down in Ch. II, section IV, placitum 8, of the Mitakshara about a competition between nephews and brothers to be extended to the case of remoter agnates; and it can, therefore, be said that the principle laid down in the neighbouring placitum 5 in regard to a competition of whole blood and half blood in the case of brothers should similarly be extended to the case of remoter heirs, especially as the reason given for the principle applies equally to the case of such remoter heirs. That, I think, is the most that can legitimately be said. But, on the other hand, if the point did come up before the Privy Council, they would have to consider how far the principle of *stare decisis* should be given effect to. I also think that the ruling in *Vithalrao* v. *Ramrao* (1) should not be dissented from by a Full Bench of this Court except for very strong reasons, and it is preferable that, as was said in that case, any such reversal should have the authority of the Privy Council.

Madgavkar, J.—The answer to the reference is, in my opinion, in the negative.

The case comes from the Ratnagiri District and is governed by the Mitakshara. The exact point now in question, namely, whether the paternal uncles of the whole blood exclude, or whether they only share equally with paternal uncles of the half blood, arose and was decided by this Court in 1899 in favour of the latter, in *Vithalrao* v. *Ramrao* (1). In their elaborate judgments, Jankins, C. J., and Ranade, J., considered and adhered to the principle enunciated in 1882 by Westropp, C. J., in *Samat* v. *Amra* (4) that, *firstly*, as between *spindas* generally, the class nearest in propinquity to the common ancestor shares equally among the individuals composing it but excludes the class more remote, irrespective of considerations as to whole blood or half-blood; *secondly*, that the only exceptions to this rule are two classes expressly mentioned in the Mitakshara, namely, (*a*) brothers and (*b*) the sons of brothers, each of these two classes of the whole blood excluding respectively the corresponding class of the half blood; and, *thirdly*, that this exclusion of half blood should not be carried further in the case of any other class of *sapindas*. On the second point, it might be added, the Mayukha goes one step further than the Mitakshara, preferring brothers' sons of the whole blood not merely to brothers' sons of the half blood but even to brothers of the half blood.

The Bench in the case of *Vithalrao* v. *Ramrao* (1) adhered to the view in the earlier case of *Samat* v. *Amra* (4) after a detailed consideration, especially by Ranade, J., of the contrary view of the Full Bench of the Allahabad High Court in *Suba Singh* v. *Sarafaraz Kunwar* (2).

In that case it was the great-great-grandfather of the deceased, who had married two wives and the contest was between (1) his great-grandson through the first wife and of the half blood on the one side, (2) the great-grandson, and (3) the great-great-grandsons through the second wife on the other, both of the full blood. It was held differing from the view in *Samat* v. *Amra* (4) that the second, namely, the great-grandson of the full blood, succeeded, excluding both the first as being the half blood, and the second as being more distant *sapindas*.

In 1907 both the case of *Vithalrao* v. *Ramrao* (1) as well as the Full Bench case of *Suba Singh* v. *Sarafraz Kunwar* (2) were considered in the Calcutta High Court by Mookerjee, J., in the case of *Sham Singh* v. *Kishun Sahai* (5). In that case, which was from Bihar and was governed by the Mitakshara and not by the Dayabhaga, the High Court of Calcutta preferred the Allahabad view to that which prevailed in this Court.

The answer of the Full Bench of the Allahabad High Court was apparently thought to be more far-reaching in its effect than it was meant to be. For, in a later case, *Kesri Rohan* v. *Ganga Sahai* (10), governed by the Mitakshara alone and not by the Mayukha, where the contest

(10) 6 Ind. Cas. 364; 32 A. 541; 7 A. L. J. 560, F. B.

the reasons. For instance, the Vyavahara Mayukha gives preference to the father over the mother and is in conflict with the Mitakshara on this point.

As among brothers of the whole blood and of the half-blood, Nilakantha changes the order and puts in nephews of the whole blood before brothers of the half blood. Then the Vyavahara Mayukha specially mentions the sister as an heir before the *gotraja sapindas* but after the grandmother and though the Mitakshara does not mention the sister at all, under the rule accepted in this Presidency that the Mitakshara and the Mayukha may be harmonised as far as possible, the sister has been given the same place in the districts where the Mitakshara is to be preferred to the Mayukha in case of a conflict, as has been given to her under the Vyavahara Mayukha. It is difficult to apply the reasons logically to all positions and sometimes an apparently logical application or extension of the reason given for a rule may lead to a conclusion which neither Vijnaneshvara nor Nilakantha may have contemplated.

Further, the terms used for indicating the difference between whole blood and the half-blood are *sodara* and *bhinnodara*—literally 'of the same womb' and 'of the different womb.'

Those words are used with reference to the *propositus*. In their very nature they cannot be applied to uncles and their sons. The uncle would be a *sodara* or *bhinnodara* of the father of the *propositus*. The relationships are throughout described with reference to the *propositus*. In extending this distinction to *pitrivyah* (uncle), the expressions will have to be read with reference to the father and in the case of more distant agnates with reference to the grandfather and higher ancestors. In dealing with the question as to whether the heirship among *gotraja sapindas* goes *per stirpes* or *per capita*, Telang, J., has referred to this consideration in *Nagesh* v. *Gururao* (8), in these terms (page 305*):—

"It is to be remarked, that the remoter heirs succeed in their own right, and directly to the *propositus*. According to the Mitakshara, no doubt, they succeed as belonging to the 'line' of this or that ancestor of the *propositus*. But that is not material on the present point."

(8) 17 B. 303; 9 Ind. Dec. (N. S.) 198.

*Page of 17 B.—[*Ed.*]

I do not desire to lay undue emphasis upon this point. But after giving my best consideraion to the various reasons given in the judgments of the other High Courts to which I have referred above, I am still unable to see my way to think that the view accepted in this Presidency is erroneous or opposed to the texts. On the contrary, I am satisfied that that is the correct interpretation of the Mitakshara and the Mayukha. The propinquity—*pratyasatti*—contemplated with reference to the *gotraja sapindas* is the propinquity to the *propositus* by degrees through one ancestor or another, as clearly indicated by Vijnaneshvara.

I desire to add a word with reference to the decision in *Jana Appa Sutar* v. *Rukhma Narayan Badiger* (9). It is urged that if a full sister is preferred to a half sister, though nothing is mentioned about this difference in the Mitakshara the difference of the whole blood and the half blood with reference to brothers is extended to them; and there is no reason why it should not be extended to the uncles. It is true that in this Presidency a full sister is preferred to a half sister even under the Mitakshara on the ground of propinquity. But, as I have said, there is no good reason to extend it further to the *gotraja sapindas*; neither Vijnaneshvara nor Nilakantha refers to this distinction while dealing with the *gotraja sapindas* as heirs after the named heirs; and such distinction as is to be found between a *sodara* sister and a *bhinnodara* sister in Nirnaya Sindhu and Dharma Sindhu is not to be found with reference to the uncles and other agnates. The position of the sister is peculiar in this Presidency and considerations applicable to her cannot be extended or applied to *gotraja sapindas* generally.

I am, therefore, of opinion that, on a fair reading of the Mitakshara and the Mayukha, the rule accepted in *Vithalrao* v. *Ramrao* (1) should be followed and the question should be answered in the negative.

Fawcett, J.—I agree in the answer proposed by my learned brother. I certainly do not think that the Privy Council in *Ganga Sahai* v. *Kesri* (3) intended to overrule the decision of this Court in *Vithalrao* v. *Ramrao* (1); and, as pointed out by my learned brother, the difference of opinion between this Court and the Allahabad

(9) 52 Ind. Cas. 8; 43 B. 461; 21 Bom. L. R. 208.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 78 OF 1926.
November 30, 1926.
Present :—Mr. Findlay, J. C.
MANYA—DEFENDANT—APPELLANT
versus
SITARAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Tank—Lease for fishing and singhara *cultivation, whether creates interest in immoveable property—Long user—Presumption of grant—C. P. Land Revenue Act (I of 1917), s. 80—*Siwari *income, entry relating to, whether binding on* malguzar *—Burden of proof.*

A lease of a tank for the double purpose of fishing and for cultivation of *singhara*, creates an interest in immoveable property. [p. 440, col, 1.]

A long continued user of a tank for the purpose of cultivating *singhara* may give rise to the presumption that there was a permanent grant of the tank for cultivation purposes. [*ibid.*]

An entry in the Settlement papers by the Settlement Officer relating to *siwari* income, is binding upon the *malguzar* and the burden lies on him to prove that the entry was made without enquiry or jurisdiction. [p. 439, col. 2.]

Appeal against a decree of the District Judge, Bhandara, dated the 28th November, 1925, in Civil Appeal No. 28 of 1925.

Mr. *S. Y. Deshmukh*, for the Appellant.

Mr. *P. A. Pandit*, for the Respondents.

JUDGMENT.—Although the actual claim in this case is a petty one, it has given rise to a protracted litigation and certain questions involved are undoubtedly of importance. The plaintiffs Sitaram and four others are *malguzars* of *Mouza* Pandhara Boddi (Bhandra) and own tank No. 115 therein. Their case was that they had let out the tank with a view to *singhara* cultivation for the *Fasli* year 1932 to defendant who, however, remained in illegal possession in 1933. They accordingly claimed an injunction restraining the defendant Manya from remaining in possession of the tank. Defendant admitted plaintiffs' ownership of the tank but denied the lease for the year 1932; he alleged, on the contrary, that the tank had been in his possession for some 35 years on a yearly rent of Rs. 70, *i. e.*, from before the Napier Settlement. According to defendant, Dhondu, father of plaintiff No. 1, had given him a perpetual lease of the tank on the rent stated and he had been in undisputed possession ever since. At the first trial of the suit, the Second Munsif, Bhandara, held that the story of perpetual lease was false largely because, while defendant said the lease had been given to him, his Counsel said the original lease was given to defendant's father. In view of the vague and loose statements often made by the more ignorant class of litigant in this country it was perhaps unsafe to attach much importance to this discrepancy in the pleadings; the discrepancy might well have been a—so to speak—innocent or inadvertant one. The Second Munsif, however, further pointed out that the *khasra* copies (Exs. D-1 and D 2) for 1894-95 and 1916-17 respectively showed that there was only a yearly lease of the tank to defendant. Anyhow the original trial Court held that there was only a yearly letting of the tank and that *singhara* cultivation did not render defendant a tenant. Accordingly decree in favour of the plaintiffs was passed. Defendant appealed to the Court of the Additional District Judge, Bhandara, who deemed the case on all fours with those of *Battoo* v. *Narain Prasad* (1) and *Hari* v. *Wanu* (2) and who was of opinion that mere *singhara* cultivation could make no right of tenancy. Accordingly the mere fact that defendant had held the tank for many years, was, in the opinion of the Additional District Judge, of no avail and he accordingly dismissed the appeal.

These two decisions of the Courts below led to Second Appeal No. 43 of 1924 filed by the defendant in this Court. Kinkhede, A. J. C., therein, after pointing out that there was insufficient and faulty pleading as to the nature of the property or interest defendant enjoyed in the tank, pointed out that not only *singhara* cultivation but a right of fishery was included in defendant's use of the tank. The right of fishing—it was pointed out by the learned Additional Judicial Commissioner—amounted to the grant of an interest in immoveable property *cf. Sitaram* v. *Petia* (3). Such a right, although perhaps not capable of being acquired by prescription, might come into existence by grant or custom and such a grant might be presumed from long use: *cf. Rajrup Koer* v. *Abul Hossein* (4). The case was accordingly remanded to the First Court for trial *de novo*.

As a result of this remand, further plead-

(1) 28 Ind Cas. 869; 11 N. L. R. 49.
(2) 31 Ind. Cas. 294; 11 N. L. R. 122.
(3) 43 Ind. Cas. 962; 14 N. L. R. 35.
(4) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

ings of the parties were recorded. A perpetual lease by plaintiff No. 1's father Dhondu to defendant's father on Rs. 7 a year was pleaded, the object of the lease being *singhara* cultivation and fishing. Plaintiffs denied that any right of fishing was granted to defendant, but admitted that, in practice, he was allowed to take fish from the tank. Other pleas, *e. g.*, as to Dhondu's want of authority to give the lease, were offered, but these are of little or no importance now. The Subordinate Judge, Second Class, after taking into account certain further documentary evidence filed by defendant after the remand, held that at the Gordon Settlement of 1916-17 it had been decided in connection with the enquiry into the *siwari* income of the village that a right of non-ejectment had been created in favour of the defendant. The long continued possession and the fixed amount of the rent both pointed to the lease being a permanent one. Defendant, therefore, could not be ejected and the plaintiffs' suit was dismissed.

An appeal by the plaintiffs in the Court of the Additional District Judge proved unsuccessful. The Judge of the lower Appellate Court, after considering the evidence, oral and documentary on record, held that defendant's father had obtained a yearly lease of the tank some 35 years ago for *singhara* and fishing purposes; he disbelieved the story of a perpetual lease and he further held that in view of the decisions in *Battoo* v. *Narain Prasad* (1) and *Hari* v. *Wanu* (2), quoted above, defendant's claim to hold the tank permanently could not be upheld. All that defendant had, was, in the opinion of the Additional District Judge, a license by way of annual permission to grow *singhara* and fish in the tank. The judgment and decree of the Subordinate Judge were accordingly reversed and the plaintiffs' claim was decreed.

The defendant has now come up on second appeal to this Court. Much stress has been laid by his Counsel on the effect of the entries made at the 1916-17 Settlement in respect of this tank. It is urged that the burden of proof was wrongly placed on defendant, that it was not for him to prove that there was a yearly lease but for plaintiffs to prove that the lease was not a permanent one. Let us turn to what actually occurred at the Gordon Settlement. Exhibit D-4, an extract from the connected *wajib-ul-arz*, contains the following entry:—

"Maniram Kahar pays Rs. 7 as rent for tank No. 115 and enjoys *singharas* and (income from) fishing from the time of the Settlement. He will not be ejected from the tank so long as he pays rent regularly."

Again, Ex. D-3, copy of a report by the Assistant Settlement Officer, shows that the *malguzar* was obviously consulted in connection with the enquiry into this item of *siwari* income, for the following entry occurs:

"*Singhara* and fishing in tank.	*Malguzar* admits to be charging Rs. 7 a year from Mana Kahar for planting *singhara* and fishing in the tank near *abadi* since before the Settlement. Hence I would take it in extra income at Rs. 7."

The proposal bears an endorsement showing it was accepted by the Settlement Officer. In view of the above evidence showing that the *malguzar* had been consulted, I am wholly unable to accept that the entries were made without due enquiry by the Settlement Officer.

It seems to me that the plaintiffs have wholly failed to discharge the burden which rested on them of showing that the above entries were made without due enquiry or were *ultra vires*. *Prima facie*, it would appear that this item of *siwari* income was one which the Settlemenf Officer was bound to enquire into. As I have already shown, the *malguzars* were consulted and, if they felt aggrieved by the above entries, they had the remedy open to them under s. 80, Land Revenue Act, which came into force on 1st September, 1917. Even under the Act of 1881 the provisions of ss. 82 and 83 were available. They did not take advantage thereof and, in the circumstances, the burden lay on them of showing the entry had been made without due jurisdiction or enquiry. The evidence produced by plaintiffs as to the lease being a yearly one is of no weight whatever as against the Settlement entries referred to and the undoubted fact that defendant has held the tank for some 35 years on a fixed rent of Rs. 7 a year. Moreover, even the *khasra* entries for 1894-95 and 1913 14 (Exs. D-1 and D-5) imply the idea of a perma-

nent lease: *cf.* the entries in Remark Column. "The tank is given every year to Mania on Rs. 7" and the *malguzar* always receives Rs. 7 annually."

There is in this case no question of tenancy, but, as my learned brother Kinkhede, A J. C., pointed out, the fact that the lease was granted partly for fishing, undoubtedly creates an interest in immoveable property and the long continued use together with the other evidence in defendant's favour amply justifies the presumption that there was a permanent grant of the tank to him for the double purpose of *singhara* cultivation and fishing. The burden of proof was undoubtedly wrongly laid by the Additional District Judge on the defendant, but however that burden lay, it is perfectly clear that there has been a total failure on the plaintiffs' part to prove a yearly lease, while the evidence is overwhelmingly in favour of the lease being a permanent one. In those circumstances the defendant is not liable to ejectment. The judgment and decree appealed against are accordingly reversed and instead a decree will issue dismissing plaintiffs' suit. The plaintiffs-respondents must bear defendant-appellant's costs in all Courts as well as their own.

Z. K. *Order accordingly*

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION
CIVIL SUIT No. 202 OF 1924.
September 23, 1926.

Present:—Mr. Justice Srinivasa Iyengar.

V. VENUSWAMI IYENGAR AND ANOTHER —PLAINTIFFS

versus

K. VARADARAJA IYER AND OTHERS—DEFENDANTS

Civil Procedure Code (Act V of 1908), O. XXII, r. 8—Insolvency of plaintiff—Official assignee allowed to continue suit without furnishing security—Security, whether can be demanded at later stage.

Where a plaintiff is adjudged an insolvent and the Official Assignee elects to proceed with the suit, the time for requiring him to furnish security for the costs of the defendant under r. 8 of O. XXII of the Civil Procedure Code is when he brings himself on the record as plaintiff. [p. 440, col. 2.]

Where without requiring any such security the option is given to the Official Assignee to continue the suit, it is not open to the Court at a later stage to insist on his furnishing security for the defendant's costs of suit. [p. 441, col. 1.]

Notice of motion by the 6th defendant to direct the 2nd plaintiff, the Official Assignee, to furnish security for the costs of 6th defendant in the suit.

Mr. *V. C. Gopalaratnam*, for the Plaintiffs.

Mr. *N. Sivaramakrishna Iyar*, for the Defendants.

JUDGMENT.—This is an application for an order that the 2nd plaintiff, the Official Assignee, should be directed to furnish security for the costs of the suit of the 6th defendant. The 6th defendant claims to be the receiver appointed for the 1st defendant on his insolvency in the Dindigul Sub-Court. The only provision of law under which such orders for security can be made is r. 8 of O. XXII, Civil Procedure Code. The rule is to the effect that no suit shall abate simply because of the insolvency of the plaintiff unless one of two things happens, that is, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct. Clause 2 of that rule deals with the consequences of the failure on the part of the assignee to furnish the security. Under cl. 1 it is perfectly clear that the security required to be furnished by the Official Assignee should be at the time when electing to proceed with the suit he brings himself on the record as plaintiff. No doubt, there is also the further provision that the Court can for special reasons relieve him from such obligation and direct that he be at liberty to come on record and continue the suit even without furnishing the security. Such an order has been made in this case, the order being to the effect that he need not furnish any security. But apart from that altogether, and dealing with the present application as a fresh application for a direction to the Official Assignee to furnish such security, I am satisfied that no such order can be made at present. There is also good reason for the Rule being to that effect. If the Official Assignee considering the cause of action in the case and probability of success or failure should make up his mind to proceed with the suit only in the event of the Court relieving him from the obligation to furnish security and then is allowed to come on the record and prosecute the suit, it would be wrong that he

should thereafter be required to furnish any security. On the other hand, if he is required at the very commencement to furnish security, the Court not excusing him, then it will be for him to make up his mind whether he will go on or not. Now in this case without any such security as is now applied for, the option was given to the Official Assignee to continue the suit and on that option he has brought himself on the record and has been prosecuting the suit ever since. I am, therefore, clearly of the opinion that the stage at which any party to the suit could insist on the Official Assignee furnishing the security has long since passed. The learned Vakil for the applicant has asked me to treat this as an application now made for such an order. As I said, no such application is now sustainable. There is no provision for it and therefore, in my view the application fails and it is dismissed with costs.

Z. K. *Application dismissed.*
V. N. V.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 92 OF 1926.
November 29, 1926.
Present:—Mr. Justice Suhrawardy and Mr. Justice Cammiade.

ASHUTOSH SEAL—APPLICANT—APPELLANT
versus
THE GOURIPORE COMPANY LIMITED—OPPOSITE PARTY—RESPONDENT.

Workmen's Compensation Act (VIII of 1923), ss. 3, 4, 11 (6), 20, 30—Injury caused by accident in course of employment—Disablement—Compensation, when can be awarded—Circumstances disentitling workman from compensation—Burden of proof—Appeal—Wrong interpretation of law, whether question of law.

Section 4 of the Workmen's Compensation Act does not lay down that the disablement should be solely and directly attributable to the accident. The test is not whether the disablement is the direct or even probable result of the injury or the injury the natural cause thereof, but whether the disablement can be traced to the injury even as the unusual, but not unconnected result thereof. The requirement of the section is satisfied if the injury can be traced to the accident even as the unnatural cause thereof. [p. 442, col. 1.]

To claim exemption under s. 11 (6) of the Workmen's Compensation Act the employer must prove the circumstances mentioned in the section as disentitling the workman from claiming compensation. [p. 443, col. 1.]

Where the Commissioner appointed under s. 20 of Workmen's Compensation Act approaches the case from a wrong standpoint and proceeds upon a wrong interpretation of the law, his decision is open to appeal under s. 30 of the Act, provided the conditions laid down in that section as to valuation are satisfied. [p. 442, col. 1.]

Appeal against an order of the Commissioner, Workmen's Compensation, Bengal, dated the 16th of December, 1925.

Mr. *Atul Chandra Gupta* and Babu *Satish Chandra Singha*, for the Appellant.

Babu *Panna Lal Chatterjee*, for the Respondent.

JUDGMENT.—This is an appeal under s. 30 of the Workmen's Compensation Act (VIII of 1923). The facts are that the appellant, a workman employed by the Gouripore Company Ltd., suffered an injury in his left hand causing, according to the Medical evidence, an abrasion on the outer side of the left index finger and an injury exposing the subcutaneous tissue. It is not disputed that the injury was caused by accident arising out of and in the course of his employment. This happened on the 25th June, 1925. He was treated by the Doctor attached to the mill till the 30th June. He then, it appears, went to the Imambara Hospital in Hoogly on the opposite side of the river where he was treated from the 2nd to the 8th July. On the 8th July he wanted to become an indoor-patient of the Hospital, but he was asked by the Doctor to get a letter to that effect from the mill. On that day, according to the appellant's evidence, at about noon he went to the mill and obtained the necessary letter. Sometime after that it was found that gangrene had set in and that an operation was necessary. In the result, two of his fingers (index and thumb) had to be amputated. He then applied under the Act for compensation for the injury thus caused to his person. It is a case of partial disablement as defined in cl. (*g*) of s. 2 of the Act. It is not disputed before us that if the workman is found entitled to any compensation he would under the Schedule to the Act, be able to recover Rs. 367 odd from the defendant. The learned Commissioner appointed under s. 20 of the Act dismissed the workman's claim and hence this appeal.

Under s. 30 of the Act an appeal lies to this Court on two conditions: (1) that a substantial question of law is involved in the appeal; and (2) that the amount in dispute on the appeal is not less than Rs. 300.

The second ground is satisfied because the value of the appeal is more than Rs. 300. As regards the first point, the question of law involved is as to whether the Commissioner approached the case from the correct standpoint and whether the workman's claim was not dismissed on a wrong interpretation of the law. We are of opinion that in the present case the appeal is competent and that it is open to us in this first appeal to decide all questions of law and fact that arise in it.

The learned Commissioner framed an issue in the case which is to this effect: "Was the loss of applicant's left index finger and thumb solely and directly attributable to the accident"? It is argued that the issue as framed does not on the law as it stands properly arise in the case. Under s. 3 an employer shall be liable to pay compensation if the injury is caused to a workman by accident arising out of, and in the course of, his employment. Under s. 4 the employer is liable to compensate the workman according to the scale given in the Act where permanent partial disablement results from the injury. The wording employed by the Legislature following the English Law of compensation to workmen is that the disablement must *result* from the injury. The law does not insist and has nowhere indicated that the disablement should be solely and directly attributable to the accident. There are cases where the disability cannot be said to be due solely and directly to the accident. The true test is not whether the disablement is the direct or even probable result of the injury or the injury the natural cause thereof, but whether the disablement can be traced to the injury even as an unusual, but not unconnected result thereof. In the case of *Dunham* v. *Clare* (1) the deceased met with an accident which caused the wound to his toe. He was treated for that wound in the Hospital but after a certain interval erysipelas set in and he died of blood-poisoning. It was held that the death was the result of the injury within the meaning of the Workmen's Compensation Act, 1897, even though in fact it might not be the natural or probable consequence thereof. In *Ystradowen Colliery Co. Ltd.* v. *Griffiths* (2) a workman got a severe injury in the thigh and as he had to walk some distance to get his home he cought cold which made him subject to bronchitis and chronic asthma and permanently incapacitated him for work. Cozens-Hardy, M. R. observed thus:—"It is not the law to say that a disease which has been accelerated, still more if produced, by the accident, is not a matter which comes within the four corners of the Act of Parliament." In another passage he observed as follows:—"I think we are bound to give him" (the County Court Judge) "this direction, that the test is not whether present condition of the man is the natural result of the injury, but he must consider the result in fact. It may be an improbable result—I will even go so far as to say, as Collins, M. R., said, possibly even an unnatural result—but the question is whether the man's present condition is the result of the accident in this sense, that it is occasioned by his debilitated condition immediately after the accident and occasioned by the accident which he has met with." There are many cases which have taken the same view the result of which is that if the disability can be traced to the injury caused by accident in the course of his employment the workman will be entitled to compensation. The case of *Humber Towing Company Limited* v. *Bar Clay*(3) does not depart from the principle thus stated. In that case the workman's forearm was broken by accident. He had it set by a bone-setter who did the work so negligently that the man's arm became stiff and incapacitated him for further work. The Master of the Rolls (Cozens-Hardy, M. R.,) very rightly observed that the employer is responsible for the injury caused to the workman but he does not insure against lack of skill or competency of any doctor or physician who might treat the workman.

In our opinion the words 'result from' in s. 4 are wider than 'solely and directly attributable' as the learned Judge takes them to mean, and the requirement of the law is satisfied if the injury can be traced to the accident even as the unnatural cause thereof.

In our judgment the plaintiff's claim can only be defeated by the provisions of cl. (6) of s. 11 of the Act. That clause says that a workman becomes disqualified and cannot claim compensation if he refuses to be attended by a qualified medical practi-

(1) (1902) 2 K. B. 292; 71 L. J. K. B. 683; 66 J. P. 612; 50 W. R. 596; 86 L. T. 751; 18 T. L. R. 645.

(2) (1909) 2 K. B. 533; 78 L. J. K. B. 1044; 100 L. T. 869; 25 T. L. R. 622.

(3) Butterworth's Workmen's Compensation Cases Vol. V, p. 142.

tioner whose services have been offered to him by the employer or having accepted such offer has deliberately disregarded the instructions of such medical practitioner and it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner and that such refusal, failure or disregard was unreasonble in the circumstances of the case and that the injury has been aggravated thereby. To claim exemption the employer has to prove the circumstances mentioned in the section disentitling the workman from claiming compensation. It has been proved in this case that the appellant was offered the services of a medical practitioner. We do not know the qualifications of Mr. Sarat Chandra Chatterjee, the mill Doctor, who has been examined in this case on behalf of the respondent. Assuming that he was a qualified medical practitioner, it has further to be proved that the appellant refused to accept the offer. The evidence is that the Doctor treated him for 5 days. There is no evidence that he deliberately disregarded the instructions of the Doctor. It has further to be proved that the appellant was not attended thereafter by a qualified medical practitioner. The evidence in the case is that after leaving the mill Doctor, the appellant went to the Imambara Hospital where it cannot be said that he was not attended by a qualified Doctor. On the face of it, therefore, the respondent has not been able to discharge the onus placed upon him by law.

We next examine the evidence in the case. The appellant, supported by his witness, tells the story as stated above. The Doctor, Sarat Chandra Chatterjee, examined on behalf of the mill, says that when on the 8th July the appellant came to him his hand was wrapped up in a very dirty rag, soaked in mustard oil, and the gangrenous condition of his hand was due to sepsis from using dirty rags. The appellant and his witness, however, deny that the rag on the day he came to the mill was a dirty rag. Their case is that the appellant was dressed in the morning of that day by the Doctor at the Hospital and he came to the mill soon after for the letter. It is unfortunate that the learned Commissioner did not do his best to secure the evidence of the Doctor who had treated the appellant at the Hospital. An application was made on behalf of the appellant for the issue of process for the attendance of the Doctor as a witness on his behalf. But it was returned unserved for want of time. This was on the 26th November, 1925, though the learned Commissioner did not deliver his judgment till the 16th December, 1925. But on the evidence as it stands we are not prepared to accept the story as given by the respondent's witness. It seems to us on a reading of the entire evidence and on a consideration of all the facts that the man received the injury, the exact nature of which may be what the Doctor has described. He got himself treated for a few days by the mill Doctor but not getting much benefit he went to the Imambara Hospital for better treatment. It seems to us that as the appellant was not improving as he had expected he wanted to be an in-door patient of the Hospital and for that purpose he came to the mill for a letter. When he came there he had the bandage put by the Hospital Doctor and there is no reason to disbelieve it. The story that his hand was wrapped up in a dirty rag soaked with mustard oil seems to us to be an invention. The Doctor further says that the wound was making progress under his treatment and it would have taken 10 or 12 days to cure. This statement does not appear to us as true. There was no reason why the appellant when deriving benefit from the treatment of the mill Doctor should take the trouble of crossing the river and visiting the Hospital. It cannot, therefore, be doubted that the disablement which the appellant complains of was the result of the injury received from the accident in the course of his employment and that the employer respondent cannot claim exemption from liability for compensation under s. 11 (6) of the Act. We accordingly allow the appeal, set aside the order of the Commissioner and decree the claim of the appellant for Rs. 367-8-0 with costs of this Court only. We assess the hearing fee at three gold *mohurs*.

Z. K.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 959 OF 1924.

November 24, 1926.

Present:—Mr. Justice Iqbal Ahmad.

LACHMAN DUBE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AMBIKA DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Presumption of jointness—Alienation by manager—Burden of proving that property alienated is ancestral property—Alienation of joint and self-acquired property—Partial necessity—Procedure—Rights of alienee.

Although, ordinarily, as between two Hindu brothers there is a presumption of jointness, yet, when a suit is brought for the recovery of possession of a certain property that has passed out of the hands of the family of which the plaintiffs are members, and in that suit it is contended by the defendants, that the property sought to be recovered by the plaintiffs was not the ancestral property of the plaintiffs, the burden of proving that the property was ancestral lies on the plaintiffs. [p. 445, col. 1.]

Atar Singh v. *Thakar Singh* (1), followed.

Where, in the case of an alienation by the manager of a joint Hindu family of properties belonging to the family and his own self-acquisitions, the proportionate amount of the sale consideration found to be for legal necessity is in excess of the proportion that the joint family property bears to the self-acquired property, the members of the joint family impugning such alienation are not entitled to recover any portion of the joint family property from the alienee. [p. 446, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Azamgarh, dated the 18th of February, 1924.

Messrs. *U. S. Bajpai* and *N. Upadhia*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT. — This is a plaintiffs' appeal and arises out of a suit for recovery of possession of a one-anna 15-*gandas* and odd *zemindari* share by cancellation of a sale-deed dated the 18th of May, 1908, executed by Deoki Nandan grandfather, Chandrika father, and Ram Behari uncle of the plaintiffs along with one Parshotam who was a nephew of Deoki Nandan, the grandfather of the plaintiffs. The property sold by the said sale-deed was a two-annas 13-*gandas* and odd share out of which 17 *gandas* and odd belonged to Parshotam and I am not concerned with that share in the present appeal. The remaining share, *viz.*, the share in dispute was sold by the remaining vendors for a sum of Rs. 1,000.

The plaintiffs' allegations were in the common form jointness of the family, the property in dispute being joint ancestral property of the family, and an assertion of the absence of any legal necessity for the sale.

The suit was resisted by the defendants substantially on three grounds. *Firstly*, that the plaintiffs were not born on the date of the execution of the sale-deed and as such had no right to maintain the suit. *Secondly*, that the property in dispute was not ancestral property and as such the plaintiffs had no right or interest in the same, and *thirdly*, that the entire sale consideration was for legal necessity.

The first Court overruled the first plea taken in defence noted above, but held that the plaintiffs had failed to prove that the property in dispute was the joint ancestral property and further held that the entire sale consideration of Rs. 1,000 was for legal necessity. On these findings the trial Court dismissed the suit of the plaintiffs.

On appeal by the plaintiffs the decree of the trial Court has been upheld by the lower Appellate Court. That Court has held that out of the sale consideration of Rs. 1,000 a sum of Rs. 626-10-0 was proved to have been for legal necessity, but the remaining portion of the sale consideration, *viz.*, Rs. 373-6-0, which was advanced in cash, was not proved to have been taken for legal necessity. But it held that the major portion of the property in dispute was the self-acquired property of Deoki Nandan, and the portion of the disputed property that could be assumed to be ancestral property of the plaintiffs was far below the proportionate amount of the sale consideration that was found to be for legal necessity. It proceeded to observe that Deoki Nandan had a full disposing power with respect to his self-acquired property, and as the portion of the sale consideration held to have been advanced for legal necessity was much in excess of the proportion of the ancestral property of the plaintiffs, the plaintiffs were not entitled to avoid the sale. I am not prepared to say that the judgment of the lower Appellate Court is satisfactory in every respect, and, as a matter of fact, at the inception of the argument of the learned Counsel for the appellants, it seemed to me, that it would be impossible for me to dispose of the appeal satisfactorily, without having clear findings on certain issues from the lower Appellate Court; but after going through the pleadings of the parties and after making certain calculations with

respect to the shares that belonged to two persons named Ram Sahai and Gulab, whose relationship with the plaintiffs will presently appear, I came to the conclusion that the judgment of the lower Appellate Court, though sketchy and unsatisfactory, is right.

The main grievance of the appellants before me is that the lower Appellate Court has misdirected itself, in proceeding on the assumption, that inasmuch as the plaintiffs had failed to prove what portion of the property was the self-acquired property of Deoki Nandan, the whole property in dispute must be presumed to be non-ancestral, and further that Ram Sahai, the great-grandfather and Gulab the brother of Ram Sahai, having once admittedly been the owners of the property in dispute along with other properties, the lower Appellate Court ought to have considered the case on the assumption that those two brothers were members of a joint Hindu family unless the contrary was proved.

It is true that ordinarily as between two Hindu brothers there is a presumption of jointness; but once a suit is brought for the recovery of possession of a certain property that has passed out of the hands of the family of which the plaintiffs are members, and when in that suit it is contended by the defendants, that the property sought to be recovered by the plaintiffs was not the ancestral property of the plaintiffs the burden of proving that the property was ancestral lies on the plaintiffs. This was the view taken by their Lordships of the Privy Council in the case of *Atar Singh* v. *Thakar Singh* (1). In the present case it was definitely asserted in the written statement that the property in dispute was not ancestral property, and as such, before the plaintiffs could be held entitled to a decree, it lay on them to prove that the entire property or a portion of the same was ancestral property. In face of the pleadings and in face of issue No. 3 framed by the trial Court no assumption in the absence of direct evidence, could be made in favour of the plaintiffs. As observed by their Lordships in the case noted above "when the onus lies as it does in this case on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof". On the finding of the lower Appellate Court the plaintiffs failed to prove what portion, if any, of the property in dispute was ancestral and as such that Court was right in affirming the decree of the trial Court and dismissing the plaintiffs' suit.

But because of the unsatisfactory nature of the judgment of the lower Appellate Court, I, before disposing of the appeal, thought it proper to arrive at a finding myself, after going through the evidence on the record, in pursuance of the power vested in an Appellate Court by the provisions of s. 403, Civil Procedure Code. I have read the evidence in the case. It appears that a two-annas 14-*gandas* share belonged to two brothers Ram Sahai and Gulab in equal shares. Out of the same a one-anna 7-*gandas* share belonged to Gulab. On Gulab's death the same passed in equal shares to the three sons of Ram Sahai named Harbandhan, Deoki Nandan named above and Hardin. Thus 9-*gandas* out of Gulab's share inherited by Deoki Nandan was obviously his self-acquired property provided Ram Sahai and Gulab were separate. On the question of the jointness or otherwise of Ram Sahai and Gulab the evidence is entirely one sided. Notwithstanding the clear form of issue No. 3 the plaintiffs adduced no evidence to show that Ram Sahai and Gulab were ever joint. On the contrary the defendants did produce evidence to prove that Ram Sahai and Gulab were separate.

Out of the one-anna 7-*gandas* share of Ram Sahai each of the three sons also inherited 9-*gandas* share. One of those brothers Harbandhan died issueless and out of his 9-*gandas*, $4\frac{1}{2}$-*gandas* passed to Deoki Nandan. This $4\frac{1}{2}$-*gandas* share also became the self-acquired property of Deoki Nandan, inasmuch as here again there is positive evidence on behalf of the defendants that Harbandhan and Deoki Nandan were separate, and there is no evidence led by the plaintiffs to contradict the statements of the defendants' witnesses on the point. Undoubtedly the 9-*gandas* share that Ram Sahai inherited from Deoki Nandan would be ancestral property. Thus out of the entire $22\frac{1}{2}$ *gandas* share that came to Deoki Nandan $13\frac{1}{2}$ *gandas* share was undoubtedly self-acquired property and he had a complete disposing power

(1) 6 Ind. Cas. 721; 35 C. 1039; 128 P. W. R. 1908; 35 I. A. 206; 8 C. L. J. 359; 12 C. W. N. 1049; 10 Bom. L. R. 790; 18 M. L. J. 379; 4 M. L. T. 207; 42 P. R. 1910 (P. C.).

for the same. In consequence of a partition effected by the Revenue Court the original share of two-annas 14-*gandas* became 4-annas share, and this accounts for the fact that the share transferred by Deoki Nandan and now claimed by the plaintiffs, is represented by a one-anna 15-*gandas* share. The proportionate amount of the sale consideration found to be for legal necessity is far in excess of the proportion that 9-*gandas* share (the ancestral property of the plaintiffs) bears to 13½-*gandas* share (the self-acquired property of Deoki Nandan) and as such the plaintiffs were not entitled to a decree for any portion of the ancestral property. In my judgment the decisions of the Courts below are perfectly correct and I dismiss the appeal with costs including in this Court fees on the higher scale.

A. N. A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 365 OF 1924.
September 14, 1926.
Present:—Mr. Kinkhede, A. J. C.
Musammat DESHRANI AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS
versus
Thakur KISHORE SINGH AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse possession—Burden of proof—Adverse possession by Hindu female entitled to maintenance against another in whom inheritance vests—Nature and extent of right acquired—Proof of knowledge, necessity of—Adverse possession against limited owner—Reversioner's rights whether affected—Practice—Suit based on false averments—Dismissal, whether legal—New plea of fact, whether allowable in appeal—Evidence—Death at particular time—Burden of proof—Presumption as to time of death—C. P. Tenancy Act (I of 1920), s. 4—Absolute occupancy holding—Adverse possession against widow—Recognition by landlord—Reversionary rights, whether destroyed.

Where possession is referable to a lawful origin the presumption is that it is acquired lawfully and the burden is on the party asserting adverse possession to prove his case. [p. 447, col. 2.]

As regards the nature of possession by one Hindu female entitled to maintenance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of the *animus possidendi*. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as to extinguish his title. [p. 447, col. 2.]

No adverse possession can run against a person until he becomes entitled to possession of the property and an adverse possession of any length of time, against a tenant for life is ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of tenant for life. [p. 448, col. 1.]

Naunihal Singh v. *Alice Georgina Skinner* (3), followed.

In such cases the person in adverse possession against the life-estate-holder will acquire the life-estate of such holder, which will come to an end on the death of the latter. [*ibid.*]

A suit is not liable to be dismissed merely because it is based on false averments. [p. 448, cols. 1 & 2.]

Loola v. *Pyare* (4), followed.

A plea about which there were no pleadings in the trial Court should not be allowed to be raised at the stage of appeal at the instance of an unsuccessful litigant. [p. 448, col. 2.]

Nathu Piraji v. *Umedmal* (5), followed.

When the question is not merely one of death but of death at a particular time, there is no presumption as to the time of death but the party concerned to make out death on a specified date must prove it by evidence. [*ibid.*]

If a woman entitled to maintenance is in adverse possession of an absolute occupancy holding of a widow inherited by her after the death of her husband, the recognition of her by the landlord, in the absence of any proof that he dealt with such person independently of her position as a dependent or representative of the family of last male-holder, cannot give her the status of an absolute occupancy tenant so as to work a forfeiture of the interest of the reversioner in the holding after the widow's death. [p. 449, col. 1.]

The only effect of the recognition will be to raise a personal estoppel against the landlord in the matter of ejecting her as a trespasser. [*ibid.*]

Appeal against a decree of the District Judge, Saugor, dated 8th May, 1924, in Civil Appeal No. 22 of 1924.

Mr *G. L. Subhedar*, for the Appellants.

Mr. *J. Sen*, for the Respondents.

JUDGMENT.—The appellants took a sale-deed dated 22nd August, 1917, from the respondent No. 2, *Musammat* Baribahu, in consideration of a mortgage-debt due under a deed dated 7th February, 1908, and a cash payment of Rs. 200. Respondent No. 1 who claims to be a reversionary heir entitled to succeed to the estate involved in this litigation, after the death of respondent No. 2, instituted the suit out of which this second appeal has arisen to set aside the said alienation. This suit was filed on 12th December, 1922. The plaintiff alleged that *Musammat* Baribahu's husband Jalamsingh was the last male holder and that she inherited his estate as his widow, and that as she had no legal necessity to incur the mortgage-debt or to sell the property for

the satisfaction of that debt and a cash payment, the alienation was not binding as against him beyond her lifetime.

Jalamsingh had two brothers Lachhman Singh and Pran Singh. It is common ground that Lachhman Singh died first. While according to plaintiff Pran Singh predeceased Jalamsingh, the defendant's case is that he died after Jalamsingh. Each of these brothers left behind a widow. Rajrani was the widow of Lachhman Singh, she died in 1906. *Musammat* Shahjadi Bahu was the widow of Pran Singh; she disappeared from the village of residence of the family a few years after her husband's death; while according to plaintiff she has not returned since then, the defendants contended themselves by asserting that she has not been heard of since she left. Neither party expressly alleged that Shahjadi Bahu actually died or must be presumed to be dead at any particular point of time. On the evidence on record both the Courts below have come to the concurrent conclusion that Pran Singh was the last male holder of the estate, and that his death took place somewhere in *Sambat* 1929 corresponding to 1872. This necessarily involves the conclusion that the estate devolved on Pran Singh's widow, *Musammat* Shahjadi Bahu, and not on the widows of Lachhman Singh and Jalamsingh who predeceased him. The further question arising out of this position was as regards the nature of the interest which *Musammat* Rajrani and *Musammat* Baribahu held in the property inherited by *Musammat* Shahjadi Bahu as against her during all the period that has elapsed since the latter's disappearance. In short the question was, was the possession and enjoyment of Rajrani and Baribahu adverse merely to Shahjadi Bahu so as to deprive her of her widow's estate and clothe them with the same, or they prescribed for the larger interest of an absolute owner, which would make their possession adverse also against the plaintiff in his capacity of reversionary heir of Pran Singh's estate. The earliest document on record which shows *Musammat* Shahjadi Bahu's name against the fields in suit is Ex. 3 D-3 of *Sambat* 1930. Presumably she continued to hold the land until her disappearance from the village in *Sambat* 1935 corresponding to 1878-79, as we find from a remark in Ex. 3 D-4, a *jamabandi* for that year, that possession was ordered to remain with *Musammat* Rajrani and *Musammat* Baribahu so that Shahjadi Bahu, if aggrieved, might go to Civil Court. It is not clear that this possession of Rajrani and Baribahu had its origin necessarily in an act of trespass pure and simple and not in an act consistent with their asserting their own position as widows of predeceased co-parceners entitled to maintenance out of the family estate. It was open to the defendants who allege acquisition of a prescriptive title of an absolute owner by Baribahu to prove by the positive and direct evidence of Baribahu, who is still alive that she prescribed for and acquired an absolute title which must hold good not only against Shahjadi Bahu in the event of her return, but also against the reversioners who may be entitled to succeed to the estate on her death. Where possession is referable to a lawful origin the presumption is that it is acquired lawfully and the burden is on the party asserting adverse possession to prove his case. The learned District Judge has drawn an inference from the evidence on record consistently with Hindu notions. As regards the nature of possession by one Hindu female entitled to maintenance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of the *animus possidendi*. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as to extinguish his title. In the absence of any proved positive assertion of a hostile claim on the part of the two widows, *Musammat* Rajrani and Baribahu, at the time of the commencement of their possession and in the absence of Baribahu's own evidence it was open to the District Judge to draw the inferences he did and to hold that the nature and quality of Baribahu's possession was not proved to be such as could give rise to the further inference that it was as an absolute owner and that it, therefore, became adverse as against the present plaintiff also. The case is not taken out of the rule enunciated by Mitra, A. J. C., in *Sheo Lal* v. *Sheorajia* (1). The Privy Council case in *Lajwanti*

(1) 23 Ind. Cas. 719; 10 N. L. R. 35.

v. *Safa Chand* (2), is also instructive on this point as regards the nature of interest which a Hindu widow prescribing as a widow acquires and makes good to her husband's estate. Any length of adverse possession against *Mussammat* Shahjadi Bahu could not have, therefore, set time running against the present plaintiff so long as it is not proved by positive evidence that *Mussammat* Shahjadi Bahu died in a particular year. On the present state of record it is not possible to hold that limitation began to run against the present plaintiff from any particular date or year. It is a plain proposition of law that no adverse possession can run against a person until he becomes entitled to possession of the property. An adverse possession of any length of time, against a tenant for life is similarly ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of the tenant for life: *Naunihal Singh* v. *Alice Georgina Skinner* (3).

The defendants may at the most be said to have proved only an acquisition by Baribahu of merely the widow's interest of *Mussammat* Shahjadi Bahu and nothing further. So long as such interest is not proved to have come to an end by proof of Shahjadi Bahu's death, the plaintiff cannot be said to have become entitled to the possession of the property and the only remedy which he can claim under law is to have it declared that the alienations made by Baribahu are operative only during her own lifetime and not beyond unless they were proved to be justified by legal necessity. The plea of legal necessity raised in the case not being substantiated in the first Court was not made the subject of any specific ground of appeal before the District Judge. The result is that the transaction does not bind the plaintiff as a reversionary heir of Pran Singh's estate, and it was rightly declared as inoperative beyond Baribahu's lifetime.

The argument of the learned Counsel for the appellant that the present suit being based on false averment as to Jalamsing being the last male holder deserved to be dismissed on the finding that Pran Singh was the last male holder. But I am not prepared to uphold this contention in view of this Court's decision in *Loola* v. *Pyare* (4). The 2nd contention is that in view of the admitted disappearance of *Musammat* Shahjadi Bahu from 1878, the Courts below should have presumed under the combined operation of ss. 107 and 108 of the Evidence Act that she was dead at the end of the period of 7 years from 1878 and that the plaintiff's claim was, therefore, hopelessely barred by the time even when he instituted his former suit of 1908 to set aside the mortgage of the 7th February, 1908, or at any rate at the date of the present suit. In the absence of any specific pleadings on the point of either actual or presumed death, I do not think I should allow the present belated contention to prevail at the stage of second appeal. It exposes the plaintiff to the brunt of a new attack at the stage of appeal at the instance of an unsuccessful litigant: *Nathu Piraji* v. *Umedmal* (5). The law on the point of such presumption is also clear. There is express authority for the view that when the question is not merely one of death but of death at a particular time there is no presumption as to the time but the party concerned to make out death on a specified date must prove it by evidence: *Venkata Hanumanulu Garu* v. *Lachamma* (6), *Jayawant Jivanrao Despande* v. *Ramchandra Narayan Joshi* (7) and *Parsoo* v. *Munnalal* (8). See also *Muhammad Sharif* v. *Bande Ali* (9), *Narki* v. *Phekia Lal Sahu* (10), *Veeramma* v. *Chinna Reddi* (11) and *Mairaj Fatima* v. *Abdul Waheed* (12). It is held in *Gopal Bhimji Avte* v. *Manaji Ganuji Padval* (13) that the date of a person's death must be proved like any other fact by the party who is interested in establishing that he died on or before a particular date; see also *Lal Chand Marwari* v. *Ramrup Gir* (14). Since

(2) 80 Ind. Cas. 788; 28 C. W. N. 960; 22 A. L. J. 304; A. I R. 1924 P. C. 121; 5 Lah. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 Pat. L. R. 245; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; 51 I. A. 171; L. R. 5 A (P. C.) 94 (P. C.).

(3) 92 Ind. Cas. 63; 23 A. L. J. 691; A. I R. 1925 All. 707; 47 A. 803.

(4) 33 Ind. Cas. 497; 12 N. L. R. 57 at p. 60.

(5) 1 Ind. Cas. 456; 33 B. 35; 10 Bom. L. R. 768.

(6) 14 M. L. J. 464.

(7) 33 Ind. Cas. 484; 40 B. 239; 18 Bom. L. R. 14.

(8) 39 Ind. Cas. 21; 13 N. L. R. 16 at p. 17.

(9) 11 Ind. Cas. 474; 34 A, 36; 8 A. L. J. 1052.

(10) 5 Ind. Cas. 709; 37 C. 103; 14 C. W. N. 341; 11 C. L. J. 138.

(11) 16 Ind. Cas. 43; 37 M. 440; 23 M. L. J 443.

(12) 63 Ind. Cas. 286; 43 A. 673; 19 A. L. J. 713.

(13) 81 Ind. Cas. 449; 47 B. 451; 25 Bom. L. R. 134; A. I. R. 1923 Bom. 163.

(14) 93 Ind. Cas. 280; 42 T. L. R. 159; 24 A. L. J. 105; A. I. R. 1926 P. C. 9; (1926) M. W. N. 203; 7 P. L. T. 163; 43 C. L. J. 249; 50 M. L. J. 289; 3 O. W. N. 335; 5 Pat. 312; 30 C. W. N. 721; 28 Bom. L. R. 855; 53 I. A. 24 (P. C.)

the defendants depended upon the plea of adverse possession for their success it was necessary for them first to allege and then to prove that *Musammat* Shahjadi Bahu died in a particular year. Not having done so they are not entitled to ask me to make even the limited presumption that she was dead at the time when the question was raised much less to presume that her death took place more than 12 years before the institution of the present suit.

Now one more position taken up by the defendants appellants which is based on the recognition of Baribahu as an absolute occupancy tenant, has remained to be considered. I think this contention cannot stand. As it has not been alleged and proved in this case that the landlord dealt with Baribahu independently of her position as a dependent or representative of the family of Pran Singh, Baribahu could not acquire the status of an absolute occupancy tenant by prescription or by recognition of the landlord. The only effect of the recognition was to raise a personal estoppel against the landlord in the matter of ejecting Baribahu as a trespasser. It did not confer on her any higher and new status so as to work a forfeiture of the plaintiff's reversionary interest in the estate of Pran Singh after Baribahu's death.

On the view taken by the Courts below that *Musammat* Baribahu acquired by adverse possession only *Musammat* Shahjadi Bahu's life-interest as a Hindu widow in the estate of Pran Singh and as such her possession was not adverse to the present plaintiff, the decision that her alienation will not operate or be binding against plaintiff after her death is correct and must be upheld. The appeal, therefore, fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND APPEAL No. 1030 OF 1924.

December 1, 1926.

Present:—Mr. Justice Kendall.

Pandit SUKH NANDAN SARUP—DEFENDANT—APPELLANT

versus

Sheikh FAZAL HUSAIN—PLAINTIFF—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Malicious prosecution—Damages, whether can be recovered.

Damages may be recovered in respect of the institution of proceedings under s. 145 of the Criminal Procedure Code.

Damages for malicious prosecution are awarded to compensate the plaintiff for expenses incurred by him in defending himself, pain to mind and body and loss of reputation, etc., which he has actually suffered, and not for injuries which he might have suffered if he had been convicted.

Second appeal against a decree of the Additional Subordinate Judge, Bareilly, dated the 8th of April, 1924.

Mr. *Nehal Chand*, for the Appellant.

Mr. *Uma Shankar Bajpai*, for the Respondent.

JUDGMENT.—The only ground taken in this second appeal against the decision of the Courts below, by which the appellant was ordered to pay damages for the malicious prosecution of the respondent, is that the institution of proceedings under s. 145, Criminal Procedure Code, does not amount to a malicious prosecution. This question has, however, been settled by authority. In *Crowdy* v. *O'Reilly* (1) a Bench of the Calcutta High Court in 1912 definitely decided that proceedings under ss. 144 and 145, Criminal Procedure Code, may constitute a prosecution of the plaintiff by the defendant, so that damages may be claimed for malicious prosecution. No exactly similar decision in this Court has been pointed out to me, but a Bench in 1919 decided that proceedings under s. 107, Criminal Procedure Code, might form the basis of an action for damages [*Muhammad Niazullah Khan* v. *Jai Ram* (2)]. An attempt has been made to differentiate proceedings under s. 107 from those under s. 145, in that the former may result in the restriction of the liberty of the person on the individual charge. The distinction, however, is more apparent than real. Damages for malicious prosecution are awarded to compensate the plaintiff for expenses incurred in the prosecution, pain to mind and body, and the loss of reputation, etc., which he has actually suffered, and not for injuries which he might have suffered, if he had been convicted.

No other objection has been made to the order of the Courts below, and the result is that the appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 18 Ind. Cas. 737; 17 C. L. J. 105; 17 C. W. N. 554.

(2) 50 Ind. Cas. 140; 17 A. L. J. 776; 41 A. 503.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 587 OF 1925.
May 19, 1926.

Present:—Mr. Rupchand Bilaram, A. J. C.

MESSRS. OSBORNE GARRETT AND CO., LTD.—PLAINTIFFS

versus

RAISI JOTHABHOY AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 14, O. XXIX, r. 1—Corporation, suit by—Attorney, whether can sign plaint—Amendment of plaint—Discretion of Court.

In the case of a suit instituted by a Company, the plaint must be signed and verified either by the Secretary or by a Director or other principal officer of the Company able to depose to the facts of the case as provided by O XXIX, r. 1 of the Civil Procedure Code. An attorney appointed by the Company is incompetent to sign and verify a plaint on its behalf, but the Court may, if the plaint is not properly signed and verified, in its discretion, permit the plaint to be signed and verified as required by O. XXIX, r. 1, of the Civil Procedure Code.

Delhi and London Bank Ltd. v. *Oldham* (1), relied upon.

Mr. *D. N. O'Sullivan*, for the Plaintiffs.

Messrs. *Manghanmal Bhojraj* and *W. Lobo*, for the Defendants.

ORDER.—The plaint in this case has been signed by Mr. Jessaram Banarsidas duly constituted attorney of the plaintiffs who are described as Messrs. Osborne Garrett & Co., Ld. a firm carrying on business at Frith Street, Soho, London. A preliminary objection has been raised as to the maintainability of the suit on the ground that the plaintiff being a limited Company, the plaint should have been signed and verified either by the Secretary or by a Director or other principal officer of the Company able to depose to the facts of the case as laid down by O. XXIX, r. 1, Civil Procedure Code. Reliance has been placed on the ruling of their Lordships of the Privy Council in *Delhi and London Bank Ltd.* v. *Oldham* (1) where it was pointed out that the provisions of s. 151 of the old Civil Procedure Code corresponding to O. VI, r. 14, Civil Procedure Code, which permit an attorney to sign and verify a plaint on behalf of an absent plaintiff do not apply to a suit instituted on behalf of a Corporation. *Prima facie*, therefore, the plaint is neither properly signed nor verified. It is urged on behalf of the defendants that the suit should, therefore, be dismissed. I am not prepared to accede to this request in the present case. I see no reason why I should not exercise my discretionary powers of permitting the plaintiffs to comply with the provisions of O. XXIX, r. 1, Civil Procedure Code, and allow them time to file an amended copy of the plaint properly signed and verified. No prejudice is being caused to the defendants by this delay as it appears that so far as the defendant No. 1 is concerned, he says that he only acted as the agent of the Chartered Bank and is in no way concerned with the goods which are the subject-matter of the suit and are said to have the alleged purlioned mark "Kropp" stamped on them. So far as defendant No. 2 again is concerned he does not allege having advanced any money on the goods, and he does not care whether the goods in question which are said to be now in the possession of the Customs Authorities are delivered to him or not. The *interim* injunction issued against defendant No. 2 is not working any hardship on him. If the plaintiffs have not brought on the record proper persons against whom they should have obtained an *interim* injunction and if in consequence of that they suffer they have to thank themselves. I, therefore, grant three months' time to the plaintiffs to file an amended plaint properly signed and verified in accordance with O. XXIX, Civil Procedure Code, and order that they should bear the costs of the defendants for three hearings, the time wasted unnecessarily in consequence of their failure to present a proper plaint.

P. B. A. *Order accordingly.*

(1) 21 C. 60; 20 I. A. 132; 17 Ind. Jur. 482; 6 Sar. P. C. J. 331; Rafique and Jackson's P. C. No. 130; 10 Ind. Dec. (N. S.) 672 (P. C.),

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OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 186 OF 1926.
December 22, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

BAHRAICHI—DEFENDANT—APPELLANT

versus

Thakur TIRBENI SINGH—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption—Qabzadari rights, whether under-proprietary rights—Under-proprietary rights, sale of—Pre-emption—Rival suits, dismissal of—Appeal in one suit—Appeal against decree in other suit, whether necessary.

The word "*qabzadari*" may in some cases mean under-proprietary rights. [p. 452, col. 1.]

Where *qabzadari* rights in certain property were granted and the holders of those rights were described in the revenue papers as under-proprietors and were continuously treated as such:

Held, that the grant must be taken to be of under-proprietary rights and that the sale of such rights was open to pre-emption. [p. 451, col. 2.]

Two suits were instituted by two different persons to pre-empt the same sale and the plaintiff in each suit was impleaded as a defendant in the other suit. Both suits were dismissed and one of the plaintiffs appealed against the dismissal of his suit:

Held, that it was not necessary for him to file an appeal against the decree in the other suit. [p. 452, col. 1.]

Appeal against the judgment and decree of the District Judge, Fyzabad, dated the 31st March, 1926, reversing those of the Additional Sub Judge, Fyzabad, dated the 1st February, 1916.

Mr. *Bisheshwar Nath Srivastava*, for the Appellant.

Messrs. *R. D. Sinha*, *Kalka Prasad* and *Gopal Chandra Sinha*, for the Respondents.

JUDGMENT.—The facts necessary for the decision of this second appeal may be stated as follows:—

A certain Ram Nidh sold what he described as his rights in an under-proprietary tenure to one Bahraichi. Two persons Tribeni Singh and Rampher instituted suits which were separate suits, each asserting a right of pre-emption over the property sold. Rampher joined Tirbeni Singh as a defendant in his suit and Tirbeni Singh joined Rampher as a defendant in his suit. The two suits were heard together. At the commencement, the Court trying the suits discussed the relative claims of Tirbeni Singh and Rampher to exercise a right of pre-emption, if the property sold were property over which a right of pre-emption could be exercised. The Court found that Tirbeni Singh and Rampher had equal rights of pre-emption under such conditions. This view was accepted by Tirbeni Singh and Rampher, and the Court then proceeded (as provided by law) to draw lots to decide who would be the successful party. Tirbeni Singh succeeded in the drawing of lots, and Rampher then abandoned prosecution of his suit which was dismissed. But an issue had been framed in both the suits as to whether the property was property over which a right of pre-emption could be exercised and the learned trial Judge decided upon this point that the rights which purported to have been transferred were rights of a tenant in an occupancy holding and as such incapable of transfer. In consequence in addition to dismissing Rampher's suit, which had not been prosecuted to the end, he dismissed Tirbeni Singh's suit. Tirbeni Singh appealed and the learned District Judge decided that the property transferred was property over which a right of pre-emption could be exercised inasmuch as it was an estate held in an under-proprietary tenure. The vendor Bahraichi has come to this Court in second appeal. His learned Counsel has taken two points. The first point is that what was transferred was the right of a tenant in an occupancy holding, which cannot be transferred under the law. The second point is that Tirbeni Singh's appeal was bound to fail, because while appealing against the dismissal of his own suit he had not appealed against the dismissal of Rampher's suit.

In regard to the first point we have been taken through the evidence and we consider that the learned District Judge arrived at a correct conclusion. The *Taluqdar* of Ajudhia had at the First Regular Settlement applied to be placed in complete proprietary possession of the property, with which we are concerned in the present appeal. The predecessor-in-interest of Ram Nidh contested this claim and asked for a sub-settlement. He claimed what he called *pukhtadari* rights. The parties compromised and the predecessor-in-interest of Ram Nidh was allowed under this compromise by the *Taluqdar* of Ajudhia what were called *qabzadari* rights which included the rights in suit. The Settlement Officer in his English order called the rights "occupancy" rights. We have it in evidence that all along in the revenue papers the rights granted were described as under-proprietary rights and that all along the holders of these rights have been treated by the *taluqdar* as under-proprietors. No one has ever questioned the fact that these rights were under-proprietary rights until Bahraichi after having taken the transfer of under-proprietary rights has thought it convenient as a defence in a pre-emption suit to assert that they were only the rights of an occupancy tenant. If the decision of Mr. Carnegy had been a clear and specific decision that the rights in question were the rights of a tenant only, we should have been precluded in going behind that deci-

sion, whatever might have been the subsequent treatment of the property in the hands of the holders. We consider, however, that this decision is ambiguous and that it can be read either as a decision that under-proprietary rights were granted or as a decision that the rights of an occupancy tenant were granted. We find that in using the word "occupancy" Mr. Carnegy was translating the word "*qabzadari*" and it is settled law that the word "*qabzadari*" may in some cases mean under-proprietary rights. Taking into account the evidence of subsequent treatment, we are of opinion that the learned District Judge arrived at a correct conclusion.

Upon the second point there is very little to say. We have been referred to the Full Bench decisions of the Allahabad High High Court in *Zaharia* v. *Debia* (1) and in *Ghansham Singh* v. *Bhola Singh* (2), but neither of these decisions is directly in point though some remarks at p. 512* of the last case are very helpful. If there had been a decree in favour of any person which stood in the way of Tirbeni Singh until it was reversed, it is clear that Tirbeni Singh would not have been in a position to succeed in an appeal against the dismissal of his own suit, until he had removed the obstacle created by the decision in favour of another person against himself in the other suit. But here Tirbeni Singh was not in a position to appeal as to the dismissal of Rampher's suit. If Tirbeni Singh had appealed he would have been met with the obvious reply that the suit as against him had been dismissed, that the decree was in his favour and that there was nothing upon which he could appeal. In these circumstances we consider that Tirbeni Singh had every right to appeal against the dismissal of his own suit without taking any further action and we, therefore, dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(1) 7 Ind. Cas. 156; 33 A. 51; 7 A. L. J. 861.
(2) 74 Ind. Cas. 411; 45 A. 506; 21 A. L. J. 465; A. I. R. 1923 All. 490 (F. B.).

*Page of 45 A.—[*Ed.*]

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 855 OF 1926.
December 22, 1926.
Present:—Mr. Justice Zafar Ali.

SULTAN MUHAMMAD—VENDEE No. 1—DEFENDANT—APPELLANT
versus
SURKHRU KHAN AND OTHERS—PLAINTIFFS AND GHAZI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Custom—*Abadi—*Sale of site by non-proprietor to proprietor, whether binding upon other proprietors—Suit for possession—Relief.*

The sale of a site in the village *abadi* by a non-proprietor in favour of one of the proprietors is not binding on the remaining proprietors.

Where, therefore, in such a case some of the proprietors sue for possession of the site, they are entitled to a decree for joint possession of the site after removal of the materials, if any, standing upon it.

Second appeal from a decree of the District Judge, Attock District at Campbellpur, dated the 19th December, 1925, varying that of the Subordinate Judge, First Class, Campbellpur, dated the 12th October, 1925.

Mr. *M. S. Bhagat*, for the Appellant.
Mr. *Devi Dayal*, for the Respondents.

JUDGMENT.—The house in dispute is situate in the *abadi* of village Lawa, and it was in the possession of a non-proprietor menial, namely, Shera Musalli. Shera sold it to one of the proprietors, namely, Sultan Muhammad, defendant No. 5, and the latter sold it to two strangers who figure as defendants Nos. 2 and 3. The *abadi* land is joint property of the plaintiffs and defendants Nos. 5 to 9. The plaintiffs sued for possession of half the house, according to their share in the *abadi* land. Shera Musalli was only the owner of the material and was not competent to sell the site or the right of residence. The sale in favour of defendant No. 5 though he was one of the proprietors was not binding on the rest as held in *Heba* v. *Ram Singh* (1) and *Kahan Singh* v. *Warris Khan* (2) and consequently the sale by him to strangers was also inoperative. The trial Court granted the plaintiffs a decree for possession of half the house as prayed for by them but on appeal the learned District Judge held that they were only entitled to joint possession of the site, and orders that the purchasers should remove the materials within three months, and modified the decree of the trial Court accord-

(1) 24 P. R. 1878.
(2) 48 P. R. 1899.

ingly. Defendant No. 5, the first vendee, appeals and it is contended on his behalf that the plaintiffs were entitled only to a declaration that they were owners of a half share in the house and not to a decree for joint possession of the site and for demolition of the house and removal of the materials for which there was no prayer in the plaint. But according to the general rule of custom Shera was entitled to remove the materials and so are the alienees who stand in his shoes. As they have no right of residence in the house they should either vacate it or remove the materials. Further the plaintiffs are only entitled to joint possession of the site as the *abadi* land has not yet been partitioned. The decree of the lower Appellate Court is, therefore, correct and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2124 OF 1924.

August 26, 1926.

Present:—Mr. Justice Panton and Mr. Justice Chakravarti.

Rai KIRAN CHANDRA ROY BAHADUR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SRINATH CHAKRAVARTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Grant — Brahmottar — *Proof of ancient grant—Long possession under definite claim—Presumption of lost grant—Bengal Tenancy Act (VIII of 1885), s. 103B—Entry in Record of Rights—Presumption of correctness, rebuttal of—Evidence—Document not* inter partes, *admissibility of.*

A person who claims to hold as a tenant land within the ambit of a *zemindari* must prove his right to hold it without payment of rent by a grant from the *zemindar*; but the production of the grant itself is not the only way to prove a grant. [p. 454, col. 2.]

Where there has been long continued possession in assertion of a right, it is a well-settled principle of law that the right should be presumed to have had a legal origin, if such a legal origin was possible and the Court will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title. [p. 455, col. 2.]

Phillips v. *Halliday* (5), followed.

Whether a presumption of a lost grant should be raised or not depends on the circumstances of each case. [p. 455, col. 2.]

It is only in cases of long possession under a claim of a definite right that the question of presumption of a lost grant arises. [p. 454, col. 2.]

In raising the presumption of lost grant care must always be taken to see that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that in the circumstances it was likely to have attracted the notice of the person or persons whose rights are adversely affected by such a claim. [p. 455, col. 2.]

With regard to the *brahmottar* grants made in ancient days in Bengal by the Rajas and *Zemindars*, long possession by the grantees and their successors under a claim of rent-free *brahmottar* grant is all that can be expected after a long lapse of time in proof of a legal origin of such grants. Where possession under such a claim for a long period is proved by direct evidence, the Court not only might, but ought to presume that the claim was based upon a lost grant. [p. 458, cols. 1 & 2.]

Although an entry in the Record of Rights must be presumed to be correct unless the contrary is proved yet, where the matter is investigated by the Civil Court and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it. [p. 456, col. 1.]

Documents showing the dealing of the property by the descendants of the original grantee, as rent-free *brahmottar* and evidencing the transfer of their interests are admissible in evidence to prove the title of the grantee. [*ibid.*]

Appeal against the decree of the Officiating Subordinate Judge, First Court, Faridpur, dated the 28th of July, 1924, reversing that of the Munsif, Second Court, Bhanga, dated the 17th of March, 1924.

Babu *Hemendra Chandra Sen* (with him Babu *Surendra Nath Bose* (Sr.), for the Appellant.

Babu *Manmatha Nath Roy* (Jr.), for Babu *Upendra Chandra Banerji*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal by the plaintiffs against the judgment of the Officiating Subordinate Judge of Faridpur, dated the 26th July, 1924, reversing that of the Munsif of the Second Court at Bhanga, dated the 17th March, 1924.

The appellants brought the suit under s. 158 of the Bengal Tenancy Act for the assessment of fair and equitable rent for certain lands appertaining to their *zemindari* Touzi No. 5557 of the Faridpur Collectorate in the possession of the defendants and also for arrears of rent for the years 1326 to 1329. In the course of a Record of Rights the lands in suit were recorded as *brahmottar* Prankrishna Bhattacharji liable to assessment with fair and equitable rent. The present claim of the plaintiffs was based on the said entry in the Record of Rights.

The defence of the defendants Nos. 1 to 14 was that the lands in suit appertained to *brahmottar* Prankrishna Bhattacharji, that these lands were enjoyed as such by

the grantee and his successors from before the Permanent Settlement and that in execution of a decree, dated 1879, against a successor of the original grantee, the lands in suit were sold as rent-free *brahmottar* in 1882 and were purchased by defendants Nos. 6, 7, 8 and 9. The defendants alleged that the purchasers were all along in possession of the land as rent-free *brahmottar* without any payment of rent to the plaintiffs.

The Court of first instance held that the defendants had failed to rebut the presumption of the correctness of the Record of Rights by the documents relied upon by them. He further held that the presumption of a lost grant did not arise in the circumstances of the present case. The learned Munsif was not satisfied that the documents, Exs. A, B and C, relied on by the defendants did relate to the lands in suit and he held that even assuming that these documents did relate to the lands in suit, they were not sufficient to rebut the presumption which arose from the Record of Rights.

On appeal by the defendants the learned Subordinate Judge found that Exs. A, B and C related to the *brahmottar* lands known as Prankrishna Bhattacharji. He further found that Harish and Parbati whose names were mentioned in Exs. A, B and C were descendants of Prankrishna Bhattacharji. Exhibit A is a *hibanama*, dated 1861, by which the lands in suit were dealt with as rent-free *brahmottar* by the descendants of Prankrishna Bhattacharji. Exhibit B was the sale certificate under which the defendants purchased the land at the sale of 1882; and Ex. C was the writ for delivery of possession to the purchaser in that execution sale. No question as to the admissibility of these documents was raised either in the Court of first instance or before the learned Subordinate Judge. The only ground upon which the plaintiffs contended that those documents were of no help to the defendants was that it was not established that the lands mentioned in those documents were the lands in suit. The learned Subordinate Judge found that, to use his own words:—"There is, therefore, no doubt that the defendants and their predecessors have been holding the said lands as rent-free *brahmottar* for at least 62 years. The plaintiffs-respondents cannot show that within this period they have realised any rent from the defendants in respect of the lands in suit. The defendants denied that they ever paid rent for the said land. That being so, it can be reasonably inferred that the defendants and their predecessors-in-interest have held the land under a rent-free title. The same can also be inferred from the description of the lands as *brahmottar* in the Record of Rights." In this view the learned Subordinate Judge dismissed the plaintiffs' claim for assessment of fair and equitable rent.

The learned Vakil who appears for the appellants urged two grounds in support of this appeal: first, that the land being admittedly within the plaintiffs' *zemindari* the defendants were bound to prove an old grant recognised by law; and secondly, that Exs. A, B and C were not admissible in evidence.

In the course of arguments the learned Vakil also contended that the presumption of a lost grant which the learned Subordinate Judge held to have arisen from long enjoyment of the lands under a claim of rent-free title was not justifiable upon the findings arrived at by the learned Subordinate Judge.

The learned Vakil contended that the defendants were not entitled to establish their claim to hold under a rent free grant without the production of the original grant. In support of this contention the learned Vakil relied upon the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (1). There is no doubt as to the general principle that a person who claims to hold as a tenant land within the ambit of a *zemindari* must prove his right to hold it without payment of rent by a grant from the *zemindar*. In the case before their Lordships, they were not satisfied that the tenant had succeeded in proving such a grant. Their Lordships did not intend to lay down that the only way to prove a grant was by production of the grant itself.

This contention of the learned Vakil, therefore, fails.

The learned Subordinate Judge has presumed the existence of a lost grant. It is only in cases of long possession under the claim of a definite right that the question of presumption of a lost grant arises. It is a well-known principle. In a recent decision of the Judicial Committee in the

(1) 71 Ind. Cas. 984; 49 I. A. 399; 27 C. W. N. 925; 36 C. L. J. 499; 3 P. L. T. 605; A. I. R. 1922 P. C. 272; 32 M. L. T. 1; (1923) M. W. N. 361; 2 Pat. 38; 45 M. L. J. 460 (P. C.).

case of *Srinath Roy* v. *Dinabandhu Sen* (2) their Lordships observed: "In practice such original grants are but rarely forthcoming now, and resort must be had to secondary evidence of them, or to the inference of legal origin to be drawn from long user." Later on their Lordships observed that the evidence of "a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, but they are of opinion that in so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, the evidence in the present case was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the plaintiffs' predecessors-in-title or settle with them so as in effect to grant a *jalkar* right." In this case a lost grant by the Crown of a several fishery in favour of the subject was presumed from long possession. In cases of claims of prescriptive right based on long user, presumption of lost grant has been made. The Judicial Committee in the case of *Rajrup Koer* v. *Abdul Hossein* (3) observed as follows:—"Their Lordships think that in this case there is abundant evidence upon the facts found by the Court for presuming the existence of a grant at some distant period of time." Similar presumption of a lost grant has been drawn in cases where the permanency of a tenure has been claimed from long user and other circumstances. See the case of *Abdul Hakim Khan* v. *Elahi Baksha Saha* (4).

In Bengal Rajas and rich *Zemindars* in ancient days made numerous rent-free *brahmottar* grants to learned Pandits and Brahmins of saintly character for their maintenance. At this distance of time most of the original grants recorded in country papers have been lost.

Long possession by the grantees and their successors under a claim of rent-free *brahmottar* grant is all that can be expected after a long lapse of time in proof of a legal origin of such grants. At this distance of time it is unreasonable to expect that grants made to those Brahmins would exist or could be produced in Court. Whether a presumption of a lost grant should arise or not must depend upon the circumstances of each case. The existence of these original grants after the lapse of such a long time can only be expected if such documents escaped destruction either by the climatic influence of lower Bengal or by ravages of white ants or destruction by fire or cyclone of the thatched huts in which the grantees of this class ordinarily resided. It is only in rare cases that an ancient grant which has survived these risks is now available for production in Court. In cases of this nature when long possession, as here, for 62 years has been proved by direct evidence, the Court not only might, but, in my opinion, ought to presume that the claim was based upon a grant which is now lost. Care must, however, always be taken to see in these cases that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that in the circumstances it was likely to have attracted the notice of the person or persons whose rights are adversely affected by such a claim. In England where deeds are ordinarily kept in safer custody and are less liable to destruction, this rule of law is also well-established. I shall refer to one well-known case in which this principle is stated by Lord Herschell in the following words:—

"Now, I apprehend that where there has been long continued possession in assertion of a right, it is a well-settled principle of English Law that the right should be presumed to have had a legal origin, if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title," *Phillips* v. *Halliday* (5) Lord Reading, C. J., referred to this enunciation of the law in a comparatively recent case of *General Estates Co.* v *Beaver* (6).

In the present case the learned Subordinate Judge has found possession for 62 years under a claim of a rent-free grant by the original grantee and his successors and then, after the property was sold by the purchasers, defendants. During this long

(2) 25 Ind. Cas. 467; 41 I. A. 221 at p. 227; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 1193; 20 C. L. J. 385; 16 Bom. L. R. 901; 42 C. 489 (P. C.).

(3) 7 I. A. 240 at p. 247; 6 C. 394; 7 C. L. R. 529; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

(4) 85 Ind. Cas. 103; 29 C. W. N. 138; A. I. R. 1925 Cal. 309; 52 C. 43.

(5) (1891) A. C. 228 at p. 231; 61 L. J. Q. B. 210; 64 L. T. 745; 55 J. P. 741.

(6) (1914) 3 K. B. 918 at p. 926; 84 L. J. K. B. 21; 12 L. G. R. 1146; 30 T. L. R. 634.

period of time the *zemindar* did not receive any rent for these lands.

I am, therefore, of opinion that the learned Subordinate Judge was right in holding that from the circumstances of the present case the presumption of a lost grant arose.

As to the second point raised by the learned Vakil, as I have already stated, no objection as to the admissibility of those documents was raised in either of the Courts below. Nor was it raised in the written grounds of appeal before this Court. It is difficult to see on what ground their admissibility as evidence can be questioned. The first document is a piece of evidence which shows the dealings of the property by the descendants of the original grantee as rent-free *brahmottar* land; and the other two documents are connected with the title of the defendants. One of them is in fact the title-deed upon which the defendants' claim was based as purchasers at an execution sale. The other document shows that delivery of possession under that purchase was taken.

None of the grounds relied upon by the learned Vakil for the appellants has any force. Strong reliance was placed by the learned Vakil for the appellants on the presumption as to the correctness of the entry in the Record of Rights in favour of the plaintiffs. There cannot be any doubt that the entry must be presumed to be correct unless the contrary is proved but when the matter is investigated by the Civil Court and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it.

The appeal, therefore, fails and is dismissed with costs.

Panton, J.—I agree.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1033 OF 1925.

November 17, 1925.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

IHSAN ULLAH—DEFENDANT—APPELLANT

versus

Sheikh FARHAT ALI—PLAINTIFF AND SAID-UD-DIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Pre-emptor, whether can put vendee to proof of title of vendor in respect of portion of property sold.

In a suit for pre-emption it is open to the plaintiff to allege that the vendors have included in the sale-deed a share larger than that owned by them in the property sold in order to inflate the price and thus to defeat pre-emption. In such a case, the plaintiff is entitled to put the vendees to proof of the vendors' title in respect of the excess share sold by them.

Second appeal against the decree of the Second Additional Subordinate Judge, Allahabad, dated the 14th of March, 1925.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Zahur Ahmad* and Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This is a defendant's appeal arising out of a suit for pre-emption. The plaintiff came into Court on the allegation that although only one-sixth share each belonged to the vendors, defendants Nos. 2 and 3, they had fraudulently in order to inflate the price and to defeat pre-emption included the whole share in the disputed plot in the sale-deed. The plaintiff further alleged that the defendant No. 2 had no authority to execute the sale-deed on behalf of defendant No. 3. He, however, prayed that if the Court found that the sale-deed had been validly executed by defendant No. 3 he was ready to pre-empt his share also. The Court of first instance dismissed the suit on the ground that the plaint as drafted was defective and the plaintiff's suit was liable to dismissal because he had tried to put the defendant No. 1, the vendee, to the proof of defendant No. 3's title. The lower Appellate Court has come to a contrary conclusion. The finding of the lower Appellate Court amounts to this that, as a matter of fact, defendants Nos. 2 and 3 only own a one-sixth share each in this plot and that they knew full well that the total of their shares was only one-third but that in order to inflate the price and defeat pre-emption they fraudulently inserted more than one-third share in the sale-deed. As regards the price the finding is that Rs. 550 which is shown in the sale-deed and which was not paid before the Sub-Registrar, was not in fact the genuine price. On the basis of the profits the Court came to the conclusion that the real price of the one-third share which the defendants knew they owned and which they really transferred to the vendee was Rs. 56-10 8.

In view of the finding that the transfer of the whole share was not a *bona fide* one but was fraudulent, we think that there was

no fatal defect in the suit. The Court of first instance had relied on the case of *Sahodra Bibi* v. *Bageshari Singh* (1). In the concluding portion of the judgment the learned Chief Justice remarked that "they do not decide that a vendor is entitled fraudulently to insert property, to which he has no title, in the sale-deed for the purpose of inflating the price or otherwise fraudulently to defeat pre-emption." On the findings arrived at by the lower Appellate Court these remarks apply to this case. We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 29 Ind. Cas. 1000; 37 A. 529; 13 A. L. J. 711.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 82 OF 1925.

December 21, 1926.

Present:—Mr. Findlay, J. C.

Musammat RUKHMABAI AND OTHERS - DEFENDANTS—APPELLANTS

versus

JAIPAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Bombay School—Powars in C. P.—Widow—Acquisition from income of husband's estate—Accretion—Intention—Test.

The Powars, settled in the Central Provinces, arrived in these Provinces long before and altogether independently of the Mahrattas. [p. 460, col. 1.]

The Powars, settled in the District of Balaghat, did not migrate from the Bombay Presidency, bringing with them Bombay customs, nor are they governed by the Mayukha School of Hindu Law. [p. 461, col. 1.]

The question whether a Hindu widow who purchased immoveable property out of the profits of the estate inherited by her from her deceased husband, intended to treat the acquisition as an increment to her husband's estate or not, must be judged from her actual conduct in making and dealing with the acquisition in question. [p. 462, col. 1.]

Isri Dutt Koer v. *Hansbutty Koerain* (4), *Gonda Kooer* v. *Kooer Oodey Singh* (5), *Kula Chandra Chakravarti* v. *Bama Sundari Dasya* (6) and *Sheolochun Singh* v. *Saheb Singh* (7), followed.

Wahid Ali Khan v. *Tori Ram* (2) and *Subramanian Chetti* v. *Arunachelam Chetti* (3), distinguished.

Appeal against the decree of the Subordinate Judge, First Class, Balaghat, dated the 30th June 1925, in Civil Suit No. 3 of 1924.

Dr. Sir *H. S. Gour* and Mr. *S. B. Gokhale*, for the Appellants.

Messrs. *Fida Hussain* and *Abdul Rahman Khan*, for the Respondents.

JUDGMENT.—The plaintiffs Jaipal, Mahpal and Tikaram, sons of Jangli, as well as Ardeshar, plaintiff No. 4, filed the present suit against the defendants, *Musammat* Rukhmbai, Kisan, Soma and Jiwan, for recovery of 10-anna share in *Mouza* Birsula (Balaghat). The Subordinate Judge commenced his judgment by saying the genealogical tree included therein will serve to elucidate the matter. The highly confusing form, in which the genealogical tree has been given in the judgment, far from elucidating the relationship of the parties, tends to obscure it. I append hereto as Annexure A* a genealogical tree of the parties in what, I hope, is a more intelligible form. It will be seen therefrom that Adkoo and Ladkoo were brothers. Jangli, who was the son of Adkoo, died in 1922. After Ladkoo's death his widow *Musammat* Sita was in possession of a 10-anna share of *Mouza* Birsula as a Hindu widow. She had inherited an 8-anna share thereunder immediately after Ladkoo's death and had obtained the remaining 2-anna share under circumstances discussed below. The plaintiffs' case was that *Musammat* Sita, during her lifetime, gifted the 10-anna share to her daughter *Musammat* Sugabai who died in 1919, whereupon the defendants Nos. 1-4 had taken possession of the property. The plaintiffs had insufficient funds to meet the expenses of litigation necessary for recovery of the property, hence they sold 5-anna share thereof to the plaintiff No. 4 Ardeshar, who was accordingly joined as a party.

The defendants denied that the plaintiffs were reversioners of Ladkoo and they raised various pleas with reference to the sale of half the subjects by the first three plaintiffs to the fourth one. The defendants contended that *Musammat* Sita inherited the 8-anna share on the death of her husband Ladkoo. They further pleaded that the remaining 2-anna share had been mortgaged by the original owner Dalpat to one Jai Gopal who obtained a decree for foreclosure in Civil Suit No. 251 of 1892 in the Court of the Extra Assistant Commissioner, Balaghat. *Musammat* Sita made a payment of Rs. 448-6-3 towards the mortgage-decree and the Court ordered the share to be made over to her. The

*See Page 463 *Infra*.—[Ed.]

said payment was made by *Musammat* Sita out of her *khamora* money and in Suit No. 265 of 1893 in the Court just mentioned *Musammat* Sita got a decree for possession of the 2-anna share with a direction that she was to remain in possession until Dalpat paid off the amount due to Jai Gopal. This was never done and thus the share in question became *Musammat* Sita's absolute property. Further, under a registered deed of gift, dated the 4th June, 1897, *Musammat* Sita gifted the whole 10-anna share to her daughter Sugabai and gave over possession. *Musammat* Sugabai died in 1919, whereupon the 10-anna share was mutated in favour of her daughter Rukhmabai, defendant No. 1, and her step-sons, defendants Nos. 2-4. A further plea was offered on behalf of the defendants raising a legal point, *viz.*, that the ancestors of Ladkoo Patel migrated to the Central Provinces with the Bhonslas from the Bombay Presidency; that Ladkoo's family and ancestors always adhered to the customs and laws prevailing in the Bomhay Presidency; that the Mayukha School of Hindu Law, therefore, applied in the case, and that *Musammat* Sugabai had held an absolute and not a limited estate in the share in question.

The plaintiffs denied that the Mitakshara School of Law applied to the parties and traversed various other allegations put forward on behalf of the defendants.

On the issues, which arose in the case, the Subordinate Judge came to the following decision:—

(1) That Adkoo was the brother of Ladkoo and that the first three plaintiffs were the sons of Jangli, the son of Adkoo.

(2) That the sale of the 5-anna share by plaintiffs Nos. 1-3 was proved and was not champertous or void.

(3) That there was no evidence to show that *Musammat* Sita had any *khamora* funds, and further that there was no proof from what particular funds she had acquired the 2-anna share. Even, however, on the assumption that it was purchased out of the income of Ladkoo's property, the plaintiffs could not claim it.

(4) That plaintiff No. 4, Ardeshar, was legitimately joined as a party in the case.

(5) That *Musammat* Sita had executed a registered deed of gift on 4th June 1897 in favour of her daughter *Musammat* Sugabai.

(6) That the gift deed could not be regarded as a surrender so far as the 2-anna share, which was *Musammat* Sita's absolute property, is concerned.

(7) That the Mitakshara, and not the Mayukha Law applied in the case.

(8) That Gondi, *alias* Kulpat, had not consented to the gift by *Musammat* Sita in favour of *Musammat* Sugabai, but that, in any event, on the date of the gift, Jangli, and not Kulpat, was the nearest reversioner.

On these and connected minor findings the Subordinate Judge passed a decree giving to the plaintiffs Nos. 1-3 possession of a 3-anna share of the subject mentioned, while plaintiff No. 4 secured a decree for a 5-anna share thereof. The claim of the plaintiffs as regards the remaining 2-anna share was dismissed.

Both the plaintiffs and the defendants have appealed. It will be convenient in the first instance to dispose of the appeal of the defendants. In this appeal two points are, in reality, raised. The first six grounds of appeal attack the finding of the Subordinate Judge that the Benares, and not the Mayukha, School of Hindu Law applies in the facts of this case, while the last two grounds of appeal relate to the house which formed part of Ladkoo's share, which, it is alleged, should have been retained by the defendant No. 1 either in whole or, at least, to the extent of a 2-anna share. I proceed at once to discuss the most important question in this appeal, *viz.*, what School of Law applies to the family in question.

The main pleading of the defendants on this question was contained in para. 6 of the written statement, dated the 30th July, 1924. It was therein alleged that the ancestors of Ladkoo Patel migrated to these Provinces along with the Bhonslas from the Bombay Presidency, had helped the Bhonslas in their Cuttuck expedition, and in recognition of their services were granted the villages and land in the Balaghat District. The Powar Patel ancestors of Ladkoo as well as his family, all through, had adhered to the customs and laws prevailing in the Bombay Presidency and, therefore, the family is governed by the

Mayukha School of Hindu Law. If this were so, there would be no question but that the defendants were entitled to retain the property in suit.

On behalf of the plaintiffs it was denied that Ladkoo's family had come from the Bombay Presidency or was governed by the Mayukha Law.

The Subordinate Judge, after examining the evidence of various witnesses produced by the defendants on the point, held that their evidence was inconclusive towards supporting the allegation that the family could be held to be governed by the Mayukha School of Law. After referring to certain standard books of reference on the point, the Subordinate Judge came to the finding that there was no proof that the Powars, in general, or Ladkoo's family, in particular, came from the Bombay Presidency. He held, on the contrary, that the evidence of the plaintiffs went to show that the Powars must have come from Dharanagree. In those circumstances, there was, in his opinion, no room for the application of the principle laid down in *Balwant Rao* v. *Baji Rao* (1) so far as the question of the present family being governed by the Mayukha School of Law is concerned, and he held that the Mitakshara tenets applied to the case.

Turning first to the standard books, which contain references on the subject some of which have been alluded to by the lower Court, while others have been quoted in support of the defendants-appellants' case at the hearing of the appeal it must be confessed that the references in question are fragmentary and are by no means conclusive on the point involved. In Malcolm's Memoir of Central India and Malwa, Vol. I, at page 80, the following passage occurs:—

"In the early periods of Mahratta history, the family of Puar appears to have been one of the most distinguished. They were of a Rajpoot tribe, numbers of which had been settled in Malwa at a remote era; from whence this branch migrated to the Deccan."

At page 335 of Vol. IV of Russell's Tribes and Castes of the Central Provinces, where the Panwar dynasty of Dhar and Ujjain is dealt with, the following saying is quoted:

"*Jahan Puar tahan Dhar hai;*
Aur Dhar Jahan Puar;
Dhar bina Puar nahin;
Aur nahin Puar bina Dhar."

This may be translated as follows:—

"Where the *Panwar* is there is *Dhar*, and *Dhar* is where the *Panwar* is; without the *Panwars Dhar* cannot stand, nor the *Panwars* without *Dhar*."

Apparently, the Powars were expelled from Ujjain by the Muhammadans about 1190 A. D. and thereafter spread to several places in South India, and to the Central Provinces and Bombay: *cf.* page 336 of the same Volume.

At page 101 of the Balaghat District Gazetteer, the early history of the Powars is again alluded to. According to this Volume, which does not pretend to originality and is merely collated from standard works of reference and the like, some Powars having been expelled from Dhar settled at Nagardhan near Ramtek and from there gradually spread over a large part of the Bhandara, Chanda and Balaghat Districts. As a reward for help given to the Bhonslas in the Cuttuck expedition, they were given waste lands to the west of the Wainganga river and from there found their way into Mau and Baihar. These references certainly favour the plaintiffs' allegation and so far militate against the idea that the Powars, in these Provinces at least, migrated here from Bombay.

I will now turn to certain references from certain standard works which are alleged to favour the contention of the defendants. At page 1314 of Tod's Rajasthan, Vol. II, where the annals of Haravati are being dealt with, the following passage occurs:

"These kingdoms of the south as well as the north were held by Rajpoot sovereigns, whose offspring, blending with the original population, produced that mixed race of Mahrattas, inheriting with the names, the warlike propensities, of their ancestors, but who assume the name of their abodes as titles, as the Nimalkurs, the Phalkias, the Patunkars, instead of their tribes of Jadoon, Tuar, Puar, &c. &c."

I have also been referred to two passages in Ketkar's Mahratta Cyclopædia. One of these is to be found at page 47 of Vol. 17 and may be translated as follows:—

"At Malthan in the Poona District there is a family of Powars; it is said that this

(1) 57 Ind. Cas. 515; 16 N. L. R. 187: 39 M. L. J. 166; (1920) M. W. N. 483; 22 Bom. L. R. 1070; 28 M. L. T. 157; 18 A. L. J. 1049; 12 L. W. 679; 47 I. A. 213; 25 C. W. N. 243; 48 C. 30 (P. C.).

(place or house) is the origin of the Dhar Powar home."

At page 57, of Vol. 16, the following passage occurs:—

"The ruling family Mahratta by surname Panwar ruled in Malwa from the 9th to 13th century and were descendants of Parwar Rajpoot family."

In Duff's History of the Mahrattas, Vol. I, Appendix page (*ii*), the following passage occurs:

"It will thus be seen that neither Shivaji whose family came from Rajputana, nor the Peshwas, who came from Egypt, nor the Prabhus who came from the valley of the Chinab in Kashmir and Punjab *via* Oude and Dalbhum, are the original residents of the tract they now claim as their 'native lands.' Who then are the Mahrattas? The answer is Mahrattas are a conglomerate body of tribes and castes who have settled themselves in the tract in which the present Marathi language is spoken, and Grant Duff's History of the Mahrattas is the history of this mixed ethnic group containing Brahmans, Kshatriyas, Vaishyas, Shudras and unclassified forest tribes.' "

The indications, however, are that so far as the clan of Powars, who have settled in the Central Provinces, is concerned, their arrival in these parts dates from long before the Mahratta invasion. On this point I need only refer to pages 27-33 of the Nagpur District Gazetteer as well as to page 101 of the Balaghat one. The indications, however, on the fragmentary references to the question contained in the volumes quoted above, certainly seem to me, on the whole, to favour the view that the Powars, who settled here, arrived long before and altogether independently of the Mahrattas.

It will be convenient now to turn to the oral evidence on record. The burden of proving that the Bombay School of Law applies in the present case lay heavily on the defendants and it remains to decide whether that burden has been sufficiently discharged.

It has been urged on behalf of the defendants that many circumstances go to show that the Powars are, in effect, Mahrattas from the Bombay Presidency. Their language, their marriage ceremonies, the dress of their women and the various ceremonies they observe or do not observe, are all said to point in this direction. It has been suggested on behalf of the appellants that certain parts of the evidence of the plaintiffs' witnesses go to prove the theory of Mahratta origin. Nanda (P. W. No. 7) admits that the ceremony of *bhujalia* is not observed by the Powars. Personally, I can attach little importance to this fact. *Bhujalia* is a ceremony observed when wheat is sown and is peculiar to Northern India and non-Mahratta people. Assuming that Powars are of Northern India extraction, it would be very natural for them to allow this ceremony to lapse when they found themselves settled in a non-wheat growing country. So far as the non-observance of the "pillar" ceremony at marriages is concerned, this is certainly significant of the Mahratta custom, but I do not think that isolated items of this sort can be regarded as conclusive in view of the fact that originally a small clan of Powars settled in the Central Provinces and gradually came into close contact with the Bhonslas through helping them in an invasion of Cuttack and being otherwise associated with them. It would be very natural, in those circumstances for their original customs and ceremonies gradually to acquire a certain Mahratta tinge, but it is altogether a different matter to postulate of the Powars that, from the first, they came here bringing these Mahratta customs and observances with them. The same remarks would apply, it seems to me, to admissions like those made by Pratap (P. W. No. 9) that the Powar women do not wear *lahangas* (the dress of up-country women) and also that they wear *kashta* which is more distinctive of the Mahratta women.

The evidence of the defendants' witnesses has been carefully examined by the Subordinate Judge. The utmost, in my opinion, that the said evidence makes out is that the Powars are now, at any rate in certain respects, assimilated to the Mahrattas in isolated matters of customs, dress and the like and that also their language has, to some extent, been modified in the direction of Marathi. It is significant, however, that even a witness like Raghuji (D. W. No. 3) admits that he knows Hindi, is ignorant of Mahratti and of Mahratta customs, and has never attended a Mahratta marriage. Doma (D. W. No. 4) who has, in his examination-in-chief, attempted to establish the contention that the Powars and the Mahrattas were almost entirely assimilated, gave himself away badly in cross-examination. Therein he had to admit that in the Balaghat and Seoni Districts the Powars do not

speak Marathi and that he himself was ignorant of Mahratta customs and ceremonies and it is significant that even this witness admitted the possibility that the Powars had come from Dharanagree. Gana (D. W. No. 7) who, in his examination-in-chief emphasised the similarity between the Mahrattas and the Powars, was unable to stick to this position in the cross-examination and was obviously ignorant of the place of the origin of his caste. Rambakhsh (D. W. No. 8) talks of the analogy between the marriage rites of the Mahrattas of the Deccan and of the Powars of the non-observance of the *bhujalia* festival and of the Powar women having *kashtas* on their wearing garments. The evidence of Tukaram (D. W. No. 9) is similar, and so is that of Chindhoo (D. W. No. 10). The evidence of Soma (D. W. No. 16) to the effect that the Powars came to the Central Provinces during the Bhonslas' regime is directly contradicted by the authoritative works on the subject and cannot be accepted, and it is significant in this connection that Gana (D. W. No. 7) admitted that the Powars had settled in the Central Provinces some 500-700 years ago. Lakhan (D. W. No. 17), in his cross-examination, made admissions which militate strongly against the alleged identity or assimilation between Mahrattas and the Powars.

In short, after a careful examination of this oral evidence, I am forced to the conclusion that it fails to weigh the balance down in favour of the defendants' allegation. At the most, what this evidence shows is that since their migration to these Provinces the Powars have come into close contact with the Mahrattas and have inevitably been tinged thereby in matters of language, dress, marriage ceremonies and the like. The oral evidence wholly fails to establish the fact that the Powars came here from the Bombay Presidency, bringing with them Bombay customs, much less that they were governed by the Bombay School of Law. The fragmentary references in the authoritative works quoted above also seem to me very evenly balanced and, as it was incumbent on the defendants to establish circumstances proving that the Mayukha School of Law applied to them, it seems to me clear that they have failed to do so.

It has been suggested that the evidence already referred to showing that the Powars have become tinged with Mahratta customs and the like, was sufficient to shift the burden of proof to the other side. I cannot, however, concur in this allegation. As I have already shown, it was natural, if not inevitable, when the history of the Powars and their eventual connection with the Bhonslas in these Provinces are taken into account, that there should have been a certain assimilation or lessening of the gap between the Bhonslas and the Powars. But it is a very different proposition to postulate from such a circumstance that the Powars and Mahrattas who have migrated here from the Bombay Presidency are subject to the Bombay School of Law. For the above reasons the first six grounds of appeal fail.

As regards the 7th and 8th grounds of appeal, in which it is urged that, in any event, *Musammat* Rukhma could not be ejected from the dwelling house, or was, at the most, entitled to retain a 2-anna share therein, it was admitted by Counsel for the appellants that these grounds stood or fell with the grounds already stated. I do not think this was necessarily so on the actual terms in which grounds 7 and 8 are framed. But, on the other hand, the contention now put forward does not seem ever to have been raised in the pleadings and introduced, in effect, a new question of fact which cannot be entertained for the first time in appeal.

These findings govern the appeal of the defendants, which is dismissed. The appellants must bear the respondents' costs in this appeal.

I now turn to the appeal of the plaintiffs. Their contention in this connection is that, as the lower Court has held that the plaintiffs have failed to prove that the 2-anna share of the property was acquired by *Musammat* Sita out of her *khamora*, the evidence on record justified the conclusion that *Musammat* Sita intended to treat the 2-anna share as an increment to her husband's estate and that the 2-anna share should also be passed to the plaintiffs along with the 8-anna one, for which decree has been given by the lower Court.

The Subordinate Judge dealt with this matter in issue No. 4. I have already set forth the circumstances under which *Musammat* Sita acquired this share by paying off the mortgage-money due to Jai Gopal. I concur with the lower Court that the evidence on record leaves it an

open question as to whether *Musammat* Sita made this acquisition with the aid of her *khamora* or personal funds, or whether she was able to pay the amount in question out of the income derived from her husband's estate. Even on this position, however, the Subordinate Judge held that there was nothing on record to show that she ever intended the 2-anna share to form an accretion to the family estate, and, in coming to this conclusion, the Subordinate Judge relied on the decision in *Wahid Ali Khan* v. *Tori Ram* (2). In the said decision, Richards, C. J., and Tudbull, J., held that where immoveable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate, such property does not necessarily become an accretion to the husband's estate. The widow has full power to dispose of it during her lifetime, and it is only when she manifests during her lifetime a clear intention to treat it as an accretion to her husband's estate, or allows it at her death to remain undisposed of, that such property will become part of that estate. The facts of this case, however, were very special. The property the widows purchased in this connection related to a village, in which their husband had never held a share, and there are various other circumstances tending to show a distinct intention to keep the property separate. A similar remark applies to the decision in *Subramanian Chetti* v. *Arunachellam Chetty* (3). On the other hand, there is a strong current of decisions pointing in a somewhat different direction, and the guiding principle on the question of whether a widow intends such an acquisition, as we are concerned with, to be an increment to the husband's estate or not, would appear rather to centre around the actual conduct of the widow in making and dealing with the acquisition in question: *cf. Isri Dutt Koer* v. *Hansbutti Koerain* (4), *Gonda Kooer* v. *Kooer Oodey Singh* (5), *Kula Chandra Chakravarti* v. *Bama Sundari Dasya* (6) and *Sheolochun Singh* v. *Saheb Singh* (7). Even accepting, however, the opposite proposition urged on behalf of the plaintiffs, *viz.*, that the immoveable property purchased by a Hindu widow out of the income of her husband's estate must be held to form part of that estate, unless there is proof of a distinct intention on her part to sever such a purchase from the estate and appropriate it to herself, I do not think the present appellants can, in the particular circumstances of this case, derive any benefit therefrom.

I so far agree that the Subordinate Judge looked at the legal question involved from a wrong point of view and that it was incumbent on the defendants to show that *Musammat* Sita regarded and treated her 2-anna acquisition as separate and distinct from the remaining 8-anna share. The oral evidence on the point in this case, in reality, carries us no further. What seems to me, however, definitely to settle the question in favour of the defendants are the terms of the deed of gift (Ex. D-8) executed by *Musammat* Sita in 1897, no less than five years after she had made the payment to Jai Gopal. It is true that the 8-anna share and the 2-anna share, we are concerned with, were transferred in one and the same deed of gift, but this point seems to me immaterial whether or not *Musammat* Sita, *bona fide* believed that she had a right to transfer the 8-anna share. It is perfectly clear from the terms of the gift deed that she made a clear cut and explicit distinction between the nature of her interest in the 8-anna share and the 2-anna share and went out of her way to affirm the fact that the 2-anna share was her personal acquisition and quite distinct from the 8-anna share she had held since her husband's death. The relevant passage may be translated as follows:—

"An 8-anna share of the entire 16-anna village Birsula, *Pergana* Katangi, Tahsil and District Balaghat, has been held from the time of my husband. This was partitioned into two *pattis* by Government after the death of my husband, an 8-anna share whereof is in my possession, and the remaining 8-anna share was in the joint possession of other claimants. Out of this joint 8-anna share, the 2-anna share which was in the name of Dalpat

(2) 21 Ind. Cas. 91; 35 A. 551; 11 A. L. J. 856.
(3) 28 M. 1.
(4) 10 C. 324; 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459; 5 Ind. Dec. (N. s.) 217 (P. C.).
(5) 14 B. L. R. 159 (P. C.)
(6) 22 Ind. Cas. 701; 41 C. 870.
(7) 14 C. 387; 14 I. A. 63; 11 Ind. Jur. 231; 5 Sar. P. C. J. 1; 7 Ind. Dec. (N. s.) 257 (P. C.).

was mortgaged by him. A foreclosure decree being passed in respect of it, the creditor was to get it, when I paid Rs. 450 from my own pocket, and obtained it from the Civil Court, which has been in my possession and cultivation and to which also none but myself has a right. Thus, I own in all a 10-anna interest in the village."

Even, therefore, on the decisions relied on behalf of the present appellants, the fact of this case and *Musammat* Sita's actual conduct so clearly crystallized in the deed of gift in question clearly prove beyond doubt that she had a distinct intention of holding this share apart from her husband's estate and never intended that the former should be regarded as an increment to the latter. This finding necessarily governs the main part of the plaintiffs' appeal.

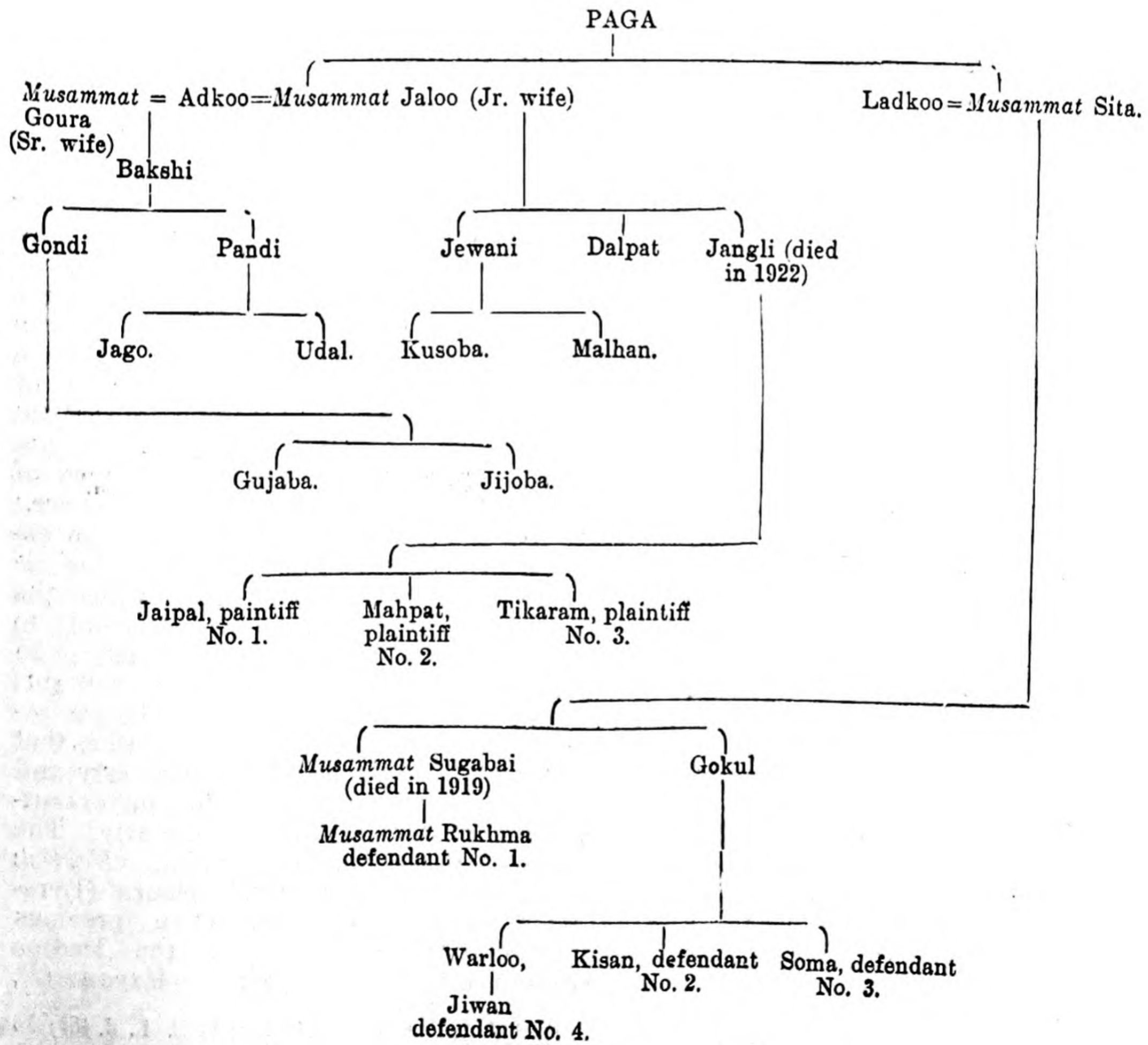
In the final ground of this appeal, objection was taken to the lower Court's allocation of costs, but this point was not pressed in the course of argument, and, for my own part, I can see no reason for interfering with the discretion which the Subordinate Judge has exercised in this connection. The appeal of the plaintiffs accordingly fails and is dismissed. They must bear the defendant-respondents' costs in the lower Court as already ordered.

G. R. D.

Z. K.

Appeal dismissed.

Annexure A.



OUDH CHIEF COURT.

EXECUTION OF DECREE APPEAL No. 44 OF 1926.
January 7, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

SHAH NAIM ATA—JUDGMENT-DEBTOR—APPELLANT

versus

GIRDHARI LAL AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Execution of decree—Attachment—Objection by judgment-debtor that property attached is in his possession as manager—Objection, nature of.

Where a decree is passed against a judgment-debtor in his personal capacity and he takes an objection to the attachment of certain property in his possession in execution of such decree upon the ground that although the property is in his possession it is not in his possession in his personal capacity but as a manager of endowed property, the question must be regarded as one arising between the parties to the suit in which the decree was passed and inasmuch as it is a question relating to the execution, discharge or satisfaction of the decree, it must be decided under s. 47 of the Civil Procedure Code. [p. 464, col. 2.]

Kartick Chandra Ghosh v. *Ashutosh Dhara* (1), dissented from.

Appeal against the order of the Subordinate Judge, Rae Bareli, dated the 7th August, 1926.

Messrs. *M. Wasim* and *Ali Mohammad*, for the Appellant.

JUDGMENT.—Lala Girdhari Lal and others hold a simple money-decree against Shah Naim Ata. In execution of this decree they have sought to attach and bring to sale six villages: Baroulia, Palipur, Pipranagar-Mohiuddinpur, Ataganj Ansari, Khwajapur and Madhopur-Sataiyan. The judgment-debtor preferred an objection the decision of which, according to his application, should be under the provisions of s. 47 of the Code of Civil Procedure to the effect that he is in possession of these villages not in his own right, but as manager of an endowment to which these villages appertain. When this objection was made the decree-holder took exception to it on the ground that it did not lie under the provisions of s. 47 but that it should have been made under the provisions of O. XXI, r. 58. The learned Subordinate Judge decided that the objection did not lie under s. 47 and that if it did lie under O. XXI, r. 58, he could not take cognizance of it as it purported to be an objection under s. 47. He dismissed the objection accordingly. The judgment-debtor appeals.

We agree with the learned Subordinate Judge that if the objection lay not under s. 47 but under O. XXI, r. 58 the proper course was to dismiss it leaving the judgment-debtor the remedy of filing a separate objection under O. XXI, r. 58. The arguments of the learned Counsel for the judgment-debtor will be only considered in so far as they are arguments to the effect that the objection lay properly under s. 47. The learned Subordinate Judge in deciding this point against the judgment-debtor had in support of his view the authority of a Full Bench decision of the Calcutta High Court reported in *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (1). In that Full Bench decision it was laid down that, when a decree is passed against a judgment-debtor in his individual capacity and he takes an objection to the attachment of certain property in his possession upon the ground that although it is in his possession it is not in the possession of him in his personal capacity but in possession of him as a manager of endowed property, the question cannot be considered to be a question between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree. While we give full weight to the view taken by the Hon'ble Judges composing this Full Bench, we are constrained to disagree with it. There can be no doubt as to the fact that the question relates to the execution and satisfaction of the decree and it should thus be determined by the Court executing the decree, and not by a separate suit, under the provisions of s. 47 if it is a question arising between the parties to the suit in which the decree was passed. The decree-holder is clearly a party to the suit in which the decree was passed. We thus have only to decide whether the judgment-debtor is to be considered not to be a party to the suit inasmuch as he is objecting not in his individual capacity but on the allegation that he is the manager of endowed property and that the decree is sought to be executed against that endowed property. The learned Judges who decided *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (1) referred in their decision to a previous decision of a Bench of the Madras High Court in *Kuriyali* v. *Mayan* (2),

(1) 12 Ind. Cas. 163; 39 C. 298; 14 C. L. J. 425; 16 C. W. N. 26.

(2) 7 M. 255; 8 Ind. Jur. 133; 2 Ind. Dec. (N. S.) 762.

which was approved by their Lordships of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3) but while recognizing that this decision took the contrary view to the view which they were taking they did not consider that it was an authoritative decision because in their opinion their Lordships of the Judicial Committee approved of it upon an entirely different point. We proceed to examine the Madras case. It was as follows: A certain person had mortgaged four parcels of land. The mortgagee instituted a suit for satisfaction of the mortgage by sale of the parcels in question. During the course of the proceeding the mortgagor died. The mortgagee obtained a decree. In execution of the decree it was sought to sell the parcels in question. The mortgagor's representative-in-interest who had become judgment-debtor under the decree objected to the sale of three of the parcels on the ground that one was his own separate property and that the other two were the property of a joint family to which the mortgagor and he belonged, and that, this being the case, the mortgagor was not entitled to transfer. The Bench of the Madras High Court held that this objection should be decided under the provisions of s. 244 of the old Code of Civil Procedure which corresponds now to s. 47 of the new Code. In that case it will be seen that the objector set up a similar case to the case set up by the appellant here. He alleged that although certain property was in his possession it was not in his possession personally as the representative of the mortgagor but that a portion of it was in his possession personally on a title distinct from the title of the original mortgagor and that a portion of it was in possession of the joint family of which both the mortgagor and he were members. It is true that in the decision of their Lordships of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3) no such point was before them. The question before them there was whether the following objection should be treated as an objection under s. 244 of the old Code of Civil Procedure. Certain persons who were judgment-debtors under a decree alleged that they had satisfied their liability by a money payment to the decree-holders and that the decree-holders agreed that in these circumstances properties to which the judgment-debtors were entitled should be exempted from sale in execution, that the properties were exempted from sale in a prior execution, but that in a subsequent execution they were attached and brought to sale. These persons then instituted a suit for a declaration that the properties were not liable to sale and it was held by their Lordships that such a suit did not lie as it was contrary to the provision of s. 244 and that their remedy was to take an objection under s. 244. When it was pressed before their Lordships in argument that this was not a question between the parties to the suit in which the decree was passed because its determination affected the right of the auction-purchasers who had subsequently purchased the property (who were clearly not parties to the suit in which the decree was passed) their Lordships in determining the point as to whether this circumstance would in any way take the case out of the purview of s. 244 "thought it desirable, before giving judgment, to examine the reported cases which had arisen under s. 244 of the Code of Civil Procedure." They continued at page 689*: "An examination of those cases, of which it is only necessary to mention *Sakharam Govind Kale* v. *Damodar Akharam Gujar* (4) and *Kuriyali* v. *Mayan* (2), has satisfied their Lordships that the decision appealed from is in accordance with the construction which the Courts in India have uniformly placed on the section in question." And they proceed further: "It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of s. 244." They then continued to apply the principles to the case before them. We are unable, with great respect, to agree with the learned Judges who decided the Full Bench decision to which we have already referred that the words of their Lordships can be construed in any other manner than this. We find that they clearly decided that the Bench of the Madras High Court which decided *Kuriyali* v. *Mayan* (2) had arrived at a correct interpretation of the law. We are unable to attach any other meaning to their words. The point before them was

(3) 19 I. A. 166; 19 C. 683; 6 Sar. P. C. J. 209; 9 Ind. Dec. (N. S.) 898 (P. C.).

(4) 9 B. 468; 5 Ind. Dec. (N. S.) 311.

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whether a liberal construction should be given to the provisions of s. 244 or whether a narrow construction should be given to those words. They laid down, as we construe, as one of the conditions governing the decision the importance of disposing of objections to execution sale as cheaply and as speedily as possible. In this connection they considered *Kuriyali* v. *Mayan* (2) in which a Bench of the Madras High Court had refused to take a narrow view of this section and held that the objection of the representative of the original defendant put forward to the attachment and sale of certain property in execution of the decree to the effect that that property was not the defendant's own property but the property partly of his representative in his private capacity and partly of a joint family to which both he and the defendant's representative belonged was an objection which was properly decided under s. 244. The Bench in that case thereby decided clearly and distinctly that the person who was the judgment-debtor in execution of a decree was a representative of a party to the suit in which the decree was passed and that when in raising an objection to the execution of the decree he went completely outside the character of a representative of the original defendant and took an objection based upon a title which not only was not the title of the original defendant but absolutely opposed to that title he was still at liberty to object under the provisions of s. 244 and was not at liberty to bring a separate suit upon the point. We cannot read the words of their Lordships of the Judicial Committee in approving of this decision in any other manner than conveying the conclusion that the Bench of the Madras High Court was correct in their decision and that their construction of the words of the section was approved, largely because it was a sensible construction, which had the effect of disposing of an objection to an execution sale as cheaply and as quickly as possible. With all respect to the learned Judges who decided *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (1) we are of opinion that the fine distinction drawn there between the judgment-debtor in his personal capacity and the judgment-debtor in his representative capacity is a distinction which their Lordships of the Judicial Committee considered should not be made. The Bench of the Madras High Court which refused to make that distinction was considered by their Lordships to have taken the righ course. In these circumstances we need not consider the large mass of authorities which have been cited at the Bar. Some of these are in favour of the view which we have taken —some are against it. We consider that the matter is concluded by the decision of their Lordships of the Judicial Committee in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (3). The judgment-debtor-appellant we consider had every right to prefer this objection under s. 47. Unfortunately the other side has not been represented. They have received notice but they preferred not to be represented. We have, however, endeavoured to give every weight to every point in favour of the decision appealed against. In our opinion, however, the matter is concluded by the decision of their Lordships which we have quoted. We accordingly allow this appeal to this extent. We set aside the order of dismissal and hold that the application rightly lay under s. 47. We send the case back under the provisions of O. XLI, r. 23 to the learned trial Judge or his successor to be re-admitted under its original number and decided according to law. Costs will abide the result.

Z. K. *Case remanded.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1765 AND 2018 OF 1924.

November 29, 1926.

Present:—Mr. Justice Duval and Mr. Justice Mitter.

KARUNA CHANDRA DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 5—Tenure-holder or raiyat *- Holding of over one hundred* bighas *—Presumption, rebuttal of—"Cultivator,"* "raiyat," *use of, effect of—Accretions—Determination of fair rent—*Kabuliyat, *expiry of, effect of.*

The question whether a person is a *raiyat* or a tenure-holder ultimately depends on questions of fact and in order to arrive at a decision the Court must look to the attendant circumstances also. [p. 467, col. 2.]

In order to determine whether the presumption raised under s. 5 of the Bengal Tenancy Act has been rebutted, the true test is to see for what purpose the tenancy was created, and where the lease is equivocal the attendant circumstances must be

looked to in order to judge of the purpose for which the tenancy was created. Where the original lease is in a printed form no importance can be attached to the use in it of the word "cultivator." nor does the use of the word "*raiyat*" in a rent receipt carry the matter any further. [p. 467, cols. 1 & 2.]

Where a person has the status of a tenure-holder with regard to a parent tenure, he will have the same status with regard to any accretions to the tenure. [p. 468, col. 1.]

Where a tenant holds over after the expiry of the term of a *kabuliyat*, it is open to the Settlement Officer to determine a fair rent after determining the true status of the tenant, irrespective of the stipulations contained in the time-expired *kabuliyat*. [p. 468, col. 2.]

Appeals against the decrees of the District Judge, Noakhali, dated the 11th April, 1924, affirming those of the Officiating Additional Subordinate Judge of that District, dated the 22nd of December, 1921.

Mr. *Gunada Charan Sen* and Babu *Jitendra Kumar Sen Gupta*, for the Appellants.

Babus *Dwarka Nath Chakravarti* and *Surendra Nath Guha*, for the Respondent.

JUDGMENT.

Mitter, J.—These two appeals have been preferred by the plaintiffs and arise out of two suits filed on their behalf under s. 104 (*h*) of the Bengal Tenancy Act to correct an entry in the Record of Rights wherein the plaintiffs have been recorded as tenure-holders. The plaintiffs claim their status to be that of *raiyats*. The plaintiffs ask for the further relief that it be declared that the entry with regard to rent was wrong. In Appeal No. 1765 the lands are covered by two leases, Exs. 1 and 2 and the area in each lease is much in excess of 100 *bighas*. In appeal No. 2018 of 1924 the area is also over 100 *bighas*. In each of these appeals the plaintiffs have consequently to rebut the statutory presumption arising under s. 5 of the Bengal Tenancy Act. They have also to rebut a further presumption arising out of the entry in the Record of Rights. That presumption is sought to be rebutted by the description of the plaintiffs in the *kabuliyat* in the first case as a *raiyat* and by the use of the word "cultivator" therein. As the first two *kabuliyats* concern land which form the subject-matter of Appeal No. 1765 and are printed in official forms, the lower Courts were right in holding that the *kabuliyats* do not rebut the presumption under s. 5 of the Act and in holding that the real and the true test in this case is to see for what purpose the tenancy was created, and where the lease is equivocal the attendant circumstances have to be looked to to judge of the purpose for which the tenancy was created. Here we find that Palwan who was the original tenant was a *bhadralogue* Mussalman carrying on business elsewhere. The question whether he is a *raiyat* on a tenure-holder ultimately depends on a question of fact. The Judicial Committee have in two recent cases, namely, in *Debendra Nath Das* v. *Bibudhendra Mansingh Bhramarbar Roy* (1) and in *Rajani Kanta Ghose* v. *Secretary of State for India* (2), pointed out that the question whether the tenants are *raiyats* ultimately depends on the question of fact and we must look to the attendant circumstances. The whole evidence which was placed before the first Court leads to the conclusion which has been arrived at by both the Courts below that Palwan employed the agency of tenants to cultivate the disputed land. He was in fact a middle man and was a very useful one. He reclaimed the *char* in order to make money by letting out the lands to cultivators. Nor can very great stress be laid on the words in the *kabuliyat* of 1882 of *raiyat* and cultivator as pointed out by the Judicial Committee in *Gokul Mandar* v. *Pudmanund Singh* (3): "Their Lordships did not attach any importance to the mere form of the *kabuliyat* or to the use in it of the word "cultivator". It has been suggested in this case that there are some rent receipts which show that the status of the tenant is that of *raiyat*. With regard to these receipts the following remarks of the Judicial Committee in the case just referred to apply [*Gokul Mandar* v. *Pudmanund Singh* (3)]. "Nor does the receipt of rent in which the appellant is described as a *raiyat* carry the matter any further." We think that so far as this appeal is concerned the double presumption which arises in favour of the Secretary of State has not been rebutted by the proof of the two *kabuliyats* and by the use of the expressions "*raiyats* and cultivators" therein.

In Appeal No. 2018 a special feature which distinguishes it from the other case and which has been pointed out to us is that the printed forms are not used and

(1) 45 Ind. Cas. 411; 45 I. A. 67 at p. 72; 5 P. L. W. 1; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 C. 805 (P. C.)

(2) 51 Ind. Cas. 226; 45 I. A. 190 at p. 192; 46 C. 90; 23 C. W. N. 649 (P. C.).

(3) 29 C. 707; 29 I. A. 196; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

that the words in the printed forms "not possessed of the rights of occupancy" are struck out and instead of them the words "possessed of the rights of occupancy" are to be found. It is true that deliberate alteration would have considerable effect in making the plaintiffs *raiyats* but for two circumstances, *viz.*, 1st, the lands are said to be accretions and re-formations *in situ* of lands in respect of which the plaintiffs have accepted the position of tenure-holders from 1902 till the date of the institution of the suit. In 1902 a previous Record of Rights was prepared in which the plaintiffs were described as tenure-holders. That record stood unchallenged. It is argued on behalf of the appellants that it is not necessary for them to challenge the entry as to their status being that of tenure-holders as there was no alteration in the rental and suit under s. 104-H could only be brought if they were aggrieved by any entry of rent. Materials have not been placed before us to show that there was no change in the rental in 1902 and we cannot assume the contrary, nor is it admitted on behalf of the Secretary of State that the rent remained unchanged. Now the plaintiffs having accepted the position of tenure-holders with regard to the present tenure they cannot rely on the *kabuliyats* executed in 1911 in which certain officers of Government gave a lease or allowed the description of the status in connexion with the accretions to be different from the description with regard to the parent tenure. It was a misapprehension of the legal rights of Government by its officers and could anything done under such misapprehension not affect the title of Government in this land nor can it make the law one way or the other. Though the *kabuliyats* created larger rights in favour of the appellants nothing done by the officers of Government could create any right in the accreted land not belonging to them. If the appellants were tenure-holders with regard to the parent tenure, they have the status with regard to accretions. This position is supported by the decision of the Judicial Committee in the case reported in *Secretary of State for India* v. *Srinivasa Chariar* (4).

With regard to the argument that the Settlement Officer should not have fixed the rent on the basis of assets...but on the basis of *hasila* rent we hold that the *kabuliyats* in which this condition was incorporated spent their force long before the institution of the present suit and the tenants were really holding over. In the circumstances, it was open to the Settlement Officer to determine fair rent after determining the true status of the tenants, irrespective of the stipulation in the time-expired *kabuliyats*.

As these grounds fail, both the appeals must be dismissed with costs.

Duval, J.—I agree.

Z. K. *Appeals dismissed.*

(4) 60 Ind. Cas. 230; 44 M. 421; 40 M. L. J. 262; (1921) M. W. N. 111; 29 M. L. T. 181; 19 A. L. J. 201; 33 C. L. J. 280; 13 L. W. 592; 25 C. W. N. 818; 3 U. P. L. R. (P. C.) 43; 48 I. A. 56 (P. C.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2126 OF 1926.

January 8, 1927.

Present:—Mr. Justice Dalip Singh.

SARDARA—PLAINTIFF—APPELLANT

versus

Musammat HAYAT BIBI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3, 4—Guardian ad litem, *appointment of—Person having interest in suit, whether proper guardian—Formal order of appointment, absence of, effect of.*

In a suit for restitution of conjugal rights against a minor female, a person who is alleged to have had a hand in the marriage of the defendant with the plaintiff is not a proper person to be appointed guardian *ad litem* of the defendant. [p. 469, col. 1.]

A trial Court rejected the application of a certain person to be appointed guardian *ad litem* of a minor defendant, but subsequently it acted upon the written statement filed by that person on behalf of the minor and framed issues on its basis and proceeded to try such issues with the result that the suit was finally dismissed:

Held, that the Court must be taken to have cancelled its previous order rejecting the application for appointment of guardian *ad litem* and to have treated the applicant as such guardian and that the failure of the Court to make a formal order to that effect did not vitiate the proceedings. [p. 469, col. 2.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 1st June, 1926, reversing that of the Senior Sub-Judge, Gujranwala, dated the 24th July, 1925.

Dr. *Muhammad Alam*, for the Appellant.

Lala *Ishwar Das*, for the Respondent.

JUDGMENT.—The plaintiff in this case sued for restitution of conjugal rights against a minor alleging that she was his wife formally married to him through her guardian and that she had been living

with him as his wife. One Allah Ditta was appointed guardian *ad litem* for the minor in the plaint. Allah Ditta was a maternal uncle of the defendant and as he is alleged to have a hand in the marriage, he was hardly a proper person to be a guardian *ad litem* One *Musammat* Fazal Bibi a widow of *Musammat* Hayat Bibi's brother made an application on the 17th March, 1925, to be appointed guardian *ad litem* for the minor *Musammat* Hayat Bibi.

On the 18th March, 1925, the first date of hearing, Allah Ditta confessed judgment and prayed to be released from carrying on the suit. He was evidently unwilling to act as guardian. *Musammat* Fazal Bibi also filed a *jawab-i-dawa* on behalf of *Musammat* Hayat Bibi alleging that no marriage had taken place at all. On the 19th of March the Court passed an order on the application of *Musammat* Fazal Bibi to be appointed guardian *ad litem* rejecting the application.

On the 19th March it, however, also ordered that the written statement put in by *Musammat* Fazal Bibi should be placed on the record. It then proceeded to frame issue on the written statement put in by *Musammat* Fazal Bibi and decreed the suit.

Musammat Fazal Bibi appealed to the learned District Judge and an objection was taken that as she was not the guardian *ad litem* of the minor, she was not entitled to appeal on her behalf. The learned District Judge held that *Musammat* Fazal Bibi had been treated as a guardian *ad litem* and the Court had merely omitted to record a formal order to that effect. He dismissed the suit holding that *Musammat* Hayat Bibi had not attained the age of puberty at the time of her marriage and that she had not willingly cohabited with her husband at any time after attaining the age of puberty, and that the marriage, if any, was repudiated by her on attaining the age of puberty.

In second appeal it is contended that the appeal to the District Judge was not competent. It is pointed out that *Musammat* Fazal Bibi's application had been definitely rejected by the Court. This is correct. I can only suppose that the Court on finding that Allah Ditta was not acting as a guardian and was confessing judgment proceeded to treat *Musammat* Fazal Bibi as the guardian *ad litem*. It forgot to cancel its order rejecting the application of *Musammat* Fazal Bibi or to pass a formal order appointing her as guardian *ad litem*. Following *Narain Das* v. *Ralli Brothers* (1) I hold that the omission to cancel the previous order and to pass a formal order appointing *Musammat* Fazal Bibi as a guardian does not vitiate the proceedings.

On the merits I hold that the learned District Judge was right in holding that *Musammat* Hayat Bibi had repudiated the marriage after attaining puberty and that there is no evidence on the record to show that she cohabited with her husband after attaining the age of puberty. I also hold that the factum of marriage is not satisfactorily proved. No doubt, certain witnesses have stated that a formal marriage took place, but it is pointed out by Counsel for the respondent that these witnesses stated that the amount of dower was fixed at Rs. 100 whereas in the plaint it is stated that the dower was fixed at Rs. 200. Had the witnesses been present, they could hardly make a mistake on this point. I, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 31 Ind. Cas. 45; 61 P. R. 1915; 136 P. W. R. 1915.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1192 OF 1924.

November 23, 1926.

Present:—Mr. Justice Duval and Mr Justice Mitter.

NARAYAN CHANDRA DAS—DEFENDANT—APPELLANT

versus

DULAL CHANDRA DUTTA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17, O. XXXII, rr. 3, 12—Limitation Act (IX of 1908), s. 22—Suit instituted by next friend on behalf of adult plaintiff—Procedure—Amendment—Power of Court—Limitation, whether affected.

Under O. VI, r. 17 of the Civil Procedure Code, the powers given for amendment of pleadings are very wide and liberal and no amendment should be refused at any stage of a suit unless it changes the character of the suit. [p. 470, cols. 1 & 2.]

Where a suit is instituted *bona fide* on behalf of a minor plaintiff by his next friend but it is discovered that before the institution of the suit the minor had attained his majority, the suit is not liable to be dismissed but can proceed after amendment of the title by striking out of the name of the next friend and describing the plaintiff as an adult. Such amendment does not amount to the addition of a new party

within the meaning of s. 22 of the Limitation Act and no question of limitation, therefore, arises by reason of the amendment. [p. 470, col. 2.]

Appeal against the decree of the Officiating District Judge, Hooghly, dated the 29th February 1924, reversing that of the Subordinate Judge, Third Court at that place, dated the 12th June, 1923.

Babus *Tarakeswar Pal Choudhury* and *Jnan Chandra Roy*, for the Appellant.

Babus *Mrityunjoy Chattopadhyay* and *Taradas Dutt*, for the Respondent.

JUDGMENT.

Mitter, J.— This appeal is on behalf of the defendant and arises out of a suit for the winding up of a partnership business and for accounts. The suit was instituted by *Srimati* Promoda Sundari Dasi as the next friend of the infant, Dulal Chandra Dutt. One of the objections that was taken by the defendant is that the suit was not maintainable by Promoda Sundari. It transpires in the evidence that at the date of the institution of the suit, the infant Dulal had attained majority and that the suit could not proceed in the form in which it had been laid. I shall state here that this objection was not specifically taken in the written statement. But an issue was raised and the matter was discussed before the Court of first instance, who gave effect to this plea taken by the defendant, and dismissed the plaintiff's suit. On appeal by the plaintiff to the lower Appellate Court, that decision was reversed and the plaintiff obtained a partial decree in the suit. Against that decision this appeal has been preferred to this Court and in this second appeal two contentions have been raised before us.

The first ground taken is that the son, Dulal, not being a party in the original suit, the lower Court should not have allowed an amendment in the appellate stage without any application being made by any of the parties before it.

The second ground raised is that the suit is barred by limitation.

It may also be stated here that Dulal was an appellant before the lower Appellate Court.

Now, with regard to the first point as to the power of the lower Appellate Court to allow the amendment, we are of opinion that the lower Appellate Court possesses that power and had rightly exercised it. Under the Code of 1908, the powers given for amendment are very wide and liberal and no amendment is refused at any stage of the suit, subject only to this that it does not change the character of the suit. No such change is suggested in the present case.

With regard to the contention that the suit was not maintainable and that Promoda could not represent Dulal as Dulal had at the institution of the suit attained majority, we are of opinion that there is no force in that contention, for it appears that it was through a *bona fide* belief that Dulal was described as a minor and was represented by his mother as the next friend. The suit was instituted by the right person but through another person purporting to act as his next friend. In these circumstances we think that the suit was maintainable.

With regard to the question of limitation, it has been argued that as the amendment making Dulal a party, plaintiff, to the suit was made beyond three years of the institution of the suit, the suit for accounts and for the winding up of the partnership is barred under Art. 106 of the Limitation Act. We do not think that there is any force in this contention. Section 22 of the Indian Limitation Act which was invoked in the course of argument has no application to a case of this kind. For it cannot be said that when the proper amendment was made, Dulal was introduced as a new party to the suit. He was already there on the record when the plaint was filed; and consequently the amendment describing him properly at a later stage did not amount to the addition of a new party within the meaning of s. 22 of the Limitation Act; and if any authority for this proposition is needed, reference may be made to a somewhat analogous case decided by the Judicial Committee of the Privy Council and reported as *Peary Mohan Mukerji* v. *Norendra Nath Mukerji* (1).

In this view, the second ground of limitation also fails and the appeal must be dismissed with costs.

Duval, J.—I agree.

Z. K. *Appeal dismissed.*

(1) 5 Ind. Cas. 404; 37 C. 229; 14 C. W. N. 261; 7 A. L. J. 125; 7 M. L. T. 63; 11 C. L. J. 220; 12 Bom. L. R. 257; 20 M. L. J. 171; 37 I. A. 27 (P. C.).

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE No. 957 OF 1926.

January 17, 1927.

Present:—Mr. Justice Iqbal Ahmad.

DEBI SAHAI—PLAINTIFF

versus

DAULAT—DEFENDANT.

Agra Tenancy Act (III of 1926), ss. 44, 273--Ejectment suit—Plea of tenancy—Procedure—Jurisdiction of Civil and Revenue Courts—Interpretation of Statutes.

The various sections of an enactment should be so construed as not to render a particular provision in the enactment inconsistent with another provision of the same enactment. [p. 472, col. 1.]

The only possible way to so interpret the provisions of s. 44 of the Agra Tenancy Act as not to be inconsistent with the provisions of s. 273 of the Act is to hold that all that is intended by s. 44 of the Act is to give an option to a land-holder to file a suit for ejectment against a trespasser either in the Civil or in the Revenue Court. Where such a suit is filed in the Civil Court and the defendant sets up a plea of tenancy the Court must follow the procedure laid down by s. 273 of the Act. [p. 472, cols. 1 & 2.]

Defendant was a tenant of the plaintiff and was ejected by him through the Revenue Court. Plaintiff subsequently instituted a suit in the Civil Court for ejectment of the defendant on the ground that notwithstanding his ejectment by the Revenue Court the defendant had forcibly taken possession of the land in dispute. The plea of the defendant was that after his ejectment by the Revenue Court he was again re-admitted as a tenant of the holding in dispute by the plaintiff and was not in possession as a trespasser:

Held, that the suit was maintainable in the Civil Court but that in view of the plea of the defendant the procedure laid down in s. 273 of the Agra Tenancy Act must be followed. [p. 472, col. 2.]

Miscellaneous Reference under s. 267 of the Agra Tenancy Act III of 1926 made by the Munsif, Meerut.

JUDGMENT.—This is a Reference by the learned Munsif of Meerut under s. 267 of the Agra Tenancy Act (Local Act III of 1926) and arises out of a suit filed in the Civil Court for possession of, and damages with respect to an agricultural holding.

It appears that the defendant was a tenant of the plaintiff and a suit for his ejectment was brought in the Revenue Court (under s. 58 of Act II of 1901 by the plaintiff and was decreed. The plaintiff's case was that, notwithstanding his ejectment by the Revenue Court, the defendant forcibly took possession of the land in dispute and as such was liable to ejectment and to pay the damages claimed.

The defence to the suit was that the defendant, after his ejectment from the Revenue Court, was again re-admitted as a tenant of the holding in dispute by the plaintiff and was not in possession as a trespasser, and as such the suit was not cognizable by the Civil Court.

The suit was admittedly filed after the new Tenancy Act came into force and the point on which the learned Munsif entertained doubt was as to whether the suit was one the cognizance of which by the Civil Courts was barred by s. 14 of the new Act. The learned Munsif seems to have appreciated the difficulty that if cases against persons who take forcible possession of an agricultural holding are to be held to be within the exclusive jurisdiction of the Revenue Courts, it is not conceivable to what cases s. 273 of the new Act will apply.

I have had the assistance of hearing Mr. A. P. Pandey and Mr. Panna Lal, who at my request have kindly acted as *amicus curiæ*. After giving the case my anxious consideration, I have come to the conclusion that the suit as framed by the plaintiff is cognizable by the Civil Court.

By s. 34 of Act II of 1901 a person occupying land without the consent of the land-holder was made liable for the rent of the land held by him at a certain rate, but there was no povision in that section which in terms empowered a land-holder, who elected to treat the trespasser as a tenant, to eject him from the land by a suit for ejectment filed in the Revenue Court. Notwithstanding the omission in s. 34 of the old Act to make provision for ejectment of trespassers in possession of land used for agricultural purposes by suits for ejectment filed in the Revenue Court, it was held by this Court in the cases of *Balli* v. *Naubat Singh* (1) and *Jagardeo Singh* v. *Ali Hammad* (2) that "a person who, because of the provisions of s. 34 is liable for the rent of the land is also liable to the consequences which follow his non-payment of the rent and also to such consequences as would enure in the case of non-occupancy tenants holding on under similar circumstances." It appears to me by a comparison of the wordings of s. 34 of the old Act with the wordings of s. 44 of the new Act that all that has been intended by the slight amendment in the new section has been to give statutory recognition to the decisions noted above. In short the Legislature by enacting s. 44 of the new Act has in terms provided for the ejectment of a person taking possession of

(1) 16 Ind. Cas. 120; 9 A. L. J. 771.

(2) 44 Ind. Cas. 919; 16 A. L. J. 249; 40 A. 300.

an agricultural holding as a trespasser by a suit filed in the Revenue Court, and has thus made good the omission in s. 34 of the old Act that led to the contention that it was not open to a land-holder to treat a trespasser as a tenant and file a suit for his ejectment in the Revenue Court. Notwithstanding the fact that it was provided by s. 34 that a trespasser occupying land shall be liable for the rent of that land, it was consistently held by Courts that the land-holder was not bound to treat such a person as a tenant and to sue him for rent in the Revenue Court and could treat him as a trespasser and sue him for damages in the Civil Court. It was open to a land-holder to treat the trespasser as a tenant and to sue for ejectment in the Revenue Court under the old Act and this is, as I have said above, what has been recognised by the Legislature by enacting s. 44 of the present Act. A landholder has two ways of dealing with a trespasser. He may treat him as a tenant and sue for his ejectment in the Revenue Court or he may treat him as a trespasser and file a suit for his ejectment in the Civil Court.

The necessary consequence of taking the view that all suits for ejectment of persons in possession of an agricultural holding as trespassers are within the exclusive jurisdiction of the Revenue Court will be to render the provisions of s. 273 of the Tenancy Act wholly superfluous. By that section it is provided that if a defendant pleads that he is in occupation of the land in suit not as a trespasser but as a tenant on behalf of the plaintiff, the Civil Court is bound to refer the question of tenancy so raised for the decision of the Revenue Court. If suits for the ejectment of tenants and of trespassers of agricultural land are all to be within the exclusive jurisdiction of the Revenue Courts, it is impossible to conceive what class of cases are contemplated by s. 273 of the new Act. It is a well-settled canon of construction that the various sections of an enactment should be so construed as not to render a particular provision in the enactment inconsistent with another provision of the same enactment, and the only possible way to so interpret the provision of s. 44 of the Act as not to be inconsistent with the provisions of s. 273 of the Act is to hold that all that was intended by s. 44 of the Act was to give an option to the land-holder to file a suit for ejectment against a trespasser either in the Civil or in the Revenue Court.

My answer to the Reference is that the suit as brought is cognizable by the Civil Court and that the learned Munsif should, in view of the plea taken by the defendant, follow the procedure laid down by s. 273 of the Act.

Z. K. *Order accordingly.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION NO. 203 OF 1926.

December 7, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice.

BURA—PLAINTIFF—PETITIONER

versus

TEJA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 3—Dismissal for default on day fixed for judgment, legality of.

There is no rule of procedure justifying the dismissal of a suit for non-appearance of the parties on the day fixed for delivery of the judgment. [p. 473, col. 1.]

Jiwanda Mal v. *Muhammad Ali* (1) and *Nand Lal* v. *Shankru* (2) followed.

Petition, under s. 44, Act IV of 1919 and s. 107 of the Government of India Act, 1915, for revision of an order of the Subordinate Judge, Fourth Class, Shekhupura, dated the 28th November, 1925.

Mr. *Zafrullah Khan*, for the Petitioner.

JUDGMENT.—The suit which has led to this application for revision, was instituted by the plaintiff on the 26th June, 1922, and after recording all the evidence for the parties and hearing arguments on the merits the Court postponed it to 22nd October, 1923, for delivery of judgment. No judgment was, however, delivered either on that date or any subsequent date in spite of several adjournments. On the 12th May, 1924, the Subordinate Judge, after stating that Sheikh Karam Ali, Pleader for the plaintiff, was present and had requested that his client should be informed, passed an order to the effect that the suit be dismissed *for the present* for default of prosecution.

Sheikh Karam Ali has filed an affidavit in this Court in support of his allegation that he did not appear for the plaintiff

Bura in the Court of the Subordinate Judge on the 12th May, 1924, and that before the dismissal of the suit he had asked the Subordinate Judge on one or two occasions when the judgment was to be pronounced but got the reply that the judgment had not been written and that it was unnecessary for him to attend the Court in connection with the case. Mr. Zafrullah Khan for the petitioner urges that the order of the Subordinate Judge in so far as it records the presence of Sheikh Karam Ali on the 12th of May, 1924, and attributes to him the statement referred to above contains a mis-statement of facts and that there was no occasion for dismissal for default when the case had been finished and the only thing required to be done was the delivery of judgment.

It has been laid down in *Jiwanda Mal* v. *Muhammad Ali* (1), that there is no rule of procedure which would justify a Court in dismissing a suit for non-appearance of the parties on the day fixed for delivery of judgment and the same view has been affirmed in *Nand Lal* v. *Shankru* (2). The order of the lower Court dismissing the suit for default is wholly unjustified and must be set aside.

Accordingly, I accept the application for revision and, setting aside the order, direct the lower Court to decide the case on the merits. The costs in the application shall be costs in the cause.

R. L. *Application accepted.*

(1) 82 P. R. 1901.

(2) 11 Ind. Cas. 842; 165 P. W. R. 1911; 254 P. L. R. 1911.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 141 OF 1926.

December, 3 1926.

Present:—Mr. Justice Lindsay.

SALIK RAM—PLAINTIFF—APPLICANT

versus

WALI AHMAD—DEFENDANT—OPPOSITE PARTY.

Oaths Act (X of 1873), ss. 9 to 11—Agreement to abide by oath—Application for withdrawal—Duty of Court—Summary dismissal of application, whether proper—Party's right to withdraw for proper reasons—Discretion to administer oath.

Although there is nothing in the Oaths Act which allows a party to retract after his opponent has accepted a proposal to abide by an oath, the Act gives the Court a discretion to administer the oath or not. Where a party, after agreeing to an oath applies to resile from the agreement, the proper course, therefore, for the Court is to examine the grounds upon which it desires to withdraw from the reference and to satisfy itself whether the reasons given are satisfactory or not. If the Court is satisfied that there are good reasons for withdrawing, it should refuse to administer the oath and if, on the other hand, it is satisfied that the grounds are not good it should administer the oath and decide the case in accordance with the agreement. A summary dismissal of the application to withdraw from the reference on the ground that a party could not resile from such an agreement is illegal. [p. 474, col. 1.]

Thoyi Ammal v. *Subbaroya Mudali* (2) and *Ram Narain Singh* v. *Babu Singh* (2), followed.

Civil revision from an order of the Judge of the Court of Small Causes at Kanauj, dated the 17th May, 1926.

Mr. *Bhagwati Shankar*, for the Applicant.

JUDGMENT.—This is an application in revision against an order of a Judge of the Small Cause Court. It appears that the plaintiff-applicant brought a suit on a bond against the defendant opposite party. On the 16th of April, 1926, both parties joined in making a petition to the Judge in which they stated that they were willing to be bound by the oath of one Naziruddin. It was stated in the petition that Naziruddin was present in Court but for some reason or other, which does not appear, Naziruddin was not examined on that day. The Court ordered the 30th of April to be fixed for taking the evidence of Naziruddin. The witness was not served for that date and was summoned again for the 14th May. On that date Naziruddin was examined. He deposed against the plaintiff and the suit was dismissed.

In this application for revision it is stated that prior to the date on which Naziruddin was examined, the plaintiff had expressed his desire to resile from the petition of the 16th April, 1926. I find that on the 20th April the plaintiff put in an application saying that he was no longer willing to be bound by the oath of Naziruddin as he had come to know that Naziruddin was a close friend of the defendant. On this the Judge recorded an order saying that the plaintiff was not entitled to resile from the agreement to refer. Another application was presented by the plaintiff on the 8th of May in which he reiterated the same prayer. This, too, was refused by the Court for the same reason. I do not think it was correct for the Court below to hold that the plaintiff could not resile from the agreement to refer. The

law on the subject has been explained in a judgment of the Madras High Court to be found in *Thoyi Ammal* v. *Subbaroya Mudali* (1). At pages 236* and 237* of the report their Lordships observe :—

"There is nothing in ss. 9 to 11 of the Act (Indian Oaths Act) which allows a party to retract after the opponent has accepted the proposal. The Act gives the Court a discretion to administer the oath or not, and if a party after agreeing to an oath satisfies the Court that there is good ground for retracting, the Court would probably exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting we think the Court is justified in administering the oath notwithstanding the retractation. This has been expressly decided in *Ram Narain Singh* v. *Babu Singh* (2) and *Abaji* v. *Bala* (3), and there is nothing in the case of *Vasudeva Shanbog* v. *Naraina Pai* (4) to support the contrary view".

Having regard to what is stated in the case just cited and also to what is stated in the report of the case to be found in *Ram Narain Singh* v. *Bahu Singh* (2), I think the proper course for the Court below was to examine the grounds upon which the plaintiff desired to withdraw from the reference and to satisfy itself whether the reasons given for the desire to withdraw were satisfactory or not.

I accept this application, set aside the decree of the Court below and send the case back for investigation on the lines indicated. If the Judge is satisfied that the plaintiff has good reasons for withdrawing from the reference he will refuse to administer the oath to the referee. On the other hand, if he is satisfied that the grounds set out by the plaintiff for withdrawal are not good grounds he will re-examine the referee and decide the case in accordance with his statement.

As the application is not opposed here I make no order as to costs.

A. N. A. *Application accepted.*

(1) 22 M. 234; 8 Ind. Dec. (N. S.) 167.
(2) 18 A. 46; A. W. N. (1895) 158; 8 Ind. Dec. (N. S.) 736.
(3) 22 B. 281; 11 Ind. Dec. (N. S.) 770.
(4) 2 M. 356; 3 Ind. Jur. 561; 1 Ind. Dec. (N. S.) 517.

*Pages of 22 M.—[*Ed.*]

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 23 OF 1925.

December 16, 1925.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

Syed BAHADUR ALI KHAN—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT

U. P. Town Improvement Act (VIII of 1919)—Decision of Tribunal—Appeal—President refusing leave—Chief Court, whether can grant special leave.

Where the President of a Tribunal constituted under the provisions of the U. P. Town Improvement Act of 1919 has refused to grant a certificate in respect of a case decided by the Tribunal that it is a fit one for appeal, the Chief Court has no authority to grant special leave to appeal where the amount in dispute is less than Rs. 5,000.

Appeal against an order of the Improvement Trust Tribunal Judges, Lucknow, dated 21st October 1924, dismissing the objection of the appellant with costs.

Mr. *Wasi Hassan*, for the Appellant.

Mr. *G. H. Thomas*, Government Advocate, for the Respondent.

JUDGMENT.—This is an appeal against the decision of the Lucknow Tribunal deciding the amount of compensation due to the appellant under the provisions of the U. P. Town Improvement Act of 1919. Before an appeal can lie to this Court, the decision being the decision of the Tribunal and not of the President alone, it was necessary for the President of Tribunal to grant a certificate that the case was a fit one for appeal or for the Judicial Commissioner's Court or this Court to grant special leave to appeal if certain conditions were complied with. The President of the Tribunal has not only not granted a certificate but has refused to grant a certificate to that effect and this being the case the Chief Court has no authority to grant special leave to appeal, as the amount of dispute is less than Rs. 5,000. This appeal appears to have been admitted under a misapprehension. It cannot be admitted in view of the refusal of the President of the Tribunal to grant a certificate owing to its valuation being below Rs. 5,000. We, therefore, dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1918 OF 1926.

January 15, 1927.

Present:—Mr. Justice Addison.

AMIN CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KHIALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 15, Sch. I, Art. 182 (5) (6)—Order giving time for payment of decree amount, whether order staying execution or injunction —'Application in accordance with law'—Execution by one of joint decree-holders, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Issue of notice —Step-in-aid of execution.

To attract the operation of s. 15 of the Limitation Act it is necessary to show that there was an injunction or order staying execution. [p. 476, col. 1.]

Thakamoyi Dassi v. *Nadiar Chand Palmal* (1), followed.

An order merely giving time for payment of the amount due under a decree is not an order staying execution or an injunction within the meaning of s. 15, Limitation Act. [*ibid.*]

Jurawan v. *Mahabir Dube* (2), followed.

An execution application is in accordance with law within the meaning of Art. 182 (5) of Sch. I of the Limitation Act if the particulars required by rr. 11 to 15 of O. XXI of the Civil Procedure Code are mentioned in it, and the mere fact that the application is made by one of several joint decree-holders or one of several transferees from a decree-holder does not take it out of the purview of Art. 182 (5). [*ibid.*]

Jogendra Prasad Narayan Sinha v. *Mangal Prasad Sahu* (3), followed.

Even where an application for execution is not in accordance with law a notice issued under O. XXI, r. 22, Civil Procedure Code, would be a step which would give a fresh start for limitation under Art. 182 (6) of Sch. I of the Limitation Act. [*ibid.*]

Jagannath v. *Shriniwas* (4), followed.

Second appeal against a decree of the District Judge, Hissar, dated the 21st May, 1926, reversing that of the Senior Sub-Judge, Gurgaon, dated the 19th January, 1926.

Mr. *Shamair Chand*, for the Appellants

Mr. *Nanwan Mal*, for the Respondents.

JUDGMENT.—The firm Ram Parshad-Ram Richhpal obtained a money-decree against one Man Singh. On the 16th July, 1917, the firm sold by a registered-deed the decree in favour of four persons, namely, Amin Chand, Bucha Mal, Piare Lal and Ram Karan, who constitute a joint Hindu family, though the sale was in the name of the four individuals. On the 20th July, 1922, Bucha Mal one of the vendees, applied for execution of the decree, clearly stating that it had been sold to him and the three others, Notice was issued under O. XXI, r. 16, Civil Procedure Code, and on the 28th July, 1922, the decree-holder and the judgment-debtor along with Bucha Mal were present. The sale was admitted. The judgment-debtor stated that he had paid Rs. 700 and he asked for time up to the 4th November, 1922, to pay the balance of Rs. 800. Bucha Mal had no objection and the Court passed an order to the effect that transfer was sanctioned in favour of the petitioner and that at his request the execution proceedings were consigned to the record room.

Ram Karan, another of the vendees, next applied for execution of the decree on the 14th July, 1925. It would appear that by this time Bucha Mal, who first applied was dead. The petition was dismissed in default on the 20th July, 1925, and there the order should have ended. The Court, however, also went on to say that the petitioner could not take out execution as the transfer had already been effected.

Then on the 19th August, 1925, the three vendees other than Bucha Mal along with Bucha Mal's son applied for execution. It was contended that this application was time-barred. The Executing Court held that it was not time-barred but on appeal the District Judge held that it was. Against his decision this second appeal has been presented.

It was first argued that time should be held to commence to run from the 4th November, 1922, as the judgment-debtor was given time up to then on the 28th July, 1922, to pay. If that argument is accepted the application of the 19th August, 1925, which is in dispute is clearly within time apart altogether from Ram Karan's application of the 14th July, 1925. The argument is based on s. 15 of the Limitation Act. It seems to me, however, that it cannot be held that the application for the execution of the decree dated the 20th July, 1922, was stayed by an injunction or order so as to extend the time up to the 4th November, 1922. It is true that the judgment-debtor asked for time up to then and the decree-holder had no objection, so that the executing Court at the request of the decree-holder consigned the proceedings to the record room. But this was not an order or an injunction, in my opinion, staying the execution. In this connection see *Thakamoyi Dassi* v. *Nadiar Chand Palmal* (1) which is in point. It

(1) 36 Ind. Cas. 939.

was held there that it was essential to point out the injunction or order staying the execution and in the present case there was no such injunction or order. Further it was held in *Jurawan* v. *Mahabir Dube* (2) that an order merely giving time for payment is not an order staying execution or an injunction and that s. 15 of the Limitation Act did not apply in such a case. I, therefore, hold that the period between the 28th July, 1922, and the 4th November, 1922, cannot be excluded in computing the period of limitation.

It was next argued that in any case Ram Karan's application of the 14th July, 1925, brought the present application of the 19th August, 1925, within limitation. It was held by the Patna High Court in *Jogendra Prasad Narayan Sinha* v. *Mangal Prasad Sahu* (3) that an execution application was one made in accordance with law within the meaning of Art. 182 (5) of Sch. I of the Limitation Act if the particulars required by rr. 11 to 15 of O. XXI of the Civil Procedure Code were mentioned in the application. The mere fact that the application was made by one of several joint decree-holders did not take it out of the purview of cl. 5 of Art. 182. It was further held that, where the application for execution was not in accordance with law, a notice issued under r. 22 of O. XXI would be a step which would give a fresh start for limitation under cl. 6 of Art. 182 of Sch. I to the Limitation Act. In the present case a notice was issued upon the application of the 20th July, 1922, under O. XXI, r. 16. According to *Jagannath* v. *Shriniwas* (4) that would be a step-in-aid of execution. It follows, therefore, that the application of the 20th July, 1922, was a step-in-aid of execution although it was not mentioned in it specifically that the application was on behalf of all the transferees as required by O. XXI, r. 15 of the Civil Procedure Code.

It has next to be decided as to what actually happened on this application of the 20th July, 1922. Only one transferee applied to execute the decree and his application was a step-in-aid though he did not specifically state that he was executing on behalf of all the four transferees. But he clearly stated in that application that the transfer had been effected in favour of himself and the other three. In my opinion that was an application asking for the transfer to be made in the name of all the four transferees and it was merely a clerical mistake that the Court recorded the order that the transfer was sanctioned in favour of the petitioner. This order should thus be treated as transferring the decree in the names of all the four persons whom the petitioner clearly mentioned as being the transferees.

That being the case, there is no doubt that the application of Ram Karan dated the 14th July, 1925, was a good application as it was presented within time. It follows that the application now in dispute dated the 19th August, 1925, is also within time.

Even if it be held that the order of transfer made by the Court was in favour of Bucha Mal, then the application of Ram Karan also to execute the decree on the ground that he was a transferee would be competent and would be, for the reasons given above, a step-in-aid of the execution. See in particular *Jagannath* v. *Shriniwas* (4). Ram Karan's application dated the 14th July, 1925, was to the effect that he was a purchaser, that he should be allowed to execute the decree. In that view also his application would save limitation.

For the various reasons given I hold that the application in question was presented within time. I, therefore, accept the appeal and setting aside the order of the District Judge, restore with costs throughout the order of the Executing Court holding that the application was within limitation. The Executing Court will now proceed with the execution.

R. L. *Appeal accepted.*

(2) 44 Ind. Cas. 24; 40 A. 198; 16 A. L. J. 71.
(3) 90 Ind. Cas. 847; (1925) Pat. 315; A. I. R. 1926 Pat. 160; 7 P. L. T. 330.
(4) 88 Ind. Cas. 112; A. I. R. 1925 Nag. 362.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 257 OF 1926.

November 29, 1926.

Present:—Mr. Justice Dalal.

BUDHU KHAN—DEFENDANT—APPELLANT

versus

MESSRS. A. BONER—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Decree directing payment of additional Court-fee—

Application for execution—Limitation—Time whether runs only from date of paying additional fee.

Where a judgment directs that a party should pay additional Court-fee before taking out execution, the period of limitation for executing the decree runs from the date of the judgment and not from the date on which the additional Court-fee is paid.

Kishori Mohan Pal v. *Provash Chandra Mondal* (1), followed.

Where a decree-holder who has been directed to pay additional Court-fee, applies for execution within 3 years of the decree but pays the additional fee only after the expiry of three years, he is not entitled to recover the same in execution from the judgment-debtor.

Execution first appeal against a decree of the Subordinate Judge, Allahabad, dated the 1st May, 1926.

Mr. *Nehal Chand*, for the Appellant.

Mr. *Balmakund*, for the Respondent.

JUDGMENT.—This appeal relates to the execution of a decree of this Court which was passed in favour of the decree-holder who had not paid the proper Court fee in the Subordinate Courts. This Court, therefore, ordered that the decree will not issue unless the amount of Court-fee payable on the plaint was deposited by the plaintiff and that when it was deposited, it will be included in the costs of the Court below. The judgment was delivered on the 30th January, 1923, and without payment of Court-fee the plaintiff applied for the execution of the decree on 30th January, 1926. This application was within time from the date of the judgment of this Court. Subsequently, on 2nd February, 1926, the plaintiff paid the deficiency in Court-fee here. She desires to recover both the amount paid by her on 2nd February, 1926, and the costs she had incurred and already paid prior to 30th January, 1926. I cannot agree with the view of the lower Court that the decree became capable of execution on 2nd February, 1926, and that three years' limitation was to run from that date. For a case like the present the analogy of a partition decree should be applied. A decree in a partition suit is not formally drawn up until the stamp duty is recovered, but for the purposes of limitation the period runs from the date of the judgment and not from the date on which the Court-fee has been paid [see *Kishori Mohan Pal* v. *Provash Chandra Mondal* (1)] The period of limitation must run from the date of the judgment of this Court.

From that point of view the plaintiff is entitled to recover whatever she had incurred up to the date of her application of the 30th of January, 1926. The Court-fee, however, she paid subsequent to the expiry of the period of limitation, and, in my opinion, she could not recover that amount. That amount is, no doubt, included in her application of 30th January, 1926, but she was not entitled to recover it on that date as it has not been paid by her. Subsequently, after she paid the amount execution of the decree was time-barred.

I hold that she is entitled to execute the decree for Rs. 111-8-0 and not for the sum of Rs. 149-2-8 paid by her as deficiency in Court-fee after the period of limitation for the execution of the decree of this Court had expired. I decree this appeal in those terms without any order as to costs.

A. N. A. *Decree modified.*

(1) 72 Ind. Cas. 646; A. I. R. 1924 Cal. 351.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1462 OF 1926.

November 8, 1926.

Present:—Mr. Justice Martineau.

KANSHI RAM—PLAINTIFF—APPELLANT

versus

TAJA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144—Suit for possession on allegation of tenancy—Tenancy not proved—Limitation—Burden of proof.

A suit for possession on the allegation of tenancy, even if the tenancy is not proved is, in the absence of an allegation by the plaintiff or proof that he was ever dispossessed or that he discontinued possession, governed by Art. 144 and not by Art. 142 of Sch. I of the Limitation Act and it is for the defendant to prove adverse possession for over 12 years. [p. 478, col. 2.]

Second appeal from a decree of the Subordinate Judge, First Class, Gujrat, dated the 23rd February, 1926, affirming that of the Sub-Judge Fourth Class, Phalia, District Gujrat, dated the 17th November, 1925.

Malik *Ram Lal* and Mr. *Shamair Chand*, for the Appellant.

Mr. *Abdul Ghani*, for the Respondent.

JUDGMENT.—The plaintiff purchased the house in dispute at a Court-sale in 1891 and obtained possession. He says that he leased the house to the defendant about 8 years ago, and he now sues to recover possession.

The defendant said that the plaintiff after his purchase dispossessed some *Mirasis*, who had been living in the old house—but that afterwards that house fell down, and he (the defendant) built the present house 12 or 13 years ago.

The plaintiff produced some witnesses, who deposed to their having taken the house on rent from him, but their evidence has not been believed, and it has also been found that the plaintiff has not proved that he eased the house to the defendant. On that finding the suit has been dismissed, the Courts below holding that it was necessary for the plaintiff to prove that he was dispossessed within 12 years of the suit, and that he failed to do so.

The plaintiff has filed a second appeal, and it is contended on his behalf that as he did not allege dispossession or discontinuance of possession he is entitled to succeed on the strength of his title unless the defendant proves, that he has been in adverse possession for 12 years. *Santa Singh* v. *Narain Singh* (1), *Ismail* v. *Ibrahim* (2), *Jai Chand* v. *Girwar Singh* (3), *Ali Hammad* v. *Ghurpattar Singh* (4) and *Mahamad Saheb Ibrahim Saheb* v. *Tilokchand Abheerchand Marwadi* (5) are relied upon in support of this contention.

The rulings cited on the other side are nearly all cases in which the plaintiff had been dispossessed of the property for which he was suing. The only case in point was *Subappa Shenkareppa* v. *Venkappa Golappa* (6) and that was decided by the Bombay High Court, which appears to have changed its view in *Mahamad Saheb Ibrahim Saheb* v. *Tilokchand Abheerchand Marwadi* (5) mentioned above.

If in the present case it were proved that the plaintiff had been dispossessed or had discontinued his possession Art. 142 of the First Schedule of the Limitation Act would, I think, apply even though he himself does not allege dispossession or discontinuance of possession, but there is no evidence on this point at all, for the defendant's witnesses do not say that the plaintiff was ever dispossessed or discontinued his possession, but say that he was never in possession at all, and they make no mention of the original house having fallen down as alleged by the defendant. From the mere fact that the plaintiff has not proved that the defendant was his tenant it is not necessarily to be inferred that the defendant dispossessed him. The defendant might be a licensee or the tenancy might exist although the plaintiff failed to prove it.

I hold, therefore, that the case is not governed by Art. 142 in the absence of either an allegation by the plaintiff or proof that he was dispossessed or discontinued possession.

It is contended for the defendant that Art. 138 would apply if Art. 142 does not, but I do not agree with that contention as it is admitted that the plaintiff got possession of the property after purchase.

The Article applicable is, therefore, Art. 144 and the defendant in order to defeat the claim must prove his adverse possession for 12 years. The lower Appellate Court thinks that that is proved by the statement of the plaintiff's witness Buta Mal, but it is wrong, as Buta Mal only says that the defendant had been in possession for 10 or 12 years. The defendant's witnesses, no doubt, say that the *Mirasis* lived in the house under the defendant for 5 or 6 years, and that he himself has been living in it for the last 20 years or more, but this is entirely at variance with his own statement. In fact it can hardly be said that he definitely sets up a plea of 12 years' adverse possession when he says in a vague way that he built the existing house about 12 or 13 years ago.

I find that 12 years' adverse possession by the defendant has not been proved.

I accordingly accept the appeal, reverse the decrees of the Courts below, and give the plaintiff a decree for possession of the house with costs in all the Courts.

R. L. *Appeal accepted.*

(1) 91 Ind. Cas. 1047; 2 Lah. C. 177.
(2) 89 Ind. Cas. 995; 1 Lah. C. 323; A. I. R. 1926 Lah 13.
(3) 52 Ind. Cas. 366; 41 A. 669; 17 A. L. J. 814.
(4) 85 Ind. Cas. 578; 47 A. 389; 23 A. L. J. 244; L. R. 6 A. 184 Civ.; A. I. R. 1925 All. 454.
(5) 66 Ind. Cas. 764; 24 Bom. L. R. 373; A. I. R. 1922 Bom. 243; 46 B. 920.
(6) 28 Ind. Cas. 24; 17 Bom. L. R. 141; 39 B. 335.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1169 OF 1924.

January 17, 1927.

Present:—Mr. Justice Iqbal Ahmad.

Musammat SITARA SHAHJAHAN BEGAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MUNNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Landlord and tenant—Lease, construction of—Building lease—*Kachha *house, erection of—Presumption—Easements Act (V of 1882), s. 60—License for building purposes—Building, erection of—Revocation, whether permissible.*

The nature of a lease granted for building purposes does not depend on the character of the building actually constructed. [p. 480, col. 1.]

If the origin and the nature of a tenancy is not known and it is proved that the land was let for building purposes and a building was actually constructed on it and remained in occupation of the lessee for a long number of years, these facts, in the absence of anything pointing to a contrary conclusion should be enough to lead to the presumption that the tenancy was a permanent one. [p. 480, cols. 1 & 2.]

A *pucca* building is a building more permanent than a *kachcha* one, but a mere difference in the degree of permanence cannot alter the nature of the tenancy. The fact that a *kachha* house has been in existence for a period of more than sixty years and has passed by succession to the heirs of the lessee who originally built the house, may be enough to lead to the presumption that the lease is a permanent one. [p. 480, col. 2.]

Where a license is granted for erecting buildings and the licensee erects upon the land a work of a permanent nature the license cannot be revoked in view of the provisions of s. 60 of the Easements Act. [p. 481, col. 1.]

Second appeal from a decree of the Additional Subordinate Judge, Moradabad, dated the 23rd April, 1924.

Mr. *J. N. Takru*, for the Appellants.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit for possession of two houses by ejectment of the defendants and for Rs. 17 on account of arrears of rent.

The plaintiffs' case was that the houses in dispute belonged to them, that the defendants were in possession of the same as the plaintiffs' tenants and that the tenancy was determined by means of a notice sent by the plaintiffs to the defendants which notice the defendants refused to accept.

The defence to the suit was that the houses in dispute belonged to the defendants that they were not the plaintiffs' tenants and that they were in adverse possession of the house in dispute and the site for more than 12 years.

The trial Court held that though the site of the houses in dispute belonged to the plaintiffs, the houses were built by the predecessors-in-title of the defendants, and that from the circumstances of the case, it was reasonable to presume that "the tenure is permanent and that the plaintiffs are not entitled to oust the defendants from the land on any account". It further held that the defendants were liable to pay the amount claimed by the plaintiffs on account of arrears of rent and accordingly passed a decree for that amount and dismissed the suit with respect to the possession of the houses in dispute.

Both parties were dissatisfied with the decree of the trial Court with the result that the plaintiffs filed an appeal against that portion of the decree that was against them, and the respondents filed a cross-objection maintaining that they were in adverse possession of the site of the houses in dispute and were not liable to pay any rent to the plaintiffs. The lower Appellate Court held that the site of the houses in dispute belonged to the plaintiffs and was given to the defendants' ancestors for building purposes, and the houses in dispute were built by the defendants' ancestors more than 60 years prior to the institution of the suit, and that the defendants were not liable to be ejected from the houses. It further held that there was no substance in the plea of adverse possession urged by the defendants and that the defendants were liable to pay the rent claimed by the plaintiffs. On these findings it dismissed both the appeal and the cross-objection.

The decrees of the Courts below are assailed by the learned Counsel for the plaintiff-appellants on the ground that the Courts below have erred in law in presuming a permanent tenancy simply from the fact that the houses in dispute, which are *kachcha* houses, were built more than 60 years ago, and it is argued that, in view of the provisions of s. 106 of the Transfer of Property Act, the defendants should have been presumed to be holding under a lease from month to month that was terminable on the part of the lessor by 15 days' notice expiring with the end of a month of the tenancy. In support of this contention reliance has been placed by the learned Counsel for the appellants on the

cases of *Mohim Chandra Sarkar* v. *Anil Bandhu Adhicary* (1), *Baroda Prasad Burman* v. *Prosonna Kumar Das* (2), *Syama Charan Pal* v. *Kailash Chandra Pal* (3) and *Afzal un-nisa* v. *Abdul Karim* (4).

It has been held in the first two cases. noted above, that the mere facts that a lease of land was given for dwelling purposes and that the lessees were allowed to construct buildings that were neither masonry buildings nor buildings of a permanent character and were allowed to remain in possession of the land on payment of rent for a long period, are not in themselves enough or sufficient to raise the presumption that the tenancy was a permanent one. In the case of *Mohim Chandra Sarkar* v. *Anil Bandhu Adhicary* (1), the circumstance that the lessee was not allowed to erect masonry buildings or to cut down trees was pointed out by the learned Judges as a circumstance indicating that a permanent lease was not intended. According to the decision in the case of *Baroda Prasad Burman* v. *Prosonna Kumar Das* (2), if the house built by the lessee is of a 'permanent character,' that is to say, a masonry dwelling house, the tenancy is to be presumed to be a permanent one. But if the building is not of a 'substantial character' the lease must be presumed to have been a lease from month to month. Mr. Justice Boys while issuing notice in the present appeal observed that "I do not myself subject to anything which I might hear further, appreciate the difference between a case where a tenant has erected *kachcha* buildings or *kachcha pucca* buildings or *pucca* buildings and I do not see where any line could be drawn". With all respect to the learned Judges of the Calcutta High Court I am unable to agree with them that the nature of a lease granted for building purposes is to depend on the character of the building actually constructed. If the origin and the nature of a tenancy is not known, and if it is proved that a land was let for building purposes and a building was actually constructed on the same, and remained in occupation of the lessees for a long number of years, these facts, in the absence of anything pointing to the contrary conclusion, should be enough to lead to the presumption that the tenancy was a permanent one. A *kachcha* house is also a building of a permanent character, *vide*, *Nasir-ul-zaman Khan* v. *Azim-ul-lah* (5). It may be that a *pucca* building is a building more permanent than a *kachcha* one, but the mere difference in the degree of permanence cannot alter the nature of the tenancy. The fact, that a *kachcha* house has been in existence for a period of more than 60 years, and has passed by succession to the heirs of the lessee, who originally built the house, may be enough to lead to the presumption that the lease is a permanent one. If I am right in holding that a *kachcha* house is a building of a substantial character I am unable to distinguish the present case from the case of *Gungadhur Shikdar* v. *Ayimuddin Shah* (6), and I am, with all respect unable to discover the ground on which that case was distinguished by the learned Judges of the Calcutta High Court, who decided the case of *Baroda Prasad Burman* v. *Prosonna Kumar Das* (2).

It has been held in the case of *Syama Charan Pal* v. *Kailash Chandra Pal* (3), that where the origin of a tenancy is unknown, and the tenancy was for residential purposes, and the original tenant and his successors have been in occupation for over t0 years and the tenancy was treated by the landlord as heritable, the tenancy must be presumed to be a permanent one.

It is true that in the case of *Afzal-ul-nisa* v. *Abdul Karim* (4), one of the various facts, from which the presumption of a permanent tenancy was drawn, was the fact that a *pucca* house had been built upon the land leased, but it was never decided by their Lordships of the Privy Council that if the house built had been a *kachcha* one, such a presumption could not be drawn. It may also be noted that the lease in the present case having been granted before the passing of the Transfer of Property Act is not governed by that Act, *vide*, *Padmabaya* v. *Ranga* (7).

Moreover, the judgments of the Courts

(1) 1 Ind. Cas. 66; 13 C. W. N. 513; 9 C. L. J. 362; 5 M. L. T. 297.

(2) 14 Ind. Cas. 152; 16 C. W. N. 564.

(3) 58 Ind. Cas. 189.

(4) 50 Ind. Cas. 749; 17 A. L. J. 608; 36 M. L. J. 580; 26 P. W. R. 1919; 1 U. P. L. R. (P. C.) 47; 26 M. L. T. 55; 81 P. R. 1919; 23 C. W. N. 966; (1919) M. W. N. 494; 30 C. L. J. 152; 21 Bom. L. R. 891 (P. C.)

(5) 3 A. L. J. 765; 3 A. W. N. (1906) 216; 28 A. 741.

(6) 8 C. 960; 4 Shome L. R. 274. 4 Ind. Dec. (N. S.) 619.

(7) 6 Ind. Cas. 447; 34 M. 161; 8 M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930.

below can be supported on another ground. There is no reason why, from the facts found, it should not be presumed that there was a license granted by the predecessors-in-title of the plaintiffs to the predecessors-in-title of the defendants to build houses on the site that belonged to the plaintiffs' predecessors-in-title. If there was a license granted for the purpose mentioned above, the licensees having erected a work of a permanent nature on the site, the license cannot in view of the provisions of s. 60 of the Easements Act be revoked.

I am not prepared to hold that in the present case the lower Appellate Court, on the facts found, was not justified in holding that the tenancy was a permanent one and that the defendants were not liable to ejectment.

I may also point out that the case on which the plaintiffs came into Court, *viz*, that they were the owners of the houses in dispute has been definitely found to be false by both the Courts below.

For the reasons given above, I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 67 OF 1925.

December 21, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

GANPAT PANDEY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu BINDESHARI PARTAB BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Decree against widow representing her husband's estate, whether binding on reversioner.

Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir. [p 482, col. 1.]

First appeal against a decree and judgment of the Subordinate Judge, Gonda, dated the 9th October 1925.

St. *G. Jackson* and Mr. *H. D. Chandra*, for the Appellant.

Messrs. *Bisheshwar Nath* and *L. S. Misra*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are as follows. There is in the village of Shah Nagar in the Gonda District a *birt* under-proprietary tenure. In 1877 a certain woman called Pali, the widow of Gopali, sued a certain Jagat Bahadur Singh for a 4 annas share in this *birt* tenure. Her suit was dismissed on the 17th November, 1877, (Ex. 7) but decreed on appeal on the 10th May, 1878, by a judgment (Ex. 8) after remand findings (Ex. 6). It is said that on the 23rd of January, 1880, Pali obtained formal possession in execution of her decree, over this 4-annas share; and we have it that in 1885 she applied for mutation of names over the share in the revenue papers. Her application, being refused she instituted a civil suit against the sons of Jagat Bahadur Singh. This suit was filed by her on the 12th July, 1887. It appears to have been decreed by the Subordinate Judge on the 20th November, 1888, but on appeal the decree was set aside and the suit was dismissed by the District Judge on the 13th May, 1889, (Ex. A-3). A second appeal was filed in the Judicial Commissioner's Court which was dismissed on the 31st March, 1891 by an order (Ex. A-4). As a result of this litigation it will be seen that Pali lost all right to the 4-annas *birt* share which had been decreed to her on the 10th May, 1878. She died in April, 1921, and the plaintiffs-appellants, who are her reversioners, have instituted the present suit for possession of the same share of *birt* of which Pali was deprived and for damages. Their suit having been dismissed by the learned Subordinate Judge the present appeal is filed.

The learned Subordinate Judge found, and found correctly, that Pali's title to the 4-annas share in question was the title of a Hindu widow. The title had originally been with her husband Gopali, who died in 1868 and she had in the share a Hindu widow's estate only. He decided that as she represented the full estate the present plaintiffs were bound by the legal proceedings to which she was a party and that in these circumstances the suit must fail. We consider that he decided the question correctly. We need only refer to three decisions in this connection. The first is the well-known decision in the *Shivaganga's case* [*Katama Natchiar* v. *Rajah of Shivagunga* (1)], in which their Lordships of the Judicial Committee state in respect

(1) 9 M. I. A. 539; 2 W. R. P. C. 31; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 25; 19 E. R 843.

of a widow's estate similar to the widow's estate here "The whole estate would, for the time, be vested in her absolutely for some purposes, though, in some respects, for a qualified interest; and until her death, it could not be ascertained who would be entitled to succeed ...It is obvious there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow". *Katama Natchiar* v. *Rajah of Shivagunga* (1). This proposition of law was quoted with approval by their Lordships of the Judicial Committee in 1884 in *Partab Narain Singh* v. *Triloki Nath Singh* (2), and was again affirmed in a recent case in 1918 in *Risal Singh* v. *Balwant Singh* (3). In the last case their Lordships say at page 602 "The principle of law to be applied in such cases was, their Lordships consider, correctly summarized by Mr. Justice Banerji in his judgment in this case thus: 'Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir'." It cannot be suggested that in the legal proceedings to which we have referred there was not a fair trial. There was no fraud. There was no collusion. The claim of *Musammat* Pali to enjoy the property in question was rejected after full adjudication and in these circumstances we agree with the learned trial Judge that the plaintiffs-appellants are bound by that decree and that their suit must fail.

It has been argued before us that we should not apply this principle because the facts of the cases which we have quoted are not exactly as the facts in this case. It is true they are not exactly as the facts in this case but the principle which we have quoted is the principle which we consider to have application to the facts of this case. It is pointed out to us that the appellants' title to institute the suit arose under the provisions of Art. 141 of the First Schedule of Act IX of 1908 upon the death of *Musammat* Pali. That death took place some 4 years before the suit was instituted, but we are in no way concerned here with the question of limitation. What we are concerned with is the binding nature of the legal proceedings upon the plaintiffs-appellants owing to the facts that *Musammat* Pali represented the estate for the purpose of this litigation and that the decree obtained against the estate was not vitiated by fraud and collusion. This concludes the matter. The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(2) 11 C. 186; 11 I. A. 197; 8 Ind. Jur. 697; 4 Sar. P. C. J. 567; Rafique & Jackson's P. C. No. 86; 5 Ind. Dec. (N. S.) 883 (P. C.).

(3) 48 Ind. Cas. 553; 40 A. 593; 28 C. L. J. 519; 24 M. L. T. 361; 9 L. W. 52; 23 C. W. N. 326; (1919) M. W. N. 155; 36 M. L. J. 597; 21 Bom. L. R. 511; 45 I. A. 168 (P. C.).

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ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1924.

November 1, 1926.

Present:—Mr. Justice Iqbal Ahmad.

SHEO CHAND MISRA—PLAINTIFF—APPELLANT

versus

SITA RAM MISRA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 11—Abatement—Suit for redemption—Appeal—Death of one of joint mortgagee-respondents—Representatives not impleaded in time—Appeal abates as a whole—Ignorance of death, effect of.

Where the legal representative of a respondent who dies during the pendency of an appeal is not brought upon the record within the period allowed by law, the appeal automatically abates as against him, even though the appellant was not aware of the death of the respondent. [p. 483, col. 1.]

Churya v. *Baneshwar* (1), followed.

The test to determine whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal, or *qua* that particular respondent alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other the appeal must abate as a whole. [p. 483, col. 2.]

Where during the pendency of an appeal from a suit for redemption of a joint mortgage in favour of two persons, one of the mortgagees dies and his legal representatives are not impleaded as parties in time, the appeal abates as a whole. [*ibid.*]

Second appeal against a decree of the District Judge, Ghazipur, dated the 3rd January, 1924.

Mr. *S. N. Verma*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal and arises out of a suit for redemption of a mortgage. The mortgage was in favour of two persons Lachhman Misser

and Sita Ram Misser. Before the institution of the suit Lachhman Misser had died leaving as his legal representative one Raj Ballaw Misser who was arrayed as defendant No. 2 and Sita Ram Misser was arrayed as defendant No. 1.

The suit was decreed by the trial Court but the decree of the trial Court has been reversed by the lower Appellate Court and the suit has been dismissed. During the pendency of the appeal in this Court Sita Ram Misser died, and no step was taken in this Court, within the statutory period, to bring on the record his heirs and legal representatives. It appears from the affidavit filed on behalf of the defendant-respondent that Sita Ram Misser died so far back as in the month of May, 1925. An affidavit on behalf of the plaintiff-appellant has been filed to-day, and in it the allegation is that Sita Ram Misser was living at a far off place from the residence of the plaintiff-appellant, and that the plaintiff-appellant for the first time came to know of the fact of his death when the contents of the affidavit filed on behalf of the respondents were communicated to him by his learned Counsel.

Be that as it may, no step having been taken to bring upon the record the legal representatives of Sita Ram Misser within the period allowed by law, the appeal as against him automatically abated, *vide*, *Churya* v. *Baneshwar* (1). The only question that remains is whether or not the appeal has abated as a whole, *i.e.*, even as against Raj Ballaw. In my opinion the failure of the plaintiff-appellant to substitute the legal representatives of Sita Ram within the period allowed by law has entailed the abatement of the entire appeal.

The mortgage in favour of the two mortgagees named above was a joint mortgage. There was no specification of the mortgage-money respectively advanced by the two mortgagees, nor was there any specification of their interests as mortgagees. As such, the mortgage either could be redeemed as a whole or could not be redeemed at all. To put it in another way, if the plaintiff had sued for redemption of that mortgage and had impleaded only one of the mortgagees as defendant in the suit, the suit would have been liable to be dismissed on the ground that all the persons who had an interest in the mortgages or in the mortgage property had not been impleaded as parties to the suit. The same result must follow if the legal representatives of one of the mortgagees have not been substituted in place of the deceased mortgagee during the pendency of the appeal in this Court.

The test to determine whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal or *qua* that particular respondent alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal must abate as a whole. I will refer in this connection to the case reported as *Wajid Ali Khan* v. *Puran Singh* (2) and to the case of *Bikramajit Rai* v. *Darshan Das* (3). I am not unaware of the fact that the decision in the last mentioned case has been modified in a Letters Patent appeal but the proposition of law laid down by the learned Judge in that case has been confirmed by the Bench that decided the Letters Patent appeal.

In the present case if the appeal were to be heard as against the surviving respondent and were to be allowed, the necessary consequence would be that there would be two decrees contrary to each other of equal validity. There will be the decree of the lower Appellate Court denying to the plaintiff-appellant the right to redeem the mortgage, that decree having become final between the legal representatives of Sita Ram, the deceased respondent, and the plaintiff-appellant. As against that decree, if the appeal in this Court were to be allowed there would be a decree of this Court granting the plaintiff-appellant a decree for redemption of mortgage as against Raj Ballaw, the surviving respondent, one of the joint mortgagees. This being the case I am compelled to hold that the appeal to this Court has abated in its entirety and I so declare.

The defendant-respondent is entitled to his costs of this appeal including in this Court fees on the higher scale.

A. N. A. *Order accordingly.*

(1) 93 Ind. Cas. 313; 24 A. L. J. 369; A. I. R. 1926 All. 217; 48 A. 334; L. R. 7 A. 297 Rev.

(2) 85 Ind. Cas. 66; 47 A. 100; 22 A. L. J. 994; L. R. 6 A. 39 Civ.; A. I. R. 1925 All. 108.

(3) 82 Ind. Cas. 26; 22 A. L. J. 1033; L. R. 5 A. 747 Civ.; A. I. R. 1925 All. 141.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 510 OF 1925.

October 27, 1926.

Present :—Mr. Justice Odgers and Mr. Justice Jackson.

VITTAL RAO AND ANOTHER—PETITIONERS—APPELLANTS

versus

R. HANUMANTHA RAO AND OTHERS—RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 4—Money due from Insurance Company under policy of insurance, whether debt—Succession certificate, whether can be granted.

Moneys due from an Insurance Company to the estate of a deceased person under a policy of insurance are debts within the meaning of s. 4 of the Succession Certificate Act, and a Succession Certificate can be granted in respect of such moneys.

Oriental Government Security Life Assurance Co., Ltd. v. *Vantedu Ammiraju* (1), *Bancharam Majumdar* v. *Adya Nath Bhattacharjee* (7) and *Abdul Karim Khan* v. *Maqbul-un-nissa Begam* (8), relied on.

Appeal against the order of the District Court, Bellary, dated the 3rd August, 1925, in O. P. No. 14 of 1925.

Mr. *K. Srinivasa Rao*, for the Appellants.

JUDGMENT.—This is an appeal against the refusal of the District Judge of Bellary to grant a Succession Certificate in order that the petitioners might recover a sum of money due on a life insurance policy. The learned Judge held, with reluctance, that the moneys did not form a debt under s. 4 of the Succession Certificate Act. The respondents are *ex parte* and we have not had the advantage of hearing their arguments; but we have examined the cases relied on by the learned District Judge in support of the view that moneys due from an Insurance Company under a policy of insurance are not debts within the meaning of s. 4 of the Succession Certificate Act. The learned Judge deals with the decision in *Oriental Government Security Life Assurance Co., Ltd.* v. *Vantedu Ammiraju* (1) and the decision of the Full Bench in *Pokkunuri Balamba* v. *Kakaraparti Krishnayya* (2) as confined to the applicability of s. 6 of the Married Women's Property Act. But *Oriental Government Security Life Assurance Co., Ltd.* v. *Vantedu Ammiraju* (1) clearly lays down that the policy is part of the estate of the deceased and that the heirs are entitled to the payment of the money under it after his death. No doubt the question was raised in *Oriental Government Security Life Assurance Co., Ltd.* v. *Vantedu Ammiraju* (1) as to the Married Women's Property Act but in *Pokkunuri Balamba* v. *Kakaraparti Krishnayya* (2) in which it is said that *Oriental Government Security Life Assurance Co., Ltd.* v. *Vantedu Ammiraju* (1) was overruled it must be observed that the only question on which *Oriental Government Security Life Assurance Co., Ltd.* v. *Vantedu Ammiraju* (1) appears to have been overruled is the question of the Married Women's Property Act; because at page 506* Sir Arnold White, C. J., said: "If the view taken by the learned Judges as to the Married Women's Property Act was right, I should agree with their conclusion in that case that no cause of action arose to the beneficiaries and that the policy moneys formed part of the estate of the assured, notwithstanding that under the contract the money was payable to the beneficiaries in default of trustees."

Another case cited by the learned District Judge *Srinivasa Chariar* v. *Ranganayaki Ammal* (3) clearly turned on the applicability of s. 6 of the Married Women's Property Act. The *dictum* in *Charusila Dasi* v. *Jyotish Chandra Sirkar* (4) relied on by the Judge must have reference to the facts of the case which it decided and it is at least doubtful as to whether this also is not a case under the Married Women's Property Act as the assured had constituted his widow his nominee for the receipt of the money. In so far as the learned Judge has held or may be taken to have held that an insurance policy is not contemplated by the Succession Certificate Act in that it is not a debt due to the deceased, it may be pointed out that in *Mathew* v. *Northern Assurance Co.* (5) it was held that the Insurance Company is a debtor and in *Vishvanath* v. *Mulraj* (6) the learned Judges held that the policy moneys are debts. Since the hearing of the appeal the Full Bench ruling of the Calcutta High Court in *Bancharam Majumdar* v. *Adya Nath Bhattacharjee* (7) has come to our notice which held that the ordinary meaning of the word 'debt' is to be ascribed to the language of s. 4 of the Act in question

(1) 10 Ind. Cas. 263; 35 M. 162; (1911) 1 M. W. N. 276; 9 M. L. T. 451.

(2) 20 Ind. Cas. 934; 37 M. 483; 25 M. L. J. 65; (1913) M. W. N. 697; 14 M. L. T. 363.

(3) 32 Ind. Cas. 991; 3 L. W. 466.

(4) 33 Ind. Cas. 157.

(5) (1878) 9 Ch. D. 80; 47 L. J. Ch. 562; 38 L. T. 468; 27 W. R. 51.

(6) 11 Ind. Cas. 961; 13 Bom. L. R. 590.

(7) 3 Ind. Cas. 492; 13 C. W. N. 966; 10 C. L. J. 180; 36 C. 492.

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and that it applies to a sum of money which does not become payable till after the death of the creditor and that in such a case the heirs of the creditor cannot obtain a decree without the production of a certificate under the Succession Certificate Act. The case in *Abdul Karim Khan* v. *Maqbul un-nissa Begam* (8) which was a question of dower was referred to with approval. These two cases fortify the opinion we had previously formed at the hearing of the argument that it may be legitimately inferred from the decisions that Succession Certificate may be granted in respect of the money due under a policy of insurance. In fact the decision of the Calcutta High Court seems to set the matter at rest. In this view, the decision of the learned District Judge was wrong and his order must be set aside and the case remanded to him to be dealt with according to law in the light of the above observations.

V. N. V. *Appeal allowed.*

(8) 30 A. 315; A. W. N. (1908) 113; 5 A. L. J. 598.

PRIVY COUNCIL.

APPEAL FROM THE OUDH CHIEF COURT.

November 1, 1926.

Present:—Lord Phillimore, Lord Carson, Mr. Ameer Ali and Sir John Wallis.

Musammat NAND RANI KUNWAR—PLAINTIFF—APPELLANT

versus

Musammat INDAR KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), ss. 3, 8, 10, 22, 23—Entry of name of grantee in List 3—Conclusive evidence of primogeniture grant—Succession.

By virtue of the provisions of s. 10 of the Oudh Estates Act Courts are bound to take judicial notice of the Lists prepared under the Act and to regard them as conclusive evidence of the facts they record. [p. 491, col. 2.]

The inclusion of a grantee's name in List 3, is, therefore, in the absence of evidence to show that the name was wrongly inserted, conclusive evidence that the *sanad* obtained by him was a primogeniture grant. [*ibid.*]

On the death of a *taluqdar* holding under a primogeniture *sanad* without lineal male descendants, the *taluq* devolves under cl. 6 of s. 22 to his brothers. [p. 493, col. 1.]

Indar Kuar v. *Nand Rani Kuar*, reported as 80 Ind. Cas. 333, affirmed.

Appeal from the decree of the Court of the Oudh Judicial Commissioner (Mr. Dalal, J. C. and Mr. Hasan, A. J. C.) dated the 30th October, 1923, in First Civil Appeal No. 40 of 1922, reported as 80 Ind. Cas. 333 reversing that of the Additional Subordinate Judge, Lucknow, dated the 27th May, 1922, in O. S. No. 62/27 of 1921.

Messrs. *L. DeGruyther* and *S. Hyam*, for the Appellant.

Messrs. *A. M. Dunne* and *B. Dube*, for the Respondents.

JUDGMENT.

Mr. Ameer Ali.—This appeal arises out a suit brought by the plaintiff, Nand Rani Kunwar, in the Court of the Subordinate Judge of Lucknow on the 1st April, 1921, to establish her title to an estate partly situated in the District of Lucknow and partly in Barabankiin the Province of Oudh.

The plaintiff is the daughter of one Bhagwant Singh, who died on the 9th of December, 1871; and she claims the property in suit as devolving on her on the death in 1913 of her mother *Musammat* Maharani, the widow of Bhagwant Singh. Bhagwant left him surviving a younger brother named Girdhari Singh, Maharani Kunwar, his widow, and two daughters, namely, Birjrani and the plaintiff. Birjrani died chidless in or about 1885.

The plaintiff claims the estate as the sole heiress, on the death of her mother, of her father, Bhagwant Singh, to whom, she alleges, the property belonged at the time of his death.

The first and principal defendant in the action is Indar Kunwar, the widow of Bhagwant Singh's brother, Girdhari Singh, who died on the 6th August, 1919. The other defendants are the daughters of Girdhari Singh by his first wife Raj Kunwar. She died on the 16th June, 1920.

The properties in Lists A and B attached to the plaint belonged originally to one Bahadur Singh, who died in or about 1849, leaving two sons, Bhagwant and Girdhari. The latter was an infant of tender years at the time of his father's death, and accordingly Bhagwant became the head of the family and remained in possession of the joint ancestral estate. The properties mentioned in List C are said to have been acquired after Bahadur Singh's death but no separate argument has been addressed to the Board with regard to them.

The parties are admittedly subject to the Law of the Mitakshara, and the two brothers Bhagwant and Girdhari became on the death of their father jointly entitled to the ancestral estate. Matters stood thus with this family, when Lord Dalhousie in 1856 "annexed" the kingdom of Oudh, which was followed by a furious revolt. To punish the people, Lord Canning, who had

in the meantime succeeded Lord Dalhousie as Governor-General, proclaimed in 1858 a general confiscation of the landed estates in the Province. Later, under the Governor-General's Proclamation of March, 1858, the confiscated estates were restored to the proprietors, save and except in cases where they happened to be implicated in the murder of English men and English women; and Bhagwant Singh, as the head of the joint family, received back the properties which form principally the subject-matter of the present suit, and what is called the "Second Summary Settlement" was made with him.

The plaintiff's case, as made in her plaint, is that Kunwar Bahadur Singh and his two sons Bhagwant and Girdhari, constituted, from long before the annexation of Oudh, a joint Hindu family governed by the Mitakshara Law, and that when the Summary Settlement was made with Bhagwant Singh, both he and Girdhari became equally entitled to the property for which Bhagwant Singh entered into the agreement with the British Government; that the Settlement was made in Bhagwant Singh's name in his capacity as the head and "trustee" of the joint family; that he obtained in respect of the estate a *sanad* or grant in his own name in the same capacity; and in 1864 the first Regular Settlement was made with him as such head and "trustee." The plaintiff also sets out in her plaint that in 1867 Girdhari Singh applied to the Court of the Financial Commissioner of Oudh for the partition of his half-share in the joint estate, but instead of an actual separation a Settlement was arrived at between the two brothers. The plaintiff, however, does not set out in the plaint the nature of the compromise.

As already stated, Bhagwant died in 1871 and the plaintiff's allegation is that after his death his widow Maharani became entitled to the estate, and that she entrusted its management to Girdhari, and that subsequently, in 1879, she (Maharani Kunwar) relinquished all her claim and title in respect of the said property in favour of Girdhari Singh in consideration of a fixed allowance. The plaintiff's case is that she is not bound under the Hindu Law by the acts of her mother, who was a *pardanashin* woman.

Her main contentions are based on the following allegations: namely, that Bhagwant Singh by his acts and declarations evinced clearly his intention that he took the estate for the joint family, consisting of himself and his brother Girdhari Singh, and that in 1867, by the arrangement with his brother Girdhari Singh, he became vested with the entire estate in consideration of the annuity fixed for the latter; and, secondly, that the grant by the Government made by the *sanad* under the Oudh Estates Act (I of 1869), he, Bhagwant Singh, became possessed of the whole property. Her further contention was that by a mistake Bhagwant Singh's name was included in List 3 prepared under the Act, whereas it should have been entered in List 4, and that he never obtained a primogeniture *sanad*; the *sanad* that was given to him was in "ordinary" terms.

The contesting defendant, Indar Kunwar averred, in her written statement, that neither the Summary nor the Regular Settlement was made with Bhagwant Singh in his capacity of the head or trustee of the family; in fact, she strongly repudiated the idea of a trust. She also denied that in 1867 there was a separation between Bhagwant and Girdhari; and further averred that if there was a separation there was subsequent "re-union. She substantially contended that the estate remained undivided in the possession of Bhagwant Singh, and was governed by the *sanad* granted to him under Act I of 1869, and that in view of the circumstances set out in the written statement, Girdhari Singh, on the death of Bhagwant Singh, became the heir under s. 22, cl. 6, of the Act, and that on Girdhari's death, the defendant, as his widow, became entitled to the same. On these pleadings, which were considerably amplified in the course of the trial by the replication of the plaintiff and additional written statements filed on behalf of the defendants, the case went to trial before the Subordinate Judge of Lucknow, who framed a considerable number of issues.

His conclusions are thus summarised by the learned Judge in his judgment:—

"I hold as it is clear from the above discussion that Kunwar Bahadur Singh never transferred the disputed property to Bhagwant Singh, that it remained in the ownership of the entire co-parcenary body up to the time of confiscation, that soon after his being made a proprietor by letter of 10th October, 1859, he began to treat the property as belonging to the joint family

(Issue No. 1 (*b*)), that Bhagwant Singh admitted Girdhari Singh's right as a co-parcener at the Second Summary Settlement (Issue No. 2); that no primogeniture *sanad* was ever granted to Bhagwant Singh, who only received an ordinary *sanad* about the property of which he had become owner some time before, that he had received the *sanad* as a representative of the joint Hindu family (Issues Nos. 3 (*a*) (*b*)); that Bhagwant Singh admitted the equal rights of Girdhari Singh in reply to Circular Order of Government declaring in favour of succession according to the laws of his tribe and religion as against the rule of impartibility (Issue No. 5); that Bhagwant Singh admitted the equal rights of Girdhari Singh during the proceedings connected with the First Regular Settlement, that the decrees were obtained by him as head and trustee of the joint Hindu family (Issues No. 6 (*a*), (*b*)); that up to July, 1867, Bhagwant Singh declared and treated the property included in Lists A and B as joint family property subject to Mitakshara Law, that Bhagwant Singh by his words and deed transferred the entire property to the co-parcenary body of which he was a member (Issues Nos. 7 and 8); that the property in Lists A and B annexed to the plaint was the joint family property of Bhagwant Singh and Girdhari Singh (Issue No. 1 (*a*)); that plaintiff was in no way estopped from pleading the subsistence of the joint Hindu family during the lifetime of her father and taking advantage of the legal consequences of this plea (10 (*a*) and (*b*)).''

He further held that the proceedings initiated by Girdhari Singh in 1867 effected a separation of the joint family, and transferred Girdhari's share to Bhagwant Singh "in lieu of a monetary payment." He overruled the plea of re-union put forward by the defendant.

He held further that the *sanad* granted to Bhagwant Singh was not a *primogeniture sanad*, that his name was, by mistake, entered in List 3 which deals with primogeniture grants, and consequently the succession to the estate was governed by s. 23 of Act I of 1869 (to which reference will be made later in the course of this judgment). He was of opinion that on Bhagwant's death his widow became entitled to the estate, and that her renunciation in 1879 in favour of Girdhari did not affect the rights of the plaintiff, who claims as the reversioner. He accordingly decreed the suit.

From this decree the defendant appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of the Appellate Court came to a totally different conclusion. They held, in substance, that the *sanad* obtained by Bhagwant Singh was a *primogeniture* grant; they overruled the allegation of the plaintiff that Bhagwant's name was entered by mistake in List 3, whereas it should have been entered in List 4. They held that the succession to the estate came under the provisions of s. 22, cl. 6 of the Act; and that Girdhari Singh became, on the death of his brother, Bhagwant, lawfully entitled to the estate which vested in him as the *taluqdar*. They held also that although the Settlement that had been effected with Bhagwant Singh created a "trust" in favour of his brother Girdhari Singh, that trust was "discharged" by the agreement entered into between them in 1867, and that thereupon Bhagwant Singh took the whole estate as the *taluqdar* "discharged" of the trust in favour of his brother. They held further, in agreement with the trial Judge, that in 1867 there was a separation between the two brothers, and as a consequence the arrangement effected between Bhagwant and Girdhari in that year gave a complete title to the elder brother in the estate. They accordingly came to the conclusion that the defendant was rightfully entitled to the *taluqa* as the widow of Girdhari Singh, and that the suit should be dismissed with costs.

The plaintiff has now appealed to His Majesty in Council.

Their Lordships consider it desirable at this stage to recapitulate briefly the main contentions of the parties.

Having regard to the application of Girdhari in July, 1867, both the Courts below have rightly overruled the plea of the defendant that the two brothers remained joint until Bhagwant's death in 1871. Had that issue been decided against the plaintiff the legal result would have been that the whole estate under the personal law of the parties would have vested in Girdhari by survivorship. It was for this reason that the defendant denied that there had been any partition between the brothers in 1867.

The plaintiff's case, on the other hand, is that there was a partition in 1867, and that

by the compromise of the 8th of September in that year the share to which Girdhari was entitled was, as the Subordinate Judge puts it, "transferred to Bhagwant Singh," and the whole property thereupon vested in the eldest brother. Her case is that the *taluqa* never came under Act I of 1869, and if it did the succession to it fell under s. 23 of the Act and not under s. 22.

Regarding the inclusion of Bhagwant's name in List 3 as already mentioned, the plaintiff's allegation was that it was entered by mistake in that List; that it should have, in fact, been entered in List 4.

Thus two facts become of crucial importance. First: what was the nature of the transaction between Bhagwant Singh and Girdhari in September, 1867, and whether the *sanad* granted by Government to Bhagwant Singh was a *primogeniture* grant the succession under which is governed by s. 22.

Section 22 relates to estates held by *taluqdars* included in List 3 prepared under s. 8 of the Act. In the case of other estates where the descent is governed by the personal law s. 23 applies.

Section 22, cl. 6, under which the defendant contends the *taluqa* came to her husband Girdhari on the death of his eldest brother, runs as follows:—

"If any *taluqdar* or grantee whose name shall be inserted in the second, third or fifth of the Lists mentioned in s. 8, or his heir or legatee...shall die intestate as to his estate, such estate shall descend as follows, *viz.*:—

After providing for the succession of lineal descendants and adopted sons, it declares:—

"...then to the eldest and every other brother of such *talqudar* or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid."

Section 23, on which the plaintiff rests her case, is as follows:—

"Except in the cases provided for by s. 22, the succession to all property left by *taluqdars* and grantees, and their heirs and legatees, dying intestate, shall be regulated by the ordinary law to which members of the intestate's tribe and religion are subject."

The Settlement with Bhagwant Singh was effected in July, 1858. By the letter of the Governor-General in Council of the 10th October, 1859, the Settlement thus made conferred full proprietary title on every *taluqdar* with whom it was made, and he acquired thereunder a permanent heritable and transferable right in the estate.

In 1860 a *sanad* was granted to Bhagwant Singh with regard to the nature of which there is great dispute between the parties. The Subordinate Judge has accepted the allegation of the plaintiff that it was an *ordinary sanad*. The Judicial Commissioners have held, supporting the defendant's contention, that it was a *primogeniture* grant. The Act became law in January, 1869. During this period between the "Second Summary Settlement" and the passing of the Act the Government was engaged in interrogating the *taluqdars* with whom the Settlement had been made, in what class (included subsequently in the Lists framed under s. 8) they desired to be included. Throughout these proceedings Bhagwant denied that there was any custom of *gaddinashini* in his family or that the estate descended to a single heir by the custom of the family. In the *khewats* prepared after the Settlement, the names of both Bhagwant and Girdhari were entered as joint proprietors. There can be little doubt that from the Second Summary Settlement up to the Regular Settlement in 1864, Bhagwant Singh, by his acts and declaration, obtained the estate for himself and his brother Girdhari Singh as members of the joint Mitakshara family. In 1867, however, a complete change took place in the relations of the two brothers. On the 15th July of that year, Girdhari Singh applied to the Court of the Financial Commissioner of Oudh for the partition of his share in the estate. His application is in the following terms:—

"In the *lambardari* column Bhagwant Singh is entered as *sadar malguzar* (chief revenue payer) and in the *khewat* (the proprietary register) and other papers the names of us both are recorded in the Remarks column as possessing half and half [share] under each other's verification. It was for this reason that a *sanad* containing the words *gaddinashini* (succession to *gaddi*, was not conferred on us. Nor did we try to obtain it. No custom of *gaddinashini* by a single person or of *taluqdari* exists amongst us. The *karindas* (agents), servants and expenditure have continued to be in common and on equal terms on behalf of both the parties from an ancient time prior to that of our father on account of harmony, jointness and commensality amongst

us. Till now owing to the minority of both of us under the guardianship of our mother, and the prevalence of mutual good-feeling, jointness in making collections and expenses, private and public, none applied for perfect partition of land but remained joint of their own accord. But now I pray this honourable Court that after perusal of the *sanads* hereto annexed, wherein my brother Bhagwant Singh, *sadar malguzar* has been admitted as holding a moiety share as shown above, a partition of the villages be effected by metes and bounds."

Subsequently, on the 8th September, 1867, the following compromise was entered into between the two brothers :—

"Since I (Girdhari Singh), the plaintiff, have applied in the Courts of the Financial Commissioner and the British Indian Association for partition of the *taluqa* containing the villages Gokulpur, Aseni and others, situate in District Lucknow to the extent of a moiety share, now a compromise has been entered into between me, the plaintiff, and my brother, the defendant, to this effect. At present there is a good deal of indebtedness, so he (my elder brother) will be paying me Rs. 1,200 a year for daily expenses from 1275 *Fasli* and full amount of Rs. 2,600 annually after discharge of the debt. If the aforesaid amount remains unpaid then a property, that is, the villages reserving the profit of Rs. 2,600, after deducting the Government revenue and the collection charges and so forth, be set apart from the *taluqa*. Therefore there is left no dispute on my part as regards partition of the aforesaid *taluqa*. Nor shall I ever raise any objection. Hence I, by filing this application in the shape of a compromise arrived at between us and verified by my brother, namely, Kuar Bhagwant Singh, in token of approbation pray that this case be excluded from the arrears and consigned to the records."

This document is signed both by Girdhari Singh and Bhagwant Singh. Bhagwant Singh's signature deserves notice. He signs himself not as a *lambardar* nor as a *malguzar*, but as *taluqdar*. To the significance of this particular designation their Lordships will call further attention later in the course of this judgment.

The primary matter for consideration, therefore, is what was the effect of this arrangement in regard to the estate. In this connection it is to be noted that on the 10th June, 1871, some months before his death, Bhagwant Singh applied to the Court of Wards to take charge of the *estate*. To this application Girdhari Singh does not appear to have been a party, and, so far as the records show, he took no part in respect thereto. The property was taken charge of by the Court of Wards and remained in its charge until Girdhari took possession of the property on the decease of his brother in December, 1871. There were disputes between Girdhari Singh and Bhagwant Singh's widow Maharani in 1872, and on the 10th January of that year an agreement was entered into between the widow of Bhagwant and his brother Girdhari Singh in counterparts. The first, executed by Girdhari, is in the following terms :—

"Whereas the estate *Taluqa* Gokulpur, Aseni, etc., in the District of Lucknow and Bara Banki is in the proprietary possession of Kuar Bhagwant Singh my real brother by hereditary right and by virtue of the *sanad* granted by Government, and the aforesaid *taluqa* has on the application of my brother been placed under the superintendence of the Court of Wards since the 10th June, 1871. Since my brother died on the 9th December, 1871, and my name has been entered as proprietor of the aforesaid estate, and at present as well as after release from superintendence of the Court of Wards, I, the declarant, am to be in charge of making collections of the income of the *ilaqa* and management of the estate, therefore, I with consent do covenant and place on record that after payment of Government revenue, the *ilaqa* charges with the exception of the household expenses, whatever shall be left as surplus and profit from the income of *ilaqa*, I shall be paying to *Musammat* Maharani, widow of Kuar Bhagwant Singh, as a moiety share according to rendition of accounts without any excuse and dispute."

Maharani, in the document executed by her, states as follows :—

"Whereas the estate comprising *Taluqa* Gokulpur, Aseni and other villages situate in Lucknow and Nawabganj Bara Banki Districts is the ancestral property of my husband, and was, by virtue of the *sanad* granted by the Government, in the proprietary possession of my husband Kuar Bhagwant Singh, *taluqdar*; whereas, the said *taluqa*, on an application of my

husband, was taken under the management of the Court of Wards from the 10th June, 1871; and whereas my husband died a natural death on 9th December, 1871, I (and the other person) having agreed together, I agree and accept and hereby declare and commit to writing that in respect of the *taluqa* the name of Kuar Girdhari Singh, real brother of my husband, be entered as against the number, and Kuar Girdhari Singh to collect income from the *ilaqa* to look after and manage the *ilaqa* now and after the termination of the management by the Court of Wards, that after paying the Government revenue and incurring expenses relating to the *taluqa*, excepting the domestic expenses, he (Kuar Girdhari Singh) from such profits of the *Ilaqa* as might be left surplus, shall divide to me one-half according to the amount as might be found due on rendition of account, and the same is agreeable and acceptable to me, and to this I have no sort of objection or dispute."

Disputes again broke out between Maharani and Girdhari in 1879 which were settled by deeds executed on the 4th September, 1879, in which Maharani on her part states as follows :—

"Therefore I, the executant, too, while in a sound state of body and mind, without reluctance and coercion, do hereby covenant, and reduce it to writing, that I, the declarant, relinquish all my claims and rights to the *taluqa*; and now there remains no claim or concern or right to me in respect of the said *taluqa* as well as the *sir* land decreed on 3rd November, 1873, by the Court of the Judicial Commissioner of Oudh. I shall not make any sort of interference in the *taluqa*, and put forward no claim with the exception of one for receipt of the life maintenance amounting to Rs. 2,400, if not paid at the stipulated periods of instalments. If anything contrary to this agreement occurs, it will be simply illegal If the said Kuar Saheb fails to pay the aforesaid amount in the undermentioned instalments, then I shall be at liberty to realize the same from the hypothecated property, as well as from moveable and immoveable property of the Kuar Saheb, myself or through Court, and no objection of the Kuar Saheb will be entertained. The said Kuar Saheb has given me 100 *bighas kham* out of the numbers of *sir* land in villages Aseni and Gokulpur, numbered below, entered in this deed of agreement, executed by Kuar Girdhari Singh, rental Rs. [paper torn], for cultivation, without the powers of alienation by sale, gift and mortgage, for my life. The rental [paper torn] shall be paid by me annually and at each instalment, without any objection, which if I raise or do not pay the rental hereof, the Kuar Saheb may deduct the same from the maintenance allowance fixed and I shall have no objection thereto."

Their Lordships accept the contention that the renunciation by the widow of Bhagwant Singh of her rights and her claims to the estate does not bind the reversioner, the daughter of Bhagwant Singh. But they cannot be omitted altogether from consideration as they form part of the *res gestæ* and help in explaining the contentions of the parties.

The Judicial Commissioners have in appeal reviewed at length the authorities on which reliance has been placed by the parties, and have marshalled the facts with great ability. Their Lordships desire to observe that they entirely concur with the Court below in the view that there is absolutely no evidence to show that Bhagwant Singh's name was entered in List 3 by mistake.

Section 3 of Act I of 1869 declares:—

"3. Every *taluqdar* with whom a Summary Settlement of the Government revenue was made between the first day of April, 1858, and the tenth day of October, 1859, or to whom, before the passing of this Act, and subsequently to the first day of April, 1858, a *taluqdari sanad* has been granted,

"shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliyat* executed by such *taluqdar* when such Settlement was made,

"or which may have been or may be decreed to him by the Court of an officer engaged in making the First Regular Settlement of the Province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed,

"subject to all the conditions affecting the *taluqdar* contained in the orders passed by the Governor-General of India on the tenth and nineteenth days of October, 1859, and

re-published in the First Schedule hereto annexed, and subject also to all the conditions contained in the *sanad* under which the estate is held."

Section 8 provides for the preparation by the Chief Commissioner of Oudh within six months of the passing of the Act of six lists. "First: A list of all persons who are to be considered *taluqdars* within the meaning of this Act; Second: A list of the *taluqdars* whose estates, according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir; Third: A list of the *taluqdars*, not included in the second of such lists, to whom *sanads* or grants have been or may be given or made by the British Government up to the date fixed for the closing of such lists, declaring that the succession to the estates comprised in such *sanads* or grants shall thereafter be regulated by the rule of primogeniture; Fourth: A list of the *taluqdars* to whom the provisions of Section twenty-three are applicable."

The fifth and sixth are immaterial for the purposes of this case.

On the 20th July, 1869, after the Act was passed into law, the following notification was issued under the authority of the Viceroy and the Governor-General in Council:—

"Under the provisions of s. 9, Act I of 1869, His Excellency the Viceroy and Governor-General in Council is pleased to direct the publication of the following List prepared by the Chief Commissioner of Oudh, under s. 8 of the aforesaid Act.

"General List of persons who are declared to be *taluqdars* in the Province of Oudh under Act I of 1869, being List No. 1, referred to in s. 8 of the said Act."

Number.	Subordinate list.	Number in subordinate list.	Name of *Taluqdar*.	Name of Estate.	District.	Remarks.
			LUCKNOW DISTRICT.			
1	III	1	Kuar Bhagwant Singh	Aseni, Dalu Khera	Lucknow	

As already stated, the Government made every endeavour to make the Lists conform with the wishes of the *taluqdars*. Bhagwant Singh was unquestionably a *taluqdar* and his name was included in List 3. There is absolutely no evidence in proof of the allegation that Bhagwant's name was included by mistake in that list, as alleged by the plaintiff.

Section 10 of the Act provides as follows:—

"No persons shall be considered *taluqdars* or grantees within the meaning of this Act, other than the persons named in such original or supplementary lists as aforesaid. The Courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such *taluqdars* or grantees."

In the case of *Murtaza Husain Khan* v. *Muhammad Yasin Ali Khan* (1) their Lordships have held as to the effect of s. 10, as follows:—

"That section provides that the Court shall take judicial notice of the Lists and shall regard them as conclusive evidence of the facts they record."

In the absence of any evidence to show that Bhagwant's name was wrongly inserted in List 3, his inclusion in that list is, in their Lordships' opinion, conclusive that the *sanad* he obtained was a *primogeniture* grant. In other words, that he was a *taluqdar* taking an estate under a primogeniture *sanad* under the provisions of the Act. Their Lordships are also satisfied that on the evidence to which the Judicial Commissioners refer, the defendant has established that a primogeniture *sanad* was issued to Bhagwant Singh.

In the view they take of the case they do not think it necessary to refer in detail to the authorities on which the plaintiff rests her claim. In the case of *Thukrain Sookraj Koowar* v. *Government* (2) Lord Justice James, delivering the judgment of the Board, pointed out that the grant of an estate under the Act to a specific individual did not operate as an absolute conferment of an exclusive title on the *taluqdar*, independent of the equitable rights of other parties possessing rights thereto before the confiscation of the estate by the Crown.

(1) 36 Ind. Cas. 299; 43 I. A. 269; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. T. 804; 38 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538 (P. C.).

(2) 14 M. I. A. 112; 2 Sar. P. C. J. 705; 20 E. R. 728.

In *Hurpurshad* v. *Sheo Dyal* (3) the *taluqdar* was held to have transferred, by an *inter vivos* act, the estate to the joint family under s. 15 of the Act. After quoting the finding of the Financial Commissioner regarding the character and meaning of the document under consideration in that case the judgment proceeded thus:—

"Their Lordships concur in this view. They go further, however, and are of opinion that the declaration in those documents of the wish of *Gouree Shunkur* acted upon as it was by him and by the other members of the family in his lifetime, and coupled with the tabular statement, was evidence sufficient to prove an alienation *inter vivos*, which in *Gouree Shunkur's* lifetime transferred the property to the family, to be held by them as joint family property. No evidence was given to show that the rents and profits of the estate did not continue, even during the life of *Gouree Shunkur*, to be brought, like the other assets of the family, to the family treasury, for the use of the undivided family. In the *Cawnpore* case *Mohan Lall*, one of the sons of *Chotay*, said: 'Every one used to take out of the profits as much as he required.' In the tabular statement sent in in May, 1860, Rajah *Gouree Shunkur* entered his own name not alone, but with the other members of the family, as the persons fit to succeed; he could not have intended to devise to himself by a will or codicil—he clearly meant, by entering his own name as one of the sharers, to express his wish and intention that the estates should be held jointly during his own life as well as after his death."

In *Hardeo Bux* v. *Jawahir Singh* (4) the Board renunciated the principle that a person who has been registered as a *taluqdar* under Act I of 1869, and has thereby acquired a *taluqdari* right to the whole property, may nevertheless have made himself a trustee for another of a portion of the beneficial interest in the lands comprised within the estate.

These principles have been maintained in all the decisions on the subject.

The present case appears to their Lordships to stand on a different footing. Here Girdhari Singh was clearly entitled to a share of the estate, and it would not be necessary to refer his right to an implied trust in his favour in respect of a moiety of the estate. Up to 1864 Bhagwant Singh explicitly admitted his right. But what happened in 1867 completely altered the position of the two brothers in relation to the estate. Although there is no direct evidence, the circumstances leave no room for doubt as to what happened. Bhagwant was getting old. Early in 1871 he applied to the Court of Wards to take charge of the *taluqa*, and in December of that year he died. He had no male issue, and under the Act his brother would be the heir. So he would be if the family had remained joint. It is not surprising, therefore, that Girdhari Singh consented to the *taluqa* vesting in his elder brother under the *sanad* he had received, and his being included in List 3. The Government's dealings subsequent thereto with Bhagwant Singh are consistent only with the hypothesis that Bhagwant took the estate as included in a primogeniture grant. Reference has been already made to the document of the 8th September, 1867, in which Bhagwant Singh describes his status as that of a *taluqdar*. On the 27th January, 1869, there is an enquiry by the Government to the following effect:—

"With reference to the concluding portion of para. 7 of the Chief Commissioner's letter, every *sanad taluqdar* should be required to state in writing whether he desires to enter List 3 or 4, and every grantee must, similarly declare whether he elects for List 5 or 6.

"The portion of the enquiry that may entail some labour will be the investigation of claims to be considered *taluqdars* by those who have no *sanads*, and in every such case the Deputy Commissioner will record in writing the particulars of the claim, with his opinion, to which that of Commissioner should be added. No claims will be rejected without a reference, but it will be convenient if the Deputy Commissioner will show those he accepts and rejects separately."

On the 11th February, 1869, Bhagwant Singh, "*taluqdar* of Aseni," is requested by the Deputy Commissioner of Lucknow as follows:—

"As it is necessary for me to inspect the *taluqdari sanad* in Persian as well as in English, relating to your *taluqa*, you are

(3) 3 I. A. 259; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No. 41 (P. C.).

(4) 4 I. A. 178; 3 C. 522; 3 Sar. P. C. J. 704: 3 Suth. P. C. J. 427; Rafique & Jackson's P. C. No. 45; 3 Ind. Jur. 337; 1 Ind. Dec. (N. S.) 917 (P. C.).

hereby requested to send the required *sanad* at once for perusal."

So far as appears from the record the *sanad* was sent in and duly inspected, and returned to Bhagwant. A list of *sanads* issued by the Chief Commissioner to the *taluqdars* in Oudh, together with an extract from the list, has been made an exhibit in the case. There is an endorsement to the effect in answer to the query whether the English *sanad* had or had not the primogeniture clause, the answer embodied in the extract is, "It has."

In view of these considerations their Lordships entertain no doubt that (1) a primogeniture *sanad* was granted to, and eventually accepted by, Bhagwant Singh; (2) that he was the *taluqdar* under the grant; (3) that on his death without male issue or adopted son, the *taluqa* devolved under cl. 6 of s. 22, on his sole surviving brother, Girdhari Singh; (4) and that on Girdhari Singh's decease in 1919 it devolved, under cl. 7 on his surviving widow, the defendant, Indar Kunwar.

Their Lordships, on the whole, are of opinion that the conclusion at which the Judicial Commissioners arrived is right and should be affirmed. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Their Lordships desire, however, to observe that in their judgment they have confined their attention exclusively to the plaintiff's claim to the *taluqa*.

A. N. A. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *Barrow Rogers* and *Nevill*.

Solicitor for the Respondents:—Mr. *H. S. L. Polak*.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 281 OF 1924.

November 16, 1926.

Present:—Mr. Justice Curgenven.

GIRIYA SHETTI—DEFENDANT No. 2—APPELLANT

versus

ANATHAMMA SHETTITHI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 13, 66—Decree for rent—Sale proclamation—Omission to mention charge for subsequent arrears of rent—Sale, whether free of encumbrance—Subsequent suit for rent against purchaser—Estoppel—Evidence Act (I of 1872), s. 115.

Under O. XXI, rr. 13 and 66 of the Civil Procedure Code a decree-holder is bound to specify precisely what interest is being sold. [p. 494, col. 1.]

The holder of a decree for rent who fails to disclose in the sale proclamation the existence of arrears of rent for subsequent years that have accrued due at the time of the proclamation and thereby leads intending purchasers to believe that the property is sold free from incumbrances is estopped from claiming the arrears from the auction-purchaser in a subsequent suit. [*ibid.*]

Kasturi v. *Venkatachalapathi* (1), relied on.

Second appeal against a decree of the Court of the Subordinate Judge, South Kanara at Mangalore, in A. S. No. 22 of 1923 (A. S. No. 378 of 1922 on the file of the District Court), preferred against that of the Court of the District Munsif, Udipi, in O. S. No. 493 of 1921.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *B. L. N. Rai* for the Respondent.

JUDGMENT.—The first defendant's husband, a *mulgeni* lessee, fell into arrear and the plaintiff's vendor, who was the land-holder, instituted a suit for the rent and obtained a decree in execution of which the 2nd defendent, who now prefers this second appeal, purchased the lease. The proclamation of sale was dated the 23rd August, 1920, and the sale itself was held on the 13th November, 1920. The suit under which the sale was held was for arrears of rent for the year 1918-1919, ending with the 31st March, 1919. At the time of this sale, a further year's rent, that is for 1919-1920, had already fallen due and the plaintiff has now sued the 2nd defendant, as present lessee, for this amount.

The defence with which I am concerned is that the existence of the arrear of rent for the suit year was not disclosed in the sale proclamation. The proclamation was prepared by the plaintiff's vendor and no satisfactory explanation has been given why the arrear of rent was not shown there in spite of the fact that a number of other encumbrances existing on the property were enumerated. All that the proclamation shows is that the property would be "subject to the payment of *mulgeni* to the petitioner." I think that a reasonable inference from this would be that the *mulgeni* should be payable with effect from the date of the sale, or at the most of the proclamation, and not that arrears were already due for a completed year on the property. It has been said that the purchaser ought to have been aware of the suit and

its subject-matter and should have drawn the conclusion that rent for the periods following the decree must still be outstanding, but I consider that he was not bound to look beyond the terms of the proclamation into any such matters, nor do I think that there is any force in the contention that the *mulgeni* lease provides that the rent, although falling due by the end of March, might be paid with some penalty by way of interest by the 20th November. Under O. XXI, rr. 13 and 66, the decree-holder is bound to specify precisely what interest is being sold in the property and it is clear to me that in this case he failed to comply with that requirement. In *Kasturi* v. *Venkatachalapathi* (1) a decree-holder who was responsible for a proclamation, failed to mention the existence of a hypothecation which had been executed by the judgment-debtor to his (decree-holder's) partner and of which subsequently he took an assigment " The learned Judges observed: "The ground of decision is that it was plaintiff himself who led intending purchasers to believe that the property was offered for sale free of encumbrances, and that plaintiff by concealing the existence of a lien, of which he was aware, led the purchaser to pay full value for the property. He is, therefore, estopped from now denying that the sale took place free of encumbrances, (s. 115, Indian Evidence Act)". Although this is a case not of a mortgage encumbrance but of a charge for rent, I think the same principle applies and that the plaintiff ought not to be allowed to recover the arrears of rent. It is objected that the 2nd defendant did not himself go into the witness-box in order to testify that he was misled, but it appears that a plea to that effect was contained in his written statement, so that I do not think there is any substance in the objection.

I allow the second appeal, and except as regards the first defendant personally I set aside the decrees of the lower Courts and dismiss the suit, with 2nd defendant's costs throughout.

V. N. V. *Appeal allowed.*

A. N. A.

(1) 15 M. 412; 5 Ind. Dec. (N. S.) 639.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 110 OF 1926.

January 5, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

MOHAMMAD YAWAR HUSAIN *alias* PUTTAN—PLAINTIFF—APPELLANT

versus

Hakim WAZIR HASAN—DEFENDANT—RESPONDENT.

Specific performance—Sale with agreement to reconvey—Payment of money into Court before date fixed for payment, effect of.

Plaintiff sold certain property to the defendant and one of the conditions of the sale-deed was that if the plaintiff paid to the defendant the amount of the sale consideration on or before a certain date the defendant would reconvey the property to the plaintiff free from encumbrances. Before the date fixed plaintiff instituted a suit against the defendant to compel him to reconvey the property to him on receipt of the amount mentioned in the deed and the amount mentioned in the deed was tendered in Court before the date fixed. The Court directed that the amount should be deposited in the Imperial Bank of India and it was so deposited two days afterwards, which date was beyond the date fixed in the deed:

Held, that the payment of the amount into Court had the same legal effect as payment made into a Bank in which the defendant had an account to the account of the defendant and that, therefore, the plaintiff had fulfilled the condition of the deed and was entitled to a decree. [p. 495, col. 2.]

Second appeal against the judgment and decree of the Sub-Judge, Mohanlalganj, Lucknow, dated the 10th February, 1926, reversing that of the First Munsif, District Lucknow, dated the 15th October, 1925.

Mr. *Ghulam Hasan*, for the Appellant.

Mr. *Zaheer Ahmad*, for the Respondent.

JUDGMENT.—The circumstances of the suit out of which this second appeal arises are as follows. Mohammad Yawar Husain transferred by sale to Hakim Wazir Hasan on the 16th February, 1923, a certain house in Lucknow City for Rs. 700. One of the conditions of the sale-deed was that if Mohammad Yawar Husain paid to Hakim Wazir Hasan Rs. 700 on or before the 31st of March, 1925, Hakim Wazir Hasan should reconvey the house to him free of encumbrance. Mohammad Yawar Husain asserted that on more than one occasion he tendered the money to Hakim Wazir Hasan. The lower Appellate Court having, however, found on the facts against these tenders, we are not in a position to find in Mohammad Yawar Husain's favour upon these alleged preliminary offers, but this much is certain. On the 13th Feb-

ruary, 1925, Mohammad Yawar Husain issued a registered notice to Hakim Wazir Hasan requesting him to be ready to execute a registered sale-deed of the house in question upon receipt of Rs. 700 and stating that if he did not comply within four days a suit would be filed against him. Hakim Wazir Hasan admittedly received this notice and did not reply to it or comply with the request. On the 24th February, 1925, Mohammad Yawar Husain filed a suit against Hakim Wazir Hasan asking that upon payment of Rs. 700 Hakim Wazir Hasan should be obliged to execute a registered sale-deed of the house in question and reconvey the house to him. We further have it that on the 30th March, 1925, Mohammad Yawar Husain tendered in the Court of the Munsif in which the suit had been filed the sum of Rs. 700. The tender stated that the money was being deposited in accordance with the condition of the agreement to reconvey. An order was passed upon this tender that it should be examined and the application decided upon the 30th of March. It was found to be in good order on the 30th of March but for an unexplained reason no orders were passed on it till the 31st of March when the Munsif directed that it should be accepted and the money received. The money had to be paid into the Imperial Bank and it was not actually received by the Imperial Bank until the 1st of April, 1925. The Munsif in his order of the 31st March had noted that the time was pressing and that the money had to be paid in at once.

The learned Munsif who tried the suit found in favour of the plaintiff. The learned Subordinate Judge, who heard the appeal, dismissed the suit on a finding of fact with which we are not concerned that no previous tenders had been made and upon a finding with which we are concerned that the tender of the 30th of March, 1925, could not be considered as a compliance with the terms of the deed. It is against the decision upon the latter point that this second appeal is filed.

Somewhat similar circumstances arose in an appeal which was decided by a Bench of the late Judicial Commissioner's Court on the 30th of March, 1925. The report will be found in *Sumeshar Datt Singh* v. *Kamta Singh* (1). One of us was a party to that decision. We follow that decision and accept the law as laid down in it. The views which we take of the facts are these. It was open to the plaintiff appellant to pay the Rs. 700 to the defendant, or into what would be considered his account, at any time up to and including the 31st of March, 1925. We find upon the facts that he actually tendered the money on the 30th of March, 1925, and paid it into the Court in which he was suing for the relief to the defendant's account. We look upon such a payment as having the same legal effect as a payment made into a Bank in which the person entitled to receive the money had an account to the account of such person, as the defendant was actually represented in Court at the time. We, therefore, find that the learned Munsif rightly decreed the suit and we restore the decree of the learned Munsif setting aside the decree of the learned Subordinate Judge. The defendant-respondent will pay his own costs and those of the plaintiff-appellant in all Courts.

Z. K. *Decree set aside.*

(1) 89 Ind. Cas. 484; 2 O. W. N. 386; 12 O. L. J. 534; A. I. R. 1925 Oudh 533.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 324 OF 1924.
November 23, 1926

Present:—Mr. Justice Mukerji and Mr. Justice Ashworth.

Musammat SHIBBI—PLAINTIFF—APPELLANT

versus

HARDHIAN SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Mortgage suit—Exemption of party claiming adverse title—Suit by exempted party for declaration of title, maintainability of—"Questions relating to the execution, discharge or satisfaction of the decree."

In a suit on a mortgage one of the defendants pleaded that the mortgaged property had been sold to him by the mortgagor before the execution of the mortgage. This plea was found true, and he was exempted as a party from the suit which was decreed against the mortgagor;

Held, that a suit for declaration of title and for possession in the alternative by the party so exempted was not barred under s. 47, Civil Procedure Code, inasmuch as the questions in the suit did not relate to the execution, discharge or satisfaction of the decree in the mortgage suit. [p. 496, col. 2.]

Data Din v. *Nanku* (1), distinguished.

Second appeal from a decree of the Additional Subordinate Judge, Saharanpur, dated the 14th of January, 1924.

Mr. *Nehal Chand*, for the Appellant.

Mr. *Akhtar Hosain Khan*, for the Respondent.

JUDGMENT.

Ashworth, J.—This second appeal arises out of a suit brought by the plaintiff-appellant for a declaration that she is entitled to certain property. There was an alternative prayer that in the event of it being found that she had lost possession of the property the decree should be one for possession.

The circumstances of the suit are as follows: The owner of the property was originally one Ramjas. The plaintiff, *Musammat* Shibbi, brought a suit for possession against him and obtained a decree on the 8th of May, 1915. The decree was executed and the plaintiff obtained possession on the 27th of September, 1915. Subsequent to this, Ramjas executed a simple mortgage-bond in favour of Hardhian Singh, the defendant-respondent, in respect of half the property sold to plaintiff. Hardhian Singh brought a suit on the basis of this mortgage against Ramjas and therein impleaded *Musammat* Shibbi the plaintiff. *Musammat* Shibbi pleaded that the property had been sold to her by Ramjas before Ramjas executed the mortgage-bond in favour of Hardhian Singh. The Court found that this was correct. But in view of the fact that there was an earlier mortgage-bond executed in favour of Hardhian Singh by Ramjas it refrained from dismissing the suit against *Musammat* Shibbi. It held, however, that on the present mortgage-bond no claim could be maintained against *Musammat* Shibbi. It accordingly exempted *Musammat* Shibbi as a party and gave her costs, but gave the defendent against Ramjas a decree for sale in execution of which he got sold and himself purchased the whole property. Delivery of the property was given by the Court *amin*. In consequence of this delivery of the property Hardhian Singh obtained mutation of names. Thereupon, *Musammat* Shibbi applied under O. XXI, r. 100 of the Civil Procedure Code for restoration of the property on the ground that she had been dispossessed by Hardhian Singh in the execution proceedings following the decree obtained by the latter against Ramjas. This application was rejected by the Court on the ground that the *amin's* delivery of possession of the property had merely been symbolical and had not, in fact, caused *Musammat* Shibbi to lose possession of the property which had been hers up to the time of delivery by the *amin*.

The plaintiff *Musammat* Shibbi is still finding difficulty as the defendants assert their possession or at any rate their right to possession, and accordingly has brought the present suit. The first Court decreed it, and finding that *Musammat* Shibbi was, at the time of filing the suit, actually out of possession it gave not merely a declaration but a decree for possession. The lower Appellate Court has held that the suit is barred by s. 47 inasmuch as the question between *Musammat* Shibbi plaintiff and the defendant is a question arising between the parties to the mortgage suit brought by the defendant and that in consequence the question should have been settled in the execution proceedings and no suit could be brought. The question is whether this finding is correct.

It is to be noted that *Musammat* Shibbi's application under s. 100 was based on her allegation that she had actually lost possession in execution proceedings. The Execution Court then dismissed her application on the ground that she had not lost possession. Her present plea is an alternative one. Either she is still in possession and is entitled to a declaration or she has lost possession subsequent to the order of the Execution Court dismissing her application under r. 100 on the ground that she was still in possession. In my opinion the present question is not one that related to the execution, discharge or satisfaction of the decree obtained by Hardhian Singh in the mortgage suit and consequently s. 47 will be no bar even if we consider that the order of the Court exempting the plaintiff was in effect an order dismissing the suit against her.

The decision of a two-Judge Bench of this Court *Data Din* v. *Nanku* (1) has

(1) 47 Ind. Cas. 864; 16 A. L. J. 752.

been cited to us as authority for holding that where in a previons suit a remedy has been denied to a plaintiff as against one defendant, by reason of the exemption of the latter or the dismissal of the suit against the latter, the plaintiff is barred by s 47 of the Civil Procedure Code from bringing a fresh suit against the same defendant to obtain the remedy. The decision referred to, though, in my opinion, a correct decision, does not appear to me to be authority for this proposition. It was not held that a defendant exempted is a person against whom a suit is dismissed, but merely that the Judge had misused the term exempted in that particular decree. Again, in that case the plaintiff after getting a decree and failing to execute it entirely by sale of the father's interest in the joint family property applied to execute it against the sons (who had been exempted in the suit) for the balance. His application was rejected in the execution department. He then brought a suit for a *declaration* that he was entitled so to execute it. His application was held barred by s. 47 of the Code and I think rightly so. It was not held that a second suit to *obtain a new decree*, like the present one, could be so barred. Obviously in the circumstances of the case cited such a second suit would have been barred by s. 11, but it would not have been barred by s. 47.

For the above reasons I would allow the appeal with costs.

Mukerji, J.—The substantial question of law that arises in this appeal is whether the suit is barred by s. 47 of the Civil Procedure Code. It was instituted under the following circumstances. The respondent before us Hardhian Singh instituted a suit on a mortgage-bond against two persons, *viz.*, Ramjas and the present appellant *Musammat* Shibbi. *Musammat* Shibbi's contention was that she was the sole owner of the mortgage property and she had already obtained a decree declaring her right in the property as against Ramjas and that, therefore, the suit on foot of the bond given by Ramjas was not maintainable at all. This was Suit No. 1044 of 1917. The learned Munsif before whom the case was, chose not to decide the question of title that was raised by *Musammat* Shibbi. He said "so the proper course for plaintiff is to obtain a declaration against her by a separate suit. He cannot succeed against her in it." In the result the suit was decreed *ex parte* against Ramjas. As regards *Musammat* Shibbi the order was "the defendant No. 2 shall stand exempted with costs." The decree thus obtained by Hardhian Singh was put into execution and the property was sold. Hardhian Singh, it appears, was the purchaser in execution. When he obtained delivery of possession *Musammat* Shibbi objected. She said that the delivery of possession amounted to her ouster. The Court decided on the 7th of May, 1921, that she was actually in possession and, therefore, she could not come in under O. XXI, r. 100 of the Civil Procedure Code. The Court also held that it was doubtful whether she could come in under that rule because she was a party to the decree. In the result the application of *Musammat* Shibbi was dismissed. Then followed mutation of names. According to the plaint Hardhian Singh succeeded in having his name mutated over the entire property belonging to *Musammat* Shibbi although his mortgage and the decree related only to a half share. Under these circumstances *Musammat* Shibbi brought the suit, out of which this appeal has arisen, to obtain a declaration of her title and in the alternative to obtain possession.

The first Court decreed the suit on the merits. But the lower Appellate Court dismissed the suit on the preliminary ground that it was barred by s. 47 of the Civil Procedure Code.

The matter came before a learned Single Judge of this Court and he, having regard to the complicated nature of the point involved, referred the matter to a Bench of two Judges.

I am clearly of opinion that the suit is not barred by the provisions of s. 47 of the Civil Procedure Code. I am prepared to concede without deciding the point that the exemption of the present plaintiff from the suit of 1917 was tantamount to the dismissal of the suit as against her. But it is clear to me that the question now raised is not a question contemplated by s 47 of the Civil Procedure Code. Section 47 does not apply to all sorts of questions that may arise between people who had once been parties to a decree. It applies only to questions that arise 'relating to the execution, discharge or satisfaction of the decree,' to which the litigants are parties. Now, let us consider what was the decree that was passed in the Suit of 1917.

It was to the effect that the property was to be sold so far as Ramjas was concerned the suit was to be dismissed and *Musammat* Shibbi was to get her costs. So far, therefore, as *Musammat* Shibbi was concerned with the decree it related only to a denial of relief to the plaintiff Hardhian Singh and an award of costs of *Musammat* Shibbi. *Musammat* Shibbi is not attempting to recover the costs by the present suit. She wants a decision on the question of title that was left open in the Suit of 1917. That question must be decided. But it cannot be decided in the execution of the decree, the nature and the scope of which I have already described.

The case of *Data Din* v. *Nanku* (1) has been cited before us as an authority for the proposition that the present question must be decided in the execution department. The facts of the case were briefly these. A mortgagee who had obtained a mortgage from a father of a joint Hindu family brought a suit against the executant of the mortgage and his sons for recovery of the money lent by sale of the property. The sons claimed that there was no legal necessity for the loan and urged that they were not liable to pay. In the result the sons were 'exempted' and a simple money-decree was passed against the father in his personal capacity. After the decree-holder had exhausted his remedy against the father, that is to say, sold the share of the father in the family property in execution of the decree, he sought to realise by execution the balance of the decree from the sons on the ground that the sons were liable to pay the balance on account of their pious obligation to pay their father's debt. The sons successfully objected, and then a suit was filed against them to obtain a declaration that they were liable under the *decree already passed*, and their property was liable to be taken in execution. Two learned Judges of this Court held that the question must be decided in the execution department and, therefore, the suit was dismissed. The question could be litigated only in the execution department. The question that was raised was not alleged to be based on a fresh cause of action and it had everything to do with the decree that was already passed. The case of the decree-holder was that there was a balance of debt left and the sons were bound to pay that. Further, it was his case that he could execute the old decree itself against the sons, because of their pious obligation. The suit was barred not only by s. 47 of the Civil Procedure Code but also by s 11 of the same Code. If the sons were liable to pay their father's debt on account of their pious obligation that was a plea which might and ought to have been taken by the plaintiff in the very suit which failed against the sons. This case has, therefore, no application.

The case of *Krishnappa Mudaly* v. *Periaswamy Mudaly* (2) lays down "where a party to a mortgage suit, who sets up a title adverse to both the mortgagor and, the mortgagee has been exonerated from the suit on the ground of misjoinder and his claim has not been adjudicated upon in the suit, he does not remain a party to the suit for the purposes of s. 47 of the Civil Procedure Code and his claim petition in respect of properties delivered in execution of the decree to the decree-holder falls under O. XXI, r. 100 of the Code". This ruling is relied upon by the learned Counsel for the appellant. Although partially the principle of the ruling would support the appellant's case it is not necessary to discuss it because it is not on all fours with the case before us.

For reasons given above I would allow the appeal, set aside the decree of the Court below and remand the appeal to the lower Appellate Court for disposal on the merits.

By The Court.—We allow the appeal, set aside the decree of the lower Appellate Court under O. XLI, rule 23, of the Civil Procedure Code and remand the case to it for disposal on the merits. Costs here and hitherto will abide the result.

A. N. A. *Appeal allowed.*

(2) 38 Ind. Cas. 297; 40 M. 964; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 532.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2341 OF 1926.

January 17, 1927.

Present:—Mr. Justice Addison.

TUNNAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TOTA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 26—Easement—Right to take water through another person's property, whether easement—Co-sharers—Grant of easement by one co-sharer—Consent of other co-sharers, necessity of.

In the absence of a custom to the contrary a co-proprietor cannot grant an easement over joint property without the permission of the other co-sharers.

The right to take water through another person's property is an easement within the meaning of s. 26 of the Limitation Act.

Second appeal from a decree of the Senior Sub-Judge, with enhanced powers, Kangra at Dharmsala, dated the 15th June, 1926, affirming that of the Tahsildar, exercising powers as Subordinate Judge, Hamirpur, District Kangra, dated the 23rd December, 1925.

Mr. *M. C. Mahajan*, for the Appellants.

Mr. *A. N. Chona* for Mr. *Faqir Chand*, for the Respondents.

JUDGMENT.—The plaintiff owns a *gharat* and an orchard. He obtained permission in January, 1914, from Sangara, one of numerous co sharers, to take a water-course through the joint land of Sangara and the other co sharers so as to water his orchard and drive his mill. This means that the plaintiff, or rather the plaintiff's son, got from one co-sharer the right of easement of taking a water-course through the joint land of the grantor and the other co sharers. Two of the co-sharers, that is the two defendants named in the plaint, obstructed the plaintiff in the exercise of his right on the 7th June, 1924. The plaintiff accordingly sued them for Rs. 76 on account of damages for loss of income from the mill together with Rs. 23 as compensation on account of certain fruit trees in the orchard, which had dried up. The plaintiff further said that he had been taking water for 20 years in this way. The two defendants denied the plaintiff's right to take the water-course through their land and added that one co-sharer could not grant such a right. It would appear that Sangara, who granted this right, is paid Re. 1, a year by the plaintiff. The trial Court found that the water-course had been taken through this joint property for a little more than 12 years, *i. e.*, since January, 1914, and not for a period of more than 20 years, which was the period about which the parties went to trial. It, however, held that a period of 12 years was sufficient to oust the other co sharers from any right to prevent the plaintiff from getting water. Damages were assessed at Rs. 47-8 and this sum was decreed. The lower Appellate Court dismissed the appeal and the defendants have presented this second appeal.

It is obvious that permission to take water through another person's property is an easement within the meaning of s. 26 of the Limitation Act. It was admitted before me that the plaintiff had not acquired an easement under that section, but the respondent's Counsel contended that one co-sharer out of numerous co-sharers could grant such an easement to the plaintiff. It is the case that one co-sharer can sell his share of joint property and he may be able to lease his share of joint property, but this is not as sale or lease but the grant of an easement to the detriment of the other co-sharers. As stated in para. 225 of the Rattigan's Digest of Customary Law, in the absence of custom (which is not alleged here) none of the proprietors can do anything which alters the condition of the joint property without the consent of all the co-sharers. This is a well-established rule. It follows that Sangara had no right to grant such an easement to the plaintiff without the permission of his co-sharers and that the defendants were justified in obstructing the plaintiff in the exercise of this alleged right. This they probably did in order to prevent the plaintiff from acquiring permanent rights in the water-course and they were fully entitled to do so. No easement has been established and Sangara had no right to give an easement by grant without the consent of all the co-sharers.

The appeal must, therefore, be accepted and the suit dismissed with costs throughout.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 869 OF 1924.

January 13, 1927.

Present :—Mr. Justice Dalal and Mr. Justice Pullan.

ONKAR MAL—DEFENDANT—APPELLANT

versus

Sheikh ASHIQ ALI—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Public policy—Compromise of dispute—Withdrawal of prosecution, effect of.

Where the withdrawal of a criminal case of a trifling nature is one of the motives for the compromise of a real dispute, it would not follow that the compromise is void as being against public policy.

Where an agreement is in itself a fair settlement of the dispute between the parties and would possibly have been arrived at even if there had been no criminal prosecution pending at the time, the agreement cannot be held to be void merely because the withdrawal of a criminal prosecution was also one of the motives for the compromise.

Second appeal from a decree of the Second Additional Judge, Gorakhpur, dated the 13th of February, 1924.

Mr. *A. Sanyal*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondent.

JUDGMENT.—The plaintiff sued to have a certain compromise, which he entered into during partition proceedings in the Revenue Court on 22nd July, 1921, cancelled. His other reliefs were not granted, so it is not necessary in this Court to consider them The trial Court dismissed the suit, but it was decreed by the lower Appellate Court. The defendant Onkar Mal has come here in second appeal.

The foundation of the plaintiff's claim in the plaint was that he was induced to enter into the compromise by undue influence, because at the time of the compromise a criminal charge brought by a servant of Onkar Mal was pending against the plaintiff's servants and Onkar Mal offered the inducement of withdrawing that complaint. It is a fact that a criminal prosecution on some petty theft was pending in the Criminal Court and the case was withdrawn on the day that the compromise was entered into. The fact that the case was withdrawn indicates that the charge of theft must be of a trifling nature. The only relevant matter in the judgment of the lower Appellate Court is the last paragraph printed at page 18 of the printed record. It held that undue influence was not proved. It, however, thought out a new case for the plaintiff and held that the compromise failed because it was void. It held it to be void, because it was a stifling of a criminal prosecution.

The compromise as held by the trial Court was a very fair one. Onkar Mal was in possession of three *bighas* in excess of his one-anna share. The plaintiff was the owner of the seven-anna share. This seven anna share had been leased to another person by the plaintiff's vendor prior to the sale in favour of the plaintiff. Under the compromise the lessee gave up possession, though it was arranged that for the period of the lease he was to receive the profits of the seven-anna share of the property. As to the three *bighas* in possession of Onkar Mal in excess of his share, he promised under the compromise to pay rent for it to the plaintiff. One of the motives for that compromise may have been the withdrawal of the criminal case, but it cannot be said to be the only motive. There was no unfairness in the agreement between the parties. When a withdrawal of a criminal case of a trifling nature like the one pending against the plaintiff's servants is one of the motives for a compromise, it would not follow that the compromise would for that reason be void. In *Dwijendra Nath Mullick* v. *Gopi Ram Govindaram* (1) a Bench of the Calcutta High Court held that where the withdrawal of a prosecution was the motive but not the object or the consideration of the agreement, the agreement would not be rendered void under s. 23 of the Indian Contract Act. In the present case the withdrawal of the prosecution was not the consideration for the agreement. The agreement was a fair settlement of dispute between the parties and would possibly have been arrived at even if there had been no criminal prosecution pending at the time against the plaintiff's servants.

We set aside the decree of the lower Appellate Court and restore the decree of the trial Court and dismiss the plaintiff's suit with costs of all the Courts.

Z. K. *Decree set aside.*

(1) 89 Ind Cas. 200; 29 C. W. N. 855; 42 C. L. J. 90; A. I. R. 1926 Cal. 59; 53 C. 51.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1549 OF 1925.

November 18, 1926.

Present:—Mr. Justice Curgenven.

THOKALA SESHAMMA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

YELLATUR VENKATAREDDI, MINOR BY GUARDIAN AND MOTHER VENGAMMA—PLAINTIFF No. 2—RESPONDENT.

Hindu Law—Suit by reversioner—Prima facie proof of nearest relationship, reversioner's duty to adduce.

A plaintiff suing as the nearest reversioner after the death of a widow must at least adduce *prima facie* evidence that his claim is superior to that of any other person. It is not enough to rely upon statements in the plaint or in a genealogical table, or merely to prove that a certain relationship existed between the plaintiff and the *propositus*.

Gridhari Lal Roy v. *Bengal Government* (1) *Hari Pada Mukherjee* v. *Radha Bullav Pal* (2) and *Rama Row* v. *Kuttiya Goundan* (4), followed.

Second appeal against a decree of the District Court, Kurnool, in A. S. No. 126 of 1923, and No. 15 of 1924, preferred against that of the Court of the Subordinate Judge, Kurnool, in O. S. No. 17 of 1922.

Mr. *K. V. Krishnaswami Iyer*, for the Appellants.

Mr. *A. C. Sampath Iyengar*, for the Respondents.

JUDGMENT.—In taking up the question whether the first plaintiff was Swami Reddi's nearest reversioner or not, the learned District Judge says "not to speak of the oral evidence, there is clear documentary evidence in support of the plaintiff's case." Since he does not further allude to the oral evidence, I can only conclude that he bases his finding exclusively upon the documentary evidence as sufficient in itself. On that evidence, I do not suppose that the learned District Judge considered that the holding of joint *pattas*, the entry in the *pothi* report, or the fact that 1st plaintiff and Swami Reddi each enjoyed part of the same Survey numbers, went very far by themselves to prove that 1st plaintiff was nearest reversioner. He evidently relies upon the three documents, Exs. L, H and C. But in speaking of Ex. C, he makes the somewhat serious mistake of supposing that Venkanna to whom it relates is described as "son of Chinna Narasanna" whereon he bases his conclusion that Achanna must have had a brother Chinna Narasanna, whose grandson is the first plaintiff. The document does not say who Venkanna's father was, and since another Venkanna has been referred to by some of the plaintiff's witnesses, it is necessary to take that evidence into consideration in considering the effect of Ex. C. I think it is quite clear that Exs. L, M and C by themselves do not establish that there is no reversioner nearer than, or as near as, the 1st plaintiff. It may very well be, however, that read with the oral evidence, they have this effect. I do not think, therefore, that the Appellate Court was relieved of the burden of weighing the oral evidence both as regards its admissibility under s. 32 (5) or s. 50 of the Evidence Act or otherwise as regards its credibility.

Another point which, it is argued here, has been overlooked is this; that the plaintiff must show that he is the nearest reversioner, and for this purpose must at least adduce *prima facie* evidence of his claim [see *Gridhari Lall Roy* v. *Bengal Government* (1), *Hari Pada Mukherjee* v. *Radha Bullav Pal* (2), *Surjan Singh* v. *Sardar Singh* (3) and *Rama Roy* v. *Kuttiya Goundan* (4).] It is not enough to rely upon the statements in the plaint or on an unproved genealogical table, or merely to prove that a certain relationship existed between the plaintiff and the *propositus*. Of course, after such *prima facie* evidence has been adduced, it may be reasonable to look to the defence to refute it by proving a nearer heir. But, the onus lying on the plaintiff, he cannot succeed if he gives no evidence at all that his claim is superior to that of any other person. It will be in the discretion of the Appellate Court whether to admit further evidence on this point, by remand or directly, the omission appearing to be of a somewhat formal nature.

I set aside the decree of the lower Appellate Court and direct it to re-hear and dispose of the appeal in accordance with law and in the light of the foregoing observations. Costs of second appeal will abide the result and be provided for in the appellate decree.

The Court-fee on second appeal will be refunded to the appellants.

V. N. V. *Case remanded.*

(1) 12 M. I. A. 448; 10 W. R. P. C. 31; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408; 3 Ind. Jur. 386; 1 Ind. Dec. (N. S.) 28.

(2) 53 Ind. Cas. 1007; 23 C. W. N. 1018.

(3) 23 A. 72; 27 I. A. 183; 5 C. W. N. 49; 2 Bom. L. R. 942; 7 Sar. P. C J. 752 (P. C.).

(4) 34 Ind. Cas. 294; 40 M. 654; 3 L. W 331; 19 M. L. T. 275; 30 M. L. J. 514.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1801 OF 1924.

November 30, 1926.

Present:—Mr. Justice Duval and Mr. Justice Mitter.

EBAD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Sreemutty FATEMA BIBI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Dispossession, partial—Rent, suspension of.

The doctrine of suspension of the payment of rent where the tenant has not been put in possession of, or, has been dispossessed from, part of the sub-

ject leased, is applicable only where the rent is a lump sum for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or *bigha*. [p. 502, col. 2.]

Appeal against a decree of the Additional Subordinate Judge, Noakhali, dated the 28th of May, 1924, reversing that of the Munsif, Additional Court at Sandwip, dated the 15th of November, 1921.

Babus *D. L. Kastgir* and *Shamadas Bhattacharjee*, for the Appellants.

Dr. *Bijan Kumar Mukherjee* and Babu *Raj Kumar Chakravarty*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for rent for the years 1323 to 1326 for 3 *kanis* of land at the rate of Rs. 13 per *kani* and also prayed for additional rent for additional area according to the terms of a lease. The defendants put up various defences alleging that they held all the lands within certain boundaries; that there was no excess land; that they had been dispossessed of some of their lands and that they had paid rent for 1323 and part of 1324. The Munsif dismissed the suit holding that there had been partial dispossession and holding too that the rent for 1323 and part of 1324 had been paid. In appeal the Subordinate Judge has given the plaintiff a decree to this extent that he has remanded the case to the lower Court to ascertain by actual measurement the exact extent of land held by the respondents within the boundaries given in the *kabuliyat* and to assess the excess land at Rs. 13 per *kani*. He does not appear to have disturbed the finding that the rent for 1323 and part of 1324 had been paid though in the ordinary portion of his judgment he does not refer to it. Now it appears that the lands were described as being within certain boundaries excepting a tank and its bank and being of about 3 *kanis* let out to the defendants' predecessor in 1310. In the following year another 1 *kani* and 13 *gandas* was let out to one Aminulla. There appears to have been no litigation in the matter. Both defendants and Aminulla lived in the same *bari*. Now the defendants put up a claim that they had been wrongfully dispossessed after having lived amicably with their dispossessor for 20 years.

The difficulty, however, in our way in dealing with this case has been avoided owing to the fact that since the order of remand for an enquiry by a Civil Court Commissioner was made, that enquiry has been held and we are informed that in that enquiry it has transpired that the present defendants were in actual exclusive possession of a little over 3 *kanis* and that 16 *gandas* of land are held jointly by Aminulla and the defendants, that certain area is held by the plaintiff and that a certain area is held exclusively by Aminulla. So far as the rent is concerned the *kabuliyat* stated that any excess area had to be paid for at Rs. 13 per *kani* and that for any decrease of area there should be reduction of rent. The defendants are, therefore, clearly liable for rent for 3 *kanis* and in future for a little more, as found by the Commissioner. The further discussion as to whether the lease of the defendants included all the lands within the boundaries or not, specially in view of the terms of the Commissioner's report appears to us to be purely academic.

As to suspension of rent for loss of land whether there should be a permanent or proportionate suspension in such a case as this has now been set at rest by the decision of their Lordships of the Judicial Committee in *Katyayani Debi* v. *Udoy Kumar Das* (1). The doctrine of suspension of the payment of rent where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump sum for the whole land leased treated as an indivisible subject. It has no application to the case where the stipulated rent is so much per acre or *bigha*.

We would add, however, that the Additional Subordinate Judge appears to have overlooked the fact that the rent for 1323 and the rent of Rs. 10-8-0 for 1324 have been paid.

The order, therefore, we propose to pass in this case is that the appeal succeeds to this extent, namely, that the plaintiff will get a decree for rent at Rs. 39 a year for the years 1324 to 1326 less Rs. 10-8-0 already paid for 1326, and the plaintiff will also be entitled to a decree for any small additional area found exclusively in the possession of the present defendants. We do not propose to pass any order as to the land held jointly, and as to the land held exclusively by Aminulla no order

(1) 88 Ind. Cas. 110; 52 I. A. 160 at p. 166; A. I. R. 1925 P. C. 97; 52 C. 417; 23 A. L. J. 751; L. R. 6 A. (P. C.) 140; 30 C. W. N. 1 (P. C.).

is necessary as the defendants have still more than 3 *kanis* left in their exclusive possession.

The order of costs in the lower Courts will stand.

Each party will bear its own costs in this Court.

Z. K. *Appeal partly allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 183 OF 1926.

December 21, 1926.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

UDAI DAT—PLAINTIFF—APPELLANT

versus

AMBIKA PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Gift in favour of daughter in lieu of dowry, validity of.

Under the Mitakshara Law, whether a daughter is or is not excluded from succession, it is the duty of her father, and after him of her brothers, if any, and in the absence of brothers, of her mother, to unite her in marriage to a suitable husband before she attains the age of puberty. [p. 504, col. 1.]

The widow of a separated Hindu governed by the Mitakshara Law, is entitled to make an alienation of her husband's property to provide a dowry for her daughter, and such an alienation cannot be questioned by the reversioners of the husband provided it is a reasonable alienation in the circumstances of the case. The question whether it is or is not a reasonable alienation in the circumstances of a particular case is a question of fact. The same rule applies to a gift of immoveable property made by the widow in favour of her daughter immediately after the latter's marriage, in lieu of dowry. For the application of this rule it is immaterial that in any particular family daughters are excluded from succession under custom. [p. 503, col. 2.]

Second appeal against a decree of the Officiating Subordinate Judge, Gonda, dated the 8th February, 1926, upholding that of the Munsif, Gonda, dated the 23rd November, 1925.

Mr. *R. B. Lal*, for the Appellant.

Mr. *Bisheshar Nath*, for the Respondents.

JUDGMENT.—The facts as finally found by the lower Appellate Court are that Maheshdat died on the 31st January, 1920, a separated Hindu whose estate was governed by the Mitakshara Law. He left a widow *Musammat* Phuljhari and a daughter *Musammat* Durpadi. After his death *Musammat* Phuljhari bore a posthumous son, who died very shortly after. *Musammat* Phuljhari executed a registered deed of gift on the 12th May, 1924, by which she transferred a 2 annas share in an under-proprietary tenure which formed a portion of her deceased husband's estate to her daughter *Musammat* Durpadi and Ambika Prasad, *Musammat* Durpadi's husband. The marriage of Durpadi had taken place on the 28th April, 1924. The validity of this document was challenged by Udai Dat, a cousin of the late Maheshdat. It has been held by the lower Courts to be a valid disposition under Hindu Law. There can be no question as to the right of a Hindu widow of a separated Hindu governed by the Mitakshara Law to make an alienation to provide a dowry for her daughter in ordinary circumstances, and such an alienation cannot be questioned by the reversioners provided it is a reasonable alienation in the circumstances of the case. The question whether it is or is not a reasonable alienation in the circumstances of the case is a question of fact. A Bench of this Court decided in favour of this view in *Madho Prasad* v. *Dhanraj Kuar* (1), on the 13th April, 1926. The decision is reported in 3 O. W. N. 529. This decision followed the decision in *Churaman Sahu* v. *Gopi Sahu* (2), in which the Bench deciding the appeal dealt exhaustively with the provisions of the Mitakshara Law on the subject. But it is argued on behalf of the plaintiff-appellant, who questions the validity of the gift, that in this case *Musammat* Phuljhari had no right to make the alienation as it has been found on the facts that in this family daughters are by custom excluded from inheritance and as the transfer was made 14 days after the marriage ceremony had taken place. The Courts below have found that the alienation in question was a reasonable alienation in the circumstances of the case. The decision is clearly correct upon the merits. The finding that daughters are excluded from succession by custom in this family is a finding which is binding upon this Court. We do not, however, consider that the circumstance that in this family daughters are excluded from succession renders the law, which has been previously stated, inapplicable. As has been laid down in the exhaustive decision in *Chura-*

(1) 95 Ind. Cas. 574; 3 O. W. N. 529; A. I. R. 1926 Oudh 425.

(2) 1 Ind. Cas. 945; 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545.

man Sahu v. *Gopi Sahu* (2), the provisions of the Mitakshara Law are that inasmuch as it is the duty of a Hindu father to arrange for the marriage of his daughter and inasmuch as he incurs discredit in his religion if he does not do so, such daughters must be married to a suitable husband, and if the father owing to death is unable to perform this duty before the daughter has attained the age of puberty, the duty devolves upon his son, if any, and in absence of his sons upon his widow. As we read the provisions of the Mitakshara Law upon the subject (it is not necessary to enumerate them as they are discussed at length in the Calcutta decision, to which we referred) the provision of a suitable dowry is essential. There is no differentiation between the apportionment of expenditure upon a dowry and expenditure upon other expenses incurred in the ceremony. It is clear that, whether a daughter is or is not excluded from succession, it is the duty of her father, and after him of her brothers, if any, and in absence of brothers of her mother, to unite her in marriage to a suitable husband before she attains the age of puberty in the interest of the religious benefit accruing to her father; and this duty is equally incumbent whether she be or be not excluded from inheritance under a family custom. In order to perform such a ceremony it is necessary to provide the daughter with such garments and such ornaments as are necessary in her station in life, and it cannot be suggested that in a case in which she is excluded from inheritance under a family custom it is any less obligatory to provide her with such garments and such ornaments. In our opinion the provision of a suitable dowry is in the same category as the provision of suitable garments and ornaments, and the obligation to provide the dowry cannot be separated from the obligation to provide other requisites of the ceremony. We do not consider that the fact that the deed of gift was executed a few days after the wedding ceremony can be urged by the appellant in his favour. The clear object of the gift was to provide *Musammat* Durpadi with a dowry which has been found not to be an excessive dowry in the circumstances of the case. It was immaterial whether the deed was executed before or after the ceremony as the object of executing it was to provide such a dowry. In these circumstances the appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2313 OF 1925.
January 13, 1927.

Present:—Mr. Justice Addison.

BELI RAM—DEFENDANT—APPELLANT

versus

Musammat PREM KAUR—PLAINTIFF AND MAKHAN SINGH—DEFENDANT—RESPONDENTS.

Hindu Law—Widow—Right of maintenance and residence in family house—Bona fide purchaser for value, rights of.

A Hindu widow's right to maintenance is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention. A widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge already exists. But, where maintenance has been made a charge upon the property or it has been agreed that it will be a charge on certain property then the transferee must hold it subject to the charge. [p. 505, col. 1.]

There is a distinction between the right of a widow to continue to live in the ancestral family house and her right over other parts of the property. If she is living in the ancestral family house then any transfer or purchase unless it is for family necessity would be subject to that right. [p. 505, col. 2.]

Second appeal from a decree of the District Judge, Lahore, dated the 8th July, 1925, affirming that of the Sub-Judge, Fourth Class, Lahore, dated the 19th November, 1924.

Mr. *Hargopal*, for the Appellant.

JUDGMENT.—On the 26th of March, 1915, Makhan Singh mortgaged a house to one *Shrimati* Ishar Kaur, wife of Madho Ram, for Rs. 2,000. According to this deed the money was required for business and for a deposit which had to be made in some Court. On the 6th of June, 1916, a second mortgage was effected of this house for Rs. 2,500 in favour of Beli Ram. Of the sum advanced on the second mortgage Rs 2,205 were paid to the first mortgagee, Rs. 55 were on account of the expenses in connection with the registration of the deed and the stamp, while the small balance of Rs. 240 was paid to the mortgagor. The reason for the second mortgage seems to have been that the husband of the first mortgagee was pressing for his wife's money. The second mortgagee later sued the mortgagor on the mortgage and obtained the usual decree for sale of the property. The mother of the mortgagor, namely, *Musammat* Prem Kaur then in-

stituted the present suit for a declaration that she had rights of residence and maintenance in the house in question and that it should be sold subject to her rights. The two Courts below decreed her claim, and the mortgagee-decree-holder has preferred this second appeal.

The issue framed was: Whether the plaintiff had any right of maintenance and residence in the house in suit, and it is sufficiently wide to cover all the points arising. All, however, that the lower Appellate Court has held is that Makhan Singh, the mortgagor, used to drink heavily, that the first mortgage was not for necessity and that the second mortgage was also not for necessity as the second mortgagee knew the whole circumstances. The learned District Judge considered that on this finding Makhan Singh's mother was entitled both to maintenance from and residence in the house in question.

The questions of maintenance and residence are, however, different. The subject of maintenance is discussed at length in Mayne's Hindu Law and Usage, 9th Edition, page 663 *et seq.* It is also summarised at page 487 of Mulla's Hindu Law, 4th Edition. The widow's right to maintenance is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention. In fact, a widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge already exists. But, where maintenance has been made a charge upon the property or it has been agreed that it will be a charge on certain property then the transferee must hold it subject to that charge. It is pointed out in Mayne's Hindu Law that the texts which are relied on as making the widow's maintenance a charge upon the inheritance are exactly similar to those which charge it with the payment of debts the expenses of marriage and funeral ceremonies, etc. This is the reason why it is first necessary to have the maintenance made a charge upon the property before a transferee will be bound by this circumstance.

In the present case no attempt has been made to prove that the sale in question was to defeat the widow's right of maintenance or that the purchaser had notice of such intention. Her indefinite right of maintenance has so far not been a charge and was not a charge upon any part of the property at the time of the transfer in question. As regards maintenance, therefore, it follows that the appeal must be accepted.

I come next to the question of the widow's right of residence in this house. The principle is laid down in para. 465 at page 668 of Mayne's Hindu Law, 9th Edition, where it is said that there is a distinction between the right of a widow to continue to live in the ancestral family house, and her right over other parts of the property. If she is living in the ancestral family house then any transfer or purchase would be subject to that right. In the present suit no attempt has been made to prove that she is living in the house in question or that it is the ancestral family dwelling house. In fact it is admitted that this house was purchased by the widow's husband, so that it would appear that it cannot be the ancestral family house. As she has neither proved that she is living in the house or that it is the ancestral family house, in which she has a right to live, it seems to me that the appeal must also be accepted as regards the widow's right of residence. If the son had sold the family dwelling house for family necessity his mother would have no right of residence in it. In the present case, however, it has been held by the Courts below that there was no family necessity, so that she would have been entitled to the right of residence, had it been established that she was living in it and that it was the family dwelling house.

For the reasons given above I accept the appeal *ex parte* and dismiss the suit with costs in the two Courts below. There will be no costs here as the respondents did not appear.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 647 OF 1924.

November 9, 1926.

Present:—Mr. Justice Curgenven.

NATAMAL KUTTI POKKER—APPELLANT

versus

NATAMAL USSAN MAYAN AND OTHERS—RESPONDENTS.

Trusts Act (II of 1882), s. 6—Transfer of Property Act (IV of 1882), s. 100—Limitation Act (IX of 1908), s. 10—Deed of partition—Undertaking to pay money to others—Property allotted made liable in case of default—Charge, whether created—Trust, creation of—Suit to recover such money—Limitation.

Property is nonetheless trust property because the trustee as well as the beneficiary enjoy a beneficial interest in it. [p. 506, col. 2.]

Where, in a partition between members of a family, one of the parties received property of a higher value in consideration of his undertaking to pay a certain sum of money to a widow and daughter in the family and the document further provided that in case he failed to do so, he and the properties allotted to his share should be liable for the amount, in a suit to enforce the obligation:

Held, (1) that a charge was created and inasmuch as the obligation annexed to specific property arose out of a confidence reposed in and accepted by the owner, the person who undertook the obligation was a trustee and the party to whom the payment was due was a *cestui que trust*; [p. 507, col. 1.]

(2) that the suit was, therefore, governed by s. 10, Limitation Act. [*ibid.*]

Second appeal against the decree of the District Court, North Malabar at Tellicherry, in A. S. No. 481 of 1922, preferred against that of the Court of the Principal District Munsif of Quilandy, in O. S. No. 143 of 1921.

Mr. *D. A. Krishna Variar*, for the Appellant.

Mr. *K. P. Ramanatha Ayyar*, for the Respondent.

JUDGMENT.—By a registered partition *karar* dated 18th March, 1911, a division was effected between the first defendant (now appellant) and his brothers and some other, and the share in the immoveable property which the first defendant would otherwise have received was augmented in consideration of an obligation imposed upon him to pay certain sum aggregating Rs. 500 including a sum of Rs. 250 to the widow of the deceased brother and to her daughter, the latter of whom (the mother having died) is the first plaintiff and a respondent in this second appeal. Both Courts have allowed the claim. The question now left for disposal is whether upon the point of limitation it has been rightly held that s. 10 of the Limitation Act applies.

This question depends primarily upon whether the partition *karar* created a trust in respect of the sums payable by the first defendant, and, in particular, in respect of the suit claim of Rs. 250. The document recites that the first defendant has undertaken to pay the sums specified and accordingly that he has received property of a superior value. There is a further recital that should he not do so "he and the properties allotted to his share shall be liable for that amount and the loss arising therefrom."

It is contended that this arrangement does not amount to a trust because there is no specific trust property. What are the characteristics of trust property has been discussed in *Secretary of State for India* v. *Radhika Prasad Bupali* (1) the case of the Tanjore bond-holder; and the appellant relies upon the test applied there, that the fund to be a trust fund must have been specially set apart and earmarked for the service of the trust. That is, no doubt, true. If the East India Company had merely given an undertaking to discharge the bonds out of their general revenues, no trust would have been created and if here the first defendant had merely agreed to pay the money and property had been declared liable upon his default, again no trust would have been created. But it is said, the property assigned to the first defendant was not trust property because it was not exclusively appropriated to the purpose of the trust. No authority has been cited for the position that property is any-the-less trust property because the trustee as well as the beneficiary enjoy a beneficial interest in it.

A "trust" is defined in s. 3 of the Indian Trusts Act as "an obligation annexed to the ownership of property, and arising out of a confidence reposed in, and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner." This definition clearly provides for a case where the owner is also beneficially interested. It was held in *Imbichi* v. *Achampat Avukoya Haji* (2) that where, upon a partition, the property of a party thereto was to be liable upon

(1) 74 Ind. Cas. 785; 46 M. 259; 44 M. L. J. 685; 18 L. W. 210; A. I. R. 1923 Mad. 667.

(2) 39 Ind. Cas. 867; (1917) M. W. N. 533; 33 M. L. J. 58; 6 L. W. 115.

his failure to pay certain debts assigned to him, a charge was created, and it appears to me that equally here a charge was created. The Court could sell the property in order to enforce the obligation. If this is not "an obligation annexed to the ownership of property," I am unable to understand nor have I been shown what else it is. It may be true that not every charge gives rise to a trust. But we have here the further element that the obligation arises out of a confidence reposed in, and accepted by the owner. I conclude that the owner was a trustee, and the party to whom the payment was due a *cestui qui trust*.

It has been further objected that a suit, to secure the exemption conferred by s. 10 of the Limitation Act, must be for the purpose of following the trust property and that the present suit asked only for a decree for payment of the money. This is not strictly true, because there was also a prayer for such other reliefs as the plaintiffs may seek and the Court deem fit to allow. The Court, I think, might, on the facts found, have declared and enforced a charge upon the property. However that may be, the suit was in substance one for the enforcement of the trust and should not be allowed to fail upon a mere matter of pleading.

I dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1181 OF 1924.

December 1, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cammiade.

MAYEUDDI AND OTHERS—DEFENDANTS Nos. 20 AND 21—APPELLANTS

versus

MAHAMMAD RAZZAB ALI AND OTHERS—PLAINTIFFS AND REMAINING DEFENDANTS—RESPONDENTS.

Co-sharer—Dispossession of co-sharer in possession, effect of—Thak Maps, *value of—Permanent Settlement, land whether included in—Finding of fact—Appeal, second—Interference by High Court.*

Where one co-sharer is in possession of joint property through another co-sharer, the dispossession of the latter from the property must be regarded as a dispossession of the former also and it cannot be contended that after such dispossession the former must still be regarded as having continued in possession. [p. 508, col. 1.]

Thak Maps are not conclusive and may be shown to be wrong. [p. 508, col. 2.]

In every case the question what lands were included in the Permanent Settlement of 1793, is a question of fact and not of law and where on the facts found the lower Appellate Court draws an inference that certain lands formed part of a particular estate at the time of the Permanent Settlement, the finding is one of fact which cannot be interfered with in second appeal. [*ibid.*]

Appeal against the decree of the First Additional District Judge, Backergunj, dated the 17th of March, 1924, affirming that of the Additional Subordinate Judge of that District, dated the 7th of December, 1920.

Babu *Rajendra Chandra Guha*, for the Appellants.

Babus *Suresh Chandra Taluqdar* and *Surendra Nath Das Gupta*, for the Respondents.

JUDGMENT.—The plaintiffs who are the lessees from one Kiran Babu, the purchaser of an estate at a revenue sale, brought the present suit for recovery of possession of the lands in suit on the ground that they formed parts of the estate. The defence was that the lands were not part of the estate purchased by Kiran Babu, namely, Estate No. 3842 of the Backergunj Collectorate but of the 'Remainder' as shown in the *Thak Map*. They also pleaded limitation. There were various other points raised which need not be considered in this appeal as they have not been pressed. It appears that the estate was sold in 1888. In 1899 Kiran Babu sued the defendants Nos. 1 to 19 and others for *khas* possession and took delivery of possession through Court on the 9th April, 1907. It has been found by the learned District Judge that Kiran Babu remained in possession thereafter for a period of 15 days and was then dispossessed by all the defendants in this suit. This suit was brought on the 10th April, 1919, and it is, therefore, in time. But it is argued by the learned Vakil appearing for the appellants that so far as defendants Nos. 20 and 21 are concerned the plaintiffs' suit is barred against them. These defendants are the co-sharers of the other defendants and they had an interest in the *howla* as well having inherited it from their common ancestor. In the suit Kiran Babu brought in 1899 these defendants were not made parties and, therefore, it is submitted that it must be presumed that they were in possession in 1907 when Kiran Babu took possession of the land and so

the plaintiffs or their lessors were not in possession of the lands in suit as against them within 12 years. The finding of the Court below, however, does not support this contention. The learned District Judge found that defendants Nos. 20 and 21 were not in actual possession at the time when the suit of 1899 was brought and that they came for the first time on the lands when Kiran Babu was dispossessed 15 days after he had obtained possession. But it is contended that the defendants Nos. 20 and 21 might not have been in actual possession in 1907 but they were in possession through the other defendants their brothers and since the decree was not obtained against them it must be presumed that their possession continued up to the date of the institution of this suit. This argument appears to us to be fallacious. If the defendants Nos. 20 and 21 were in possession of the land in suit through their brothers, the dispossession of their brothers must be their dispossession as well. It cannot, therefore, be said that while their brothers were dispossessed they remained in possession. The finding of the learned District Judge, however, that they came for the first time to this land at the dispossession of Kiran Babu does away with the theory about these defendants being in possession at the time of the suit of 1899. The decision with regard to the question of limitation, therefore, must be upheld on the finding arrived at by the Court below.

Then with regard to the question of title. The learned District Judge has found that the *Thak Map* which shows that the lands in suit were not included in Estate No 3842 but were part of the 'Remainder' is not in the circumstances of the present case correct. Both the Courts have relied upon the Record of Rights and the documents put in by the defendants themselves showing that the lands in suit were included in Estate No. 3842 and also upon the admission by the defendants that since the *Thak Map* the proprietor of Estate No. 3842 was in possession of all the disputed lands as part of that estate. On a consideration of the entire evidence the Courts below are of opinion that the *Thak Map* cannot be considered to be correct in the face of the other evidence on the record. The procedure and the law adopted by them in considering the value of the *Thak Map* are quite consistent with those laid down in the case of *Jagadindra Nath Roy* v. *Secretary of State for India* (1) where their Lordships of the Judicial Committee say that *Thak Maps* are not conclusive and may be shown to be wrong. Their Lordships further observed that in every case the question what lands are included in the Permanent Settlement of 1793 is a question of fact and not of law. The Courts below as Courts of fact are entitled from the evidence on the record to draw the inference that these lands form part of the Estate No. 3842 at the time of the Permanent Settlement. This is a finding of fact with which we cannot interfere.

This appeal accordingly fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 30 C. 291; 7 C. W. N. 193; 30 I. A. 44; 5 Bom. L. R. 1 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 109 OF 1923.

October 26, 1926

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

MAKHAN DAS—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Land acquisition—Valuation of land—Existing advantages and possibilities, whether to be taken into account—Land used in part for residential purposes—Valuation of remaining portion—Cawnpore, value of land in—20 years' purchase.

In valuing land for the purpose of awarding compensation for acquisition under the Land Acquisition Act, the existing advantages and the possibilities of the land must be taken into account. [p. 509, col. 2.]

Narsingh Das v. *Secretary of State for India* (1) and *Fraser* v. *City of Fraserville* (2), followed.

Where a substantial portion of an area acquired has been let out for industrial and residential purposes, and there is no reason why the rest of the land might not in the course of time be let in a similar way, the latter portion also ought to be assessed as land fit for industrial and residential purposes and not merely as agricultural land. [p. 510, col. 1.]

Having regard to the value of land at Cawnpore, proper compensation for land within the Municipal limits would be at the rate of 20 years' purchase of the rents. [*ibid.*]

Lachman Prasad v. *Secretary of State for India* (3), followed.

First appeal from the decree of the Tribunal of Improvement Trust, Cawnpore, dated the 8th of November, 1923.

Dr. *K. N. Katju*, for the Appellant.

Mr. *G. W. Dillon*, for the Respondent.

JUDGMENT.—This is an appeal under s. 18 of the Land Acquisition Act in which the property in dispute has been acquired by the Improvement Trust of Cawnpore.

The appellant before us, Makhan Das, claimed compensation at the rate of Rs. 5,000 a *bigha*. He is dissatisfied with the compensation awarded by the Collector. The Tribunal which sat for the determination of his claim affirmed the award of the Collector. The appellant in his appeal before us complains that a proper method of calculation has not been observed in awarding him compensation, and he objects in particular to his being awarded compensation for a portion of the land in question as if it were merely agricultural land. So far as this portion of the land is concerned, the award is valued at Rs. 150 a *bigha*. The evidence is very scanty, but the following facts are established.

The total area in dispute is 5 *bighas* 11 *biswas* 1 *biswansi*. This land is situated close to a main road from Cawnpore apparently the Kalpi road. There can, we think, be no doubt that the land lies within what may be described as the industrial area of Cawnpore. According to the claimant's evidence which is not rebutted there is an oil-mill close by and two tanneries; there is also a cotton mill close to the land, and further Anwarganj Railway Station is only two furlongs from the site. The appellant acquired this property many years ago and we may say at once that there is nothing here to suggest that Makhan Das bought this property as a speculation calculating that some day later on an Improvement Trust would be constituted which he might constrain to award him a fancy price for his property.

The evidence of one Abdul Majid, who is a Surveyor of the Cawnpore Improvement Trust, shows that out of this 5 *bighas* and odd a portion measuring 1 *bigha* 1 *biswa* and 13 *biswansis* is occupied by an oil-mill owned by one Binda Prasad. This area has been leased by Makhan Das to the owner of the oil-mill at the rate of Rs. 132 a year. Then we have another portion of this land which measures 2 *bighas* 10 *biswas* and 17 *biswansis*. Obviously this land at the time of its acquisition was covered with small huts and sheds. Abdul Majid who measured it for purposes of acquisition states that when he surveyed in the beginning of 1921, there were 99 huts on it. Makhan Das's story was that he was able to let out small sites on this land to poor people who erected huts and paid him petty rents, amounting altogether to some Rs. 700 a year. The rest of the area is described as "uncultivated on account of trees," but the compensation officer treated it for the purpose of the award as agricultural land for which he awarded compensation at the rate of Rs. 150 a *bigha*. We do not know how this rate has actually been obtained, but we are informed that it is prescribed by the Board of Revenue in circulars issued many years ago. We think that there is force in the argument which has been placed before us on behalf of the appellant. There can be no doubt that a substantial portion, more than half the area in dispute has not been used for agricultural purposes at all but has been used for industrial and residential purposes, and so it is fair, we think, to argue that the rest of the site ought to be treated as being of the same character. We may state at once that the principle laid down by the learned President of the Tribunal in his judgment does not appear to be correct. Dealing with the case put forward by Makhan Das the learned President of the Tribunal says: "His main contention is that the land is well within Municipal limits and that it has residential areas close to it. This contention fails to help him because the land must be valued as it was used." The correct principle to be applied for the assessment of compensation for land acquired compulsorily is to be found in the case of *Narsingh Das* v. *Secretary of State for India* (1). There their Lordships cited with approval a decision in *Fraser* v. *City of Fraserville* (2). The relevant passage is as follows:—

"The seller is entitled to the value to him of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the

(1) 86 Ind. Cas. 556; 52 I. A. 133; 23 A. L. J. 113; 2 O. W. N. 137; 48 M. L. J. 386; A. I. R. 1925 P. C. 91; L. R. 6 A. (P. C.) 64; 27 Bom. L. R. 783; 6 Lah. 69; 29 C. W. N. 822 (P. C.).

(2) (1917) A. C. 187 at p. 194; 86 L. J. P. C. 91; 116 L. T. 258; 33 T. L. R. 179.

purpose for which the property is compulsorily acquired."

It is rightly argued, therefore, that the existing advantages and the possibilities of the land must be taken into account in awarding compensation. That has not been done in this case. We may point out too that the land which has been assessed as agricultural land, was not, as a matter of fact, used as agricultural land at all. We think we ought to treat all the land as being of the same character. It is clear that the claimant has been able to let a considerable portion of this land to advantage, and there is no reason why the rest of the land might not have been in the course of time let in a similar way.

For the portion other than that treated as agricultural the Tribunal awarded compensation at the rate of $16\frac{2}{3}$ years' purchase of the rental value. This works out at the rate of Rs. 120-9 per annum per *bigha*. With regard to the valuation of the land at the rate of $16\frac{2}{3}$ years' purchase of the rental, Dr. Katju claims that this is too little, regard being had to the value of the land at Cawnpore, and he has referred us to a decision of this Court reported as *Lachman Prasad* v. *Secretary of State for India* (3) to which one member of the present Bench was a party. It was there pointed out that the rate of $16\frac{2}{3}$ years' purchase of the rental is too low and in that case a rate of 20 years' purchase of the rental was allowed. Mr. Justice Tudball who was a party to this decision was District Judge of Cawnpore for many years and has a wide knowledge of the local conditions. We have decided, therefore, that a proper compensation would be at the rate of 20 years' purchase of the rents. We applied the rate of Rs. 123-9 to the entire area and working out the account on this basis we get a total sum of Rs. 13,881-4. That is the compensation which, in our opinion, should be allowed to the appellant for his land and to this has to be added the usual 15 per cent. for compulsory acquisition. Some other small items have also been awarded by the Court below in respect of houses, trees and other matters. The amounts so awarded will stand.

We, therefore, allow this appeal and vary the decree of the Court below in the manner indicated, that is to say, the sum awarded to Makhan Das is declared to be Rs. 13,881-4 *plus* 15 per cent. for compulsory acquisition, he is also to get the other smaller amounts allowed to him by the Court below as compensation in respect of the houses, trees etc. Makhan Das will get his costs of this suit both here and in the Court below.

A. N. A. *Appeal allowed.*

(2) 63 Ind. Cas. 682; 19 A. L. J. 672; 43 A. 652.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 248 OF 1924.

November 29, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Panton.

DWIJAPADA DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

KALIPADA DE AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata, *doctrine of, applicability of—Finding arrived at in proceeding for Letters of Administration, whether* res judicata *in subsequent civil suit—Failure to put forward evidence in previous suit, effect of.*

The doctrine of *res judicata* is not a rule of technicality but is based upon general principles of law which must be given effect to for the purpose of giving finality to judicial decisions. The real principle is that if a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Courts might not be the same. [p. 513, cols. 1 & 2.]

A finding with regard to the relationship of the parties to a proceeding for the grant of Letters of Administration would operate as *res judicata* in a subsequent suit between the parties in which the question of relationship arises. [p. 513, col. 2.]

If a man fighting a case fights it on false statements and does not call necessary evidence in support of his statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision given in the case as he would have been if he had put forward a true case and called all the evidence in support of it that was available. [p. 515, col. 1.]

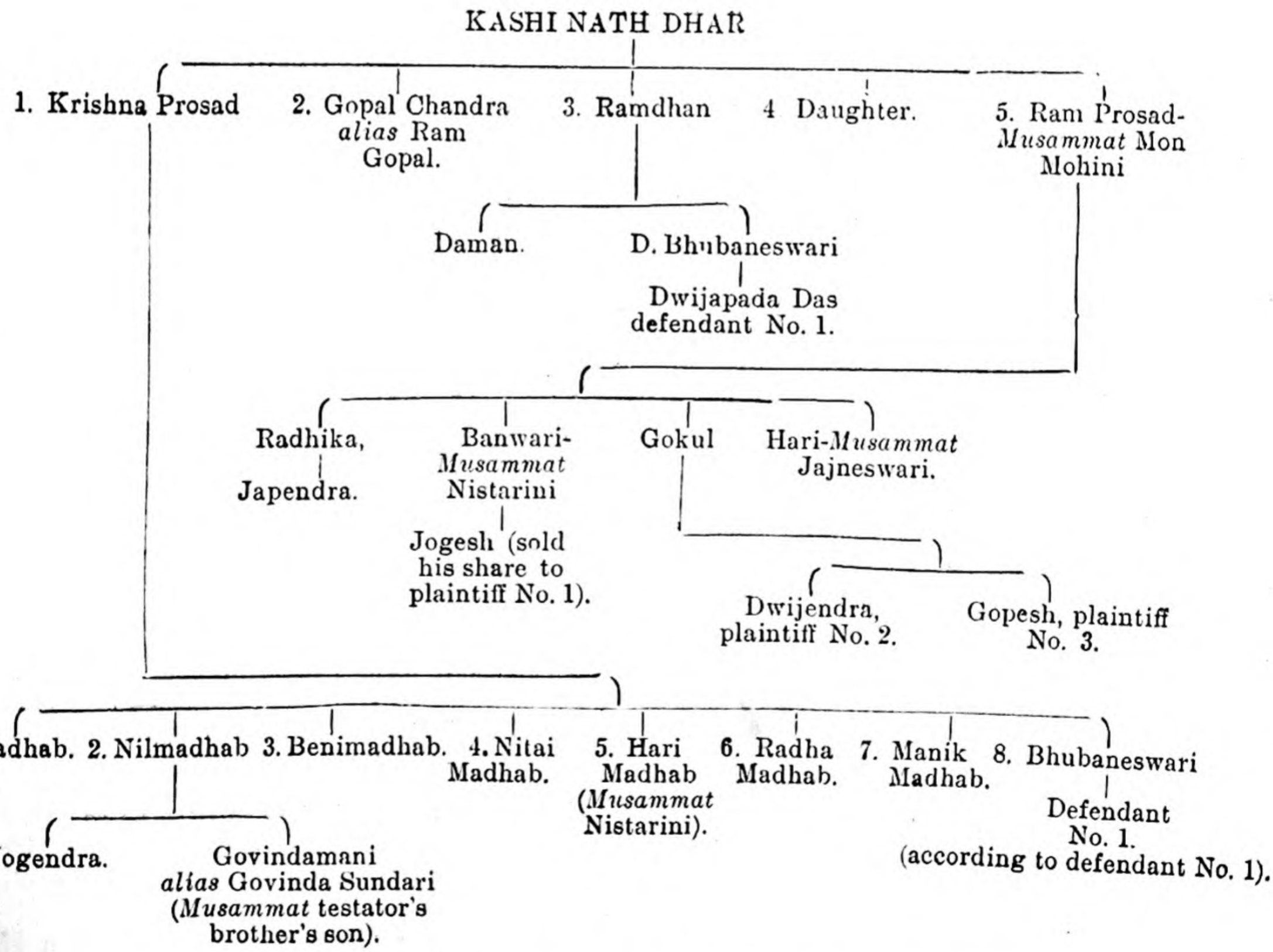
Appeal against the decree of the Subordinate Judge, Burdwan, dated the 19th of June, 1924.

Babu *Panchanon Chaudhury*, for the Appellants.

Babus *Brojo Lal Chakravarti* and *Susil Kumar Bose*, for the Respondents.

JUDGMENT.

B. B. Ghose, J.—This is an appeal by defendants Nos. 1, 2 and 3 against the judgment and decree of the Subordinate Judge of Burdwan, dated the 19th June, 1924. The suit was instituted by three persons for possession of 8-annas share of certain properties which originally belonged to one Durga Charan Baral. The plaintiffs Nos. 2 and 3 claimed as heirs of one of the daughters of Durga Charan named Nistarini Dasi and plaintiff No. 1 claimed on the strength of purchase of the share of another heir named Jogesh Chandra Dhar, and a portion of the shares of plaintiffs Nos. 2 and 3. Durga Charan had two daughters, Nistarini and Gokul Sundari. He died in 1872 after having executed a Will. Letters of Administration with the Will annexed were obtained by Nistarini and Gokul Sundari the two daughters of Durga Charan. After that this property was the subject of various legal proceedings. Two attempts were made during the lifetime of those ladies for revocation of the Probate on various grounds which it is unnecessary to mention now. Gokul Sundari died in 1313 *B. S.* Nistarini died in 1316 *B. S.* The exact date of Nistarini's death is not mentioned, but it was sometime in November 1909. After the death of Nistarini various persons claimed the properties left by her and applied for Letters of Administration of her estate as her heir, as under the Will of Durga Charan the heirs of Nistarini were entitled to succeed to the property before other persons. The question as to who was entitled to the Letters of Administration was raised in the proceedings in 1910 and the matter was decided by the Subordinate Judge on the 20th August, 1912. The Letters of Administration were issued in favour of the defendant No. 1 as the nearest heir of Nistarini. It will be necessary here to give the genealogy under which the plaintiffs based their title.



According to defendant No. 1 Krishna Prosad had a daughter named Bhubaneswari besides his seven sons. Defendant No. 1 Dwijapada Das was the son of the said daughter Bhubaneswari.

The defendant No. 1 admits the genealogy except that he says that Bhubaneswari his mother was the daughter of Krishna Prosad and that he is the nearest heir of Nistarini's *stridhan* properties being her husband's sister's son. His opponent in the Letters of Administration proceedings was Gokul, whose case was that Dwijapada, defendant No. 1 had no connection with the family. The other brother of Gokul who was then alive does not appear to have made any application for Letters of Administration, and it is a question whether he was a party to those proceedings in the Court of first instance. The defendant No. 1 has been in possession of the properties since the grant of Letters of Administration and defendants Nos. 2 and 3 are purchasers of certain lands from defendant No. 1.

The present suit was instituted on the 3rd November, 1921. The Subordinate Judge has found that it was brought on the last date on which the suit might have been instituted according to the Law of Limitation, that is, on the very last day of the expiry of 12 years from the death of Nistarini. The plea of the plaintiffs is that the defendant No. 1 was really the son of a daughter of Ramdhan; in other words Bhubaneswari his mother was the daughter of Ramdhan; therefore, the defendant No. 1 would not be the heir of Nistarini as regards her *stridhan* property, but the heirs at the time of her death would be Banwari and Gokul. The plaintiffs Nos. 2 and 3 claim these properties by virtue of inheritance from Gokul and plaintiff No 1 by purchase from the son of Banwari and also from plaintiffs Nos. 2 and 3. The defendant No. 1's case, on the other hand, is that he is really the nearest heir of Nistarini's *stridhan* and the question as regards the relationship is barred by the rule of *res judicata*.

The Subordinate Judge has put the question in a short way: If defendant No. 1 is the sister's son of Hari Madhab, then the plaintiffs are not entitled to succeed, but if he is found to be the son of a female cousin of Hari Madhab then the plaintiffs are entitled to succeed. Several issues were raised in the Court below. Some of the issues were taken up first for decision by the Subordinate Judge who was a different Judge from the one who decided the case finally. The important question that he decided was the question of *res judicata* and, in his opinion, the question as to the relationship was not *res judicata*, because he thought that the decision of the Subordinate Judge of 1912 was the decision of a Court acting under Act V of 1881 (the Probate and Administration Act) and cannot, therefore, operate as *res judicata* in the present suit. The judgment with regard to this issue was delivered in April, 1923. The case then came on for trial on the other issues and the final judgment was delivered in June, 1924. The Subordinate Judge, who finally tried the case rightly considered that he was bound by the decision on the issue on *res judicata* by his predecessor, and upon that finding he proceeded to decide the question on the evidence as regards the fact of the relationship of the parties to Nistarini Dasi and her husband. He came to the conclusion upon the evidence that the plaintiffs have succeeded in proving that Dwijapada the defendant No. 1 was not Nistarini's husband's sister's son, but he was the son of the daughter of Ramdhan, and, therefore, the plaintiffs were entitled to succeed in their suit.

The question of *res judicata* is of great importance in this case. The first case that was cited on behalf of the appellants was that of *Ramnandan Prosad* v. *Sheo Parson Singh* (1). The Subordinate Judge in his judgment of April, 1923, referred to that case. But he was of opinion that on account of the judgment of the Judicial Committee in *Sheoparsan Singh* v. *Ramnandan Parshad Narayan Singh* (2) in that very case which was carried up to the Privy Council, the opinion of the learned Judges was reduced to a mere *obiter dictum*. That suit was brought for a declaration that a certain person was the next reversionary heir with regard to certain properties, and it was pleaded by his opponent that the question was *res judicata*. The High Court held that such a suit was maintainable, but the question was decided in a previous Probate proceeding and was, therefore, *res judicata* and dismissed the suit. On appeal to the Privy Council their Lordships held that a suit such as that was not maintainable under the provisions

(1) 6 Ind. Cas. 301; 11 C. L. J. 623 at p. 630.
(2) 33 Ind. Cas. 914; 43 I. A. 91 at pp. 98, 99; 43 C. 694; 14 A. L. J. 466; 20 C. W. N. 738; 18 Bom. L. R. 397; 23 C. L. J. 621; (1916) 1 M. W. N. 419; 20 M. L. T. 1; 3 L. W. 544; 31 M. L. J. 77 (P. C.).

of s. 42 of the Specific Relief Act. But with regard to the question of *res judicata* the pronouncement of their Lordships is very important. They pointed out that the question of *res judicata* was not a rule of technicality but was based upon general principles of law which must be given effect to for the purpose of giving finality to judic al decisions. If that principle is given effect to there cannot be any doubt that the question now debated in this appeal is *res judicata* by reason of the decision of the Subordinate Judge of the 20th August, 1912, in the Probate proceedings.

It is contended, however, on behalf of the respondents that the Subordinate Judge was acting in the previous matter as a Court of Special Jurisdiction, therefore, the judgment delivered in that case cannot operate as *res judicata* in the present case. This argument is based upon the decision of this Court in *Lalit Mohan Das* v. *Radha Raman Saha* (3). That case certainly supports the contention of the respondents, but the authority of that case has been undermined by the decisions of the Privy Council and particularly the decision in the case of *Rama Chandra Rao* v. *Ramachandra Rao* (4). Their Lordships at page 137 of the Indian Appeals stated: "How the proceedings were commenced is a matter that is not material provided that they were instituted in the manner that gave the Court jurisdiction, for they ended in a decree made by the High Court and appealable to this Board." In the present case it cannot be disputed that the Probate proceedings were tried in the Court of the Subordinate Judge who had jurisdiction to decide that matter. There was an appeal to this Court which affirmed the decision of the Subordinate Judge, and the matter might have been carried to a higher Court had the conditions satisfied the provisions of the Civil Procedure Code for its being carried to the Judicial Committee. The case reported in *Lalit Mohan Das* v. *Radha Raman Saha* (3) cannot now, therefore, be treated as an authority which we are bound to follow. The same may be said of another case on which the respondents rely, *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* (5). In addition to the decisions of the Privy Council already cited the following cases decided by their Lordships may also be referred to on the question of *res judicata*. *Badar Bee* v. *Habib Merican Noordin* (6), *George Henry Hook* v. *Administrator-General of Bengal* (7), *Ram Kirpal* v. *Rup Kuari* (8), *Beni Ram* v. *Nanhu Mal* (9), *Rameshwar Singh* v. *Hitendra Singh* (10) and the principles laid down in all these cases have been followed by the Full Bench decision of the Bombay High Court in *Kalyanchand Lalchand* v. *Sitbai Dhanasa* (11) and *Maung Hmat* v. *Ma Htay* (12). It appears from all these cases that the real principle is that if a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Courts might not be the same. But in the persent case it is very difficult to say that the Subordinate Judge was not acting as a Civil Court in deciding the previous case. Under the provisions of the Bengal, North-Western Provinces and Assam Civil Courts Act, s. 23, sub-s. 2-(*d*) the District Judge may in certain circumstances transfer this class of cases to the Subordinate Judge, and when the Subordinate Judge is in seisin of a case of this class he does not cease to be a Subordinate Judge who exercises his ordinary jurisdiction. In my opinion, therefore, the previous decision of the Subordinate Judge of 1912 on the question of the relationship of the defendant No 1 with reference to the parties to this suit should be held to operate as *res judicata*, as the issue was distinctly raised in the previous proceedings as to whether

(3) 10 Ind. Cas. 434; 15 C. W. N. 1021; 13 C. L. J. 547.

(4) 67 Ind. Cas. 408; 49 I. A. 129; 45 M. 320; 30 M. L. T. 154; 26 C. W. N. 713; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A. L. J. 684; 43 M. L. J. 78; 24 Bom. L. R. 963; A. I. R. 1922 P. C. 80 (P. C.).

(5) 20 C. 888; 10 Ind. Dec. (N. s.) 596.

(6) (1909) A. C. 615 at p. 623; 78 L. J. P. C. 161; 101 L. T. 161.

(7) 60 Ind. Cas. 631; 48 I. A. 187; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 23 Bom. L. R. 648; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.).

(8) 11 I. A. 37; 6 A. 269; 4 Sar. P. C. J. 489; 3 Ind. Dec. (N. s.) 718 (P. C.).

(9) 11 I. A. 181; 7 A. 102; 4 Sar. P. C. J. 564; 4 Ind. Dec. (N. s.) 138 (P. C.).

(10) 81 Ind. Cas. 576; 40 C. L. J. 431; 5 P. L. T. 491; 47 M. L. J. 286; A. I. R. 1924 P. C. 202; 20 L. W. 456; 35 M. L. T. 182; 26 Bom. L. 1153; 22 A. L. J. 968; L. R. 5 A. (P. C.) 175; 29 C. W. N. 413; 1 Lah. Cas. 457; 3 Pat. L. R. 180 (P. C.).

(11) 23 Ind. Cas. 325; 38 B. 309 at p. 330; 16 Bom. L. R. 5.

(12) 76 Ind. Cas. 494; 1 R. 258; A. I. R. 1923 Rang. 257.

Dwijapada the son of Bhubaneswari was the sister's son of Nistarini's husband.

It is, however, said that if it was *res judicata*, that would bar the suit of plaintiffs Nos. 2 and 3, but it does not debar the plaintiff No. 1 who derived title from Jogesh the son of Banwari from raising the same question as Banwari was no party in the previous litigation and that is what the Subordinate Judge has said in his judgment. The appellants, however, point out that Banwari was a party as will appear from the decree of the High Court to which Gokul carried his appeal. It is argued on behalf of the appellants that if Banwari was no party to the suit either as applicant or as objector it is difficult to imagine how he could have been made a party in the appeal in this Court where he was described as one of the objectors. The decree of the High Court will be found at page 82 of the 2nd part of the paper-book. The point that the respondents raise is that you do not find the name of Banwari in the decree prepared by the trial Court. As there is nothing to show how Banwari was made a party in the appeal this matter seems to have been left in some obscurity. From the order of the Subordinate Judge in those proceedings (at page 50 of the paper-book, part II) it appears that there were two petitioners and nine objectors, which number does not appear in the decree. But at the same time we find that Banwari filed two petitions in the Probate case, one has been printed at page 40 in which he describes himself as the petitioner and his brother Gokul as the opposite party, and there is another petition printed at page 42 in which the cause title has been given as Gokul petitioner and Banwari opposite party. From this it would appear that Banwari was the opposite party to the petition presented by Gokul for Letters of Administration. If that is so Banwari and his heirs would be as much bound by the decision in the previous case as the heirs of Gokul. But assuming that Banwari was no party, it is quite clear that Banwari never disputed the relationship of defendant No. 1 to Nistarini as claimed by him. There is a *kabuliyat* executed by Banwari in favour of defendant No. 1 which is marked Ex. A (3) in January 1912, *i. e.*, during the pendency of the proceedings for Letters of Administration. By that *kabuliyat* Banwari purported to take a lease of certain property from the defendant No. 1 admitting the relationship as claimed by the defendant No. 1. The Subordinate Judge seems to have held that this admission was made by Banwari for the purpose of defeating the claim of his brother Gokul because he was in dispute with his brother. The Subordinate Judge further seems to hold that the *kabuliyat* was not a *bona fide* and valid transaction and the recital in the lease cannot operate as an admission of the defendant's right. The *kabuliyat* was obtained by undue influence and so forth. No evidence of undue influence has been adduced in this case and the Subordinate Judge does not give any sufficient reason why this admission by Banwari should not be taken as against him and his heir.

The next thing that requires consideration in this case is whether the Subordinate Judge is right in holding upon the evidence that the plaintiffs have succeeded in proving their title. The Subordinate Judge starts his decision with regard to that question by reference to the statements made by one Shyama Charan Nath who brought a suit in 1913 against defendant No. 1 for possession of these very properties. In that suit Shyama Charan was defeated and because Shyama Charan stated in that suit that the maternal grandfather of defendant No. 1 was Ramdhan Dhar that statement seems to have been taken as evidence against the defendant No. 1. In this there cannot be any doubt that the Subordinate Judge is clearly wrong. The next two documents which the Subordinate Judge has taken into consideration again are two genealogical tables filed by Gokul Sundari and Nistarini in 1899 and in 1907. Two different persons applied for revocation of the Letters of Administration granted to the ladies. In those proceedings those two ladies filed genealogical tables in support of their petition that the applicants for revocation of Probate were not entitled to come into possession of the properties under the terms of Will as the ladies had nearer heirs surviving. In those documents the name of Dwijapada as husband's sister's son of Nistarini does not appear. In the petition filed by those ladies they do not profess to give an exhaustive list of the heirs of Nistarini, but what they said was that they gave certain names as nearer heirs than the petitioners in those cases and they said that there were other heirs too. The omission of the name of Dwijapada cannot be decisive of the question of

his not being related as he claims. The absence of his name may be explained in many ways. It may be that the ladies thought that the husband's sister's son was not an heir of *stridhan* property and they thought it was only necessary to give the names of Nistarini's husband's agnates, or it might possibly be due to forgetfulness as Dwijapada was not a member of the family living in the village. The Subordinate Judge also relied upon certain rent decrees and proceedings which do not appear to be at all relevant to this enquiry or evidence against the defendant.

The next question is with regard to the oral evidence. The Subordinate Judge states in his judgment in more than one place that the decision of the Subordinate Judge in the Probate proceedings was based upon insufficient evidence. He seems to have been of opinion that Gokul was a very poor man and for that reason he was unable to cite any number of witnesses to prove that he was the nearest heir and not Dwijapada. The Subordinate Judge also comments on the fact that Gokul stupidly pleaded in the previous proceedings that Dwijapada was a person who was not known to him and had no connection with the family, and this plea enabled Dwijapada to establish the fact of his relationship with the family very easily. These are matters, however, which the Subordinate Judge ought not to have taken into consideration. If a man fighting a case fights it on false statements and does not call necessary evidence to support his own statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision as he would have been if he put forward a true case and called all the evidence that was available. It does not also appear that Gokul was so very poor, because he fought the case up to the High Court. As to the oral evidence which has been adduced in this case the Subordinate Judge has relied upon the evidence of Mon Mohini the mother of Gokul who gave her evidence in the previous proceedings. The Subordinate Judge says that the lady was a very pious lady and her evidence that Krishna Prosad has no daughter should be accepted. The Subordinate Judge somehow or other explained away the fact that that lady swore that she did not know who Dwijapada was. The evidence was not believed by the Subordinate Judge in whose Court it was first produced, and I am unable to believe that she was telling a true story when she said that she did not know who Dwijapada was. She being a member of the family was expected to know the son of a daughter of the family, and whether Bhubaneswari was the daughter of Krishna Prosad or of Ramdhan there cannot be any doubt that she was telling a false story when she said that she did not know Dwijapada, and the only explanation of telling this false story appears to be that Bhubaneswari was the daughter of Krishna Prosad and not of Ramdhan. That circumstance can only explain the reason why she said that she did not know Dwijapada at all. The Subordinate Judge next relies very strongly on the evidence of certain other witnesses who were examined before him or by Commission. The first class of witnesses is said to be the neighbours. Those were witnesses Nos. 9 and 10. With regard to those neighbours the only thing that can be said is that they were cited as a matter of emergency. Witness No. 9 Kudiram Samanta got summons only the day before he was examined that is in April 1924, although the case had been pending for nearly three years. The other witness Hem Chandra Sarkar also got his summons only 6 or 8 days before he was examined. This does not show that the plaintiffs ever thought that those were necessary witnesses who would prove their case. Again their evidence also is of no value whatsoever. The witness No. 9 saw the lady Bhubaneswari many years ago and there is no reason whatsoever for his knowing anything about the genealogy of the family. The other witness Hem Chandra also says that Bhubaneswari was the daughter of Ramdhan, but he says that he had no occasion to enquire of the relationship of Ramdhan with Bhubaneswari This is the class of witnesses who are said to be neighbours and who knew about the relationship. There is another neighbour Hara Sundari Dasi who proved the relationship as alleged by the plaintiffs but who says that she never had been to their house and only heard the story of the relationship at the time of taking a bath many years ago. The other class of witnesses who are said to be relations are also relied on. They are plaintiffs' witnesses Nos. 11 and 13. The relationship of witness No. 11 is rather flimsy. He says that a lady named Nitya

Shashi was the wife of an agnatic relative of his. From her he learnt the name of the father of Bhubaneswari. This man does not know the name of any other daughter of the Dhar family except Bhubaneswari, and he does not tell on what occasion he learnt the name of the father of Bhubaneswari. Witness No. 13 Debendra Krishna Chandra who is said to be a substantial man heard that defendant No. 1 was not Hari Madhab's sister's son from one Lakshimoni, who is said to be Dwijapada's aunt. This man also cannot tell under what circumstances he came to hear of the relationship between Dwijapada and Harimadhab. He says he did not make any enquiry on the point; she, that is Lakshimoni of her own accord said that Dwijapada was not Harimadhab's, *Bhagina*, that is sister's son. The mere statement of the evidence of these witnesses shows that they are hardly entitled to any credence. The other witnesses who have been examined to prove the relationship are men of no substance whatsoever.

It appears in this case that the real person who fights for the plaintiffs is one Sudhansu Bhusan Pal. It is in evidence that the plaintiff No. 1 is his *benamdar*. The purchase-money which is alleged to have been paid by plaintiff No. 1 was not actually paid, but the money was to be spent for the purpose of this litigation. This case has been instituted on the last day of limitation as already stated. There is little reason for holding that it is not entirely a speculative litigation. If the witnesses who have been examined in this case to prove the relationship know nothing about the relationship there is no reason why Gokul would not have called them when he fought out the case 12 years ago. The reason given for not doing so that is his poverty is not at all convincing. I have forgotten to mention two other persons whom the Subordinate Judge has believed, that is, Nistarini and another lady Jogeswari. This Nistarini is the mother of Jogesh the vendor of plaintiff No. 1 and Jogeswari is the widow of Hari, a deceased brother of Gokul. These ladies would naturally support the story of the plaintiffs. In one case if Jogesh had received any consideration from the plaintiff No. 1 he would have to refund it and Nistarini certainly would support the case of Jogesh in any circumstance. Jogeswari also says that by this litigation the children of her family would succeed in getting the property. That may be the motive why these two ladies would support the case of the plaintiffs. It is difficult, no doubt, to prove the genealogy of persons who have died more than 50 years ago, and the defendant No. 1, therefore, probably has not been able to give such satisfactory evidence as might have been expected. But defendant No. 1 has been in possession of this property as the nearest heir of Nistarini for nearly 12 years. The burden on the plaintiffs must be very heavy to displace that title, and they have certainly not succeeded in doing it.

On these grounds this appeal must be allowed and the suit dismissed with costs in both Courts.

Panton, J.—I agree.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 44 OF 1924.

January 5, 1927.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

BALBHADAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

UDAI NARAIN SINGH AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Settlement—Estate granted to widow—Life-estate or widow's estate—Construction—Power to alienate for necessity.

The sole surviving member of a Hindu family who had to provide for a brother's widow, a daughter's son, and the widows of two predeceased sons, under a settlement of his properties during his lifetime made a grant of a share in some villages to his daughter's son and brother's widow and granted the shares in all other villages to his sons' wives in the following terms: "The rest of the shares and the house I have given to my sons' wives on this condition that the said widows should remain in possession of the properties given to them and should maintain themselves with the profits thereof. . . . . My sons' wives and my brother's wife should remain in possession of their shares, which I have given them, for their whole life. . . . . On the death of one of the sons' wives the other shall get her share also. In short, so long as the three *Musammats* are, or any of them is, alive none of my reversioners shall have a claim to their shares:"

Held, that the grant to the sons' widows was a grant of a life-estate with remainder to the settlor

and his heirs and not of a widow's estate as recognized by Hindu Law. [p. 517, col. 2; p. 518, col. 1.]

One of the necessary incidents of a Hindu widow's estate is the power to transfer the properties absolutely in case of legal necessity. [p. 517, col. 2.]

First appeal from the decree of the Subordinate Judge of Basti, dated the 22nd of December, 1923.

Dr *S. N. Sen* and Mr. *Kumuda Prasad*, for the Appellants.

Messrs. *Hazari Lal Kapur*, *S. K. Dar* and *N. Upadhiya*, for the Respondents.

JUDGMENT.—This is a defendants' appeal arising out of a suit for recovery of possession of certain properties. The plaintiffs are the sons and grandson of one Nakchhed Singh and claimed to have inherited these properties through Nakchhed Singh by virtue of a deed of settlement dated the 5th of December, 1888, executed by Gopal Singh. It appears that in that year Gopal Singh was the sole surviving male member of his family and had dependent on him his deceased brother's widow *Musammat* Rahsa, a daughter's son Nakchhed Singh, and the widows of two predeceased sons of his own. He wanted to make provision in his lifetime for these people and executed the deed in question under which he made grants of various items of property to these people in succession. The plaintiffs' interpretation of this document is that the grants made to the three ladies were grants to them for their lifetime and the remainder belonged to Gopal Singh which was inherited on his death by his daughter's son Nakchhed Singh from whom it has devolved on the present plaintiffs. On the other hand, the defendants contended, that the deed had the effect of creating Hindu female's estates in favour of these ladies and that no undisposed of interest remained with Gopal Singh so that when the last of these ladies died and Gopal Singh also was dead the estate devolved not on Gopal Singh's daughter's son Nakchhed Singh but on his collaterals whom the defendants represented.

A translation of the deed of settlement is fully set forth in the judgment of the Court below and it is not necessary to repeat it. Briefly speaking, Gopal Singh made a grant of a share in one village to Nakchhed Singh and shares in two other villages to his deceased brother's widow. He then granted the shares in all the other villages together with a house to his sons' wives in the following words:—

"The rest of the shares and the house I have given to my sons' wives on this condition that the said widows should remain in possession of the properties given to them and should maintain themselves with the profit thereof. None of my heirs or reversioners shall, in my lifetime or after my death, have any right to the property which I have given to my daughter's son. My sons' wives and my younger brother's wife should remain in possession of their shares which I have given them for their whole life. After the death of my younger brother's wife her share also shall go to my both the sons' wives; and on the death of one of the sons' wives the other shall get her share also. In short, so long as the three *Musammats* are, or any of them is, alive, none of my reversioners shall have a claim to their shares."

After this he provided that when all the three ladies were dead the house, grove and a plot in village Mandra Par should pass to his daughter's son Nakchhed Singh and neither he nor his heirs would have a right or claim to it.

The question before us is whether the grant to the widows of his sons was a grant of a life-estate only with remainder to Gopal Singh or whether it amounted to a creation of a Hindu female's estate as recognized by the Hindu Law.

For the purposes of this appeal we may assume in favour of the appellants that a Hindu widow's estate can be created by a grant. This has been held to be so by the Madras High Court in *Meda Vengamma* v. *Mitta Chelamiah* (1) which we may assume to be correct without actually deciding it. The burden, however, lies upon the defendants to satisfy the Court that it was the intention of Gopal Singh to create a Hindu widow's estate with all its necessary incidents. One of the necessary incidents of a Hindu widow's estate is to give to the female power to transfer the property absolutely in case of legal necessity. The whole intention of Gopal Singh appears to have been to make sure that the property would remain in the possession of his relations for their maintenance and should pass on from one female to another in succession There is no power given to any of the females to dispose of the property in case of legal necessity. Indeed if they had been given such power very little

(1) 15 Ind. Cas. 17; 36 M. 484; 12 M. L. T. 293; 23 M. L. J. 168.

would have been left for being inherited by the surviving ladies.

The next point is that in the case of a Hindu widow's estate succession to the estate after the death of the female goes to the collaterals of the deceased husband of the lady. There is nothing to show in the deed that Gopal Singh intended that succession should open to the heirs of the husband of the various ladies. On the other hand that would be inconsistent with the right of survivorship given to them in case of their respective deaths.

It is strongly contended on behalf of the appellants that Gopal Singh did not reserve in himself any special right or interest in these properties in express terms. But if the interest created by him amounted to no more than a life-interest then the remainder remained undisposed of and must be deemed to have remained vested in him, as it cannot remain in abeyance.

The strongest point in favour of the view of the Court below appears to be that the grant of the entire property to the sons' widows is contained in one operative portion of the deed which we have quoted above. It is natural to suppose that the intention of Gopal Singh was to create an estate of the same character in respect of all the property covered by that disposing clause. Later on, he made a special condition that out of these properties three items would devolve on Nakchhed Singh after the death of all the three widows. With regard to these three items it cannot be disputed that only limited life-estates could have been created in favour of the ladies with a vested remainder in Nakchhed Singh, which neither Gopal Singh nor his legal heirs could claim. It is, therefore, clear that out of the properties covered by the disposing clause three items were, undoubtedly, given away as life interests to the ladies. There is, therefore, an irresistible presumption that the remainder of the property which was governed by the same clause had the same character.

We may mention that the document was not of the nature of a bequest in which case the testator would have contemplated a state of things after his death. It was really a transfer *inter vivos* with a possibility of Gopal Singh himself getting back the property after the termination of the life-estates of the three females. There is, therefore, no reason to suppose that he intended that he and his own heirs should not be entitled to the estate as soon as the life-estates of these ladies terminated.

Having regard to these circumstances we are of opinion that the view taken by the Court below as regards the interpretation of this document was correct.

We dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 635 OF 1926.

December 21, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Graham.

SARAT CHANDRA HALDAR—APPLICANT—PETITIONER

versus

MITRA MUKERJEE AND CO., AND ANOTHER—DECREE-HOLDERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 151, O. IX —Inherent powers, nature of—Jurisdiction under s. 151 not 'extraordinary' but 'residuary'—Extraordinary circumstances whether necessary for invoking inherent powers—O. IX not applicable to execution proceedings.

Order IX of the Civil Procedure Code is not applicable to cases where execution proceedings have been dismissed for default. [p. 519, col. 1.]

The power which a Court possesses under s. 151 of the Civil Procedure Code cannot justly be said to be of an 'extraordinary' nature. The power is inherent in every Court and if there are proper materials it has got to be exercised *ex debito justitiæ*. The provision in s. 151 has been made for the purpose of allowing a Court to do substantial justice for the administration of which alone the Court exists and in matters about which the Code is silent. [*ibid.*]

A Court is not, therefore, justified in refusing to exercise its powers under s. 151, Civil Procedure Code, on the ground that there are no extraordinary circumstances justifying the exercise of such power. [p. 519 col. 2.]

Rule against an order of the Munsif First Court, Diamond Harbour, 24 Parganas, dated the 30th April, 1926, in Miscellaneous Judicial Case No. 335 of 1925.

Babu *Hira Lal Chakravarti*, for the Petitioner.

Mr. *Gunada Charan Sen* and Babu *Kali Kinkar Chakravarti*, for the Opposite Parties.

JUDGMENT.

Mukerji, J.—As regards the main contention of the petitioner which is to the effect that O. IX, r. 9 applies to the case of dismissal of execution proceedings for default, we are completely in agreement with the view which the learned Munsif

has taken. In an excellent judgment the learned Munsif has dealt with this question of law and has arrived at a conclusion which is to the effect that O. IX is not applicable to cases where execution proceedings have been dismissed for default. He has also taken the correct view of the applicability of s. 151 of the Code of Civil Procedure. He, however, proceeds to observe, when considering the question as to whether, in the present case, he should exercise his powers under that section or not, that he has considered the allegations made in applicant's petition and has examined the records of the case and that he has come to the conclusion that the facts of the case are not such that he should exercise the 'extraordinary power' which the Court possesses under s. 151 of the Code. I am somewhat doubtful as to the correctness of the view which the learned Munsif has taken, as regards the nature of the power which a Court possesses under s. 151 and I am not at all sure that that power can justly be said to be of an 'extraordinary' nature. If the learned Munsif was of opinion that the power is of an extraordinary nature, then, naturally, he would, before exercising that power, look for the presence of extraordinary circumstances which would justify its exercise; and that is really what he seems to have done. The power is inherent in every Court and if there are proper materials it has got to be exercised *ex debito justitiæ*. It has been repeatedly laid down that the provision in s. 151 has been made for the purpose of allowing a Court to do that substantial justice for the administration of which alone the Court exists, and in matters about which the Code is silent. Of course, the power cannot be exercised to do something which is prohibited by the Code or is repugnant either to the letter or the spirit of the Code. In the present case the learned Munsif took the view that the power was an extraordinary one, and that because he could not find any circumstance on an examination of the record of the case nor any allegation in the applicant's petition which would justify the exercise of that power he has refused to give relief to the applicant. An examination of the record, however, discloses very little that is relevant, and as regards the allegations in the applicant's petition there has been no enquiry as to their truth or otherwise. I am of opinion that once it is conceded that the Court may proceed under s. 151, the Court must, in order to arrive at a conclusion whether relief should or should not be granted, inquire into the allegations unless the Court is of opinion that the allegations even, if true, would not justify the Court's interference. I have examined the contents of the petition that was filed on behalf of the petitioner in the present case and I am of opinion that those allegations, if true, would certainly form a ground for the exercise of the Court's power under s. 151. It appears also that four witnesses were present on behalf of the petitioner on the 20th of April, 1926, the day on which the matter was heard by the learned Munsif, but those witnesses were not examined. I am of opinion that the allegations contained in that petition should be properly inquired into and that on the conclusions at which the Court will arrive as to the truth or otherwise of those allegations will depend the determination of the question whether it will exercise the inherent power which the law provides for. In my judgment, therefore, the order passed by the Munsif as complained of in this Rule should be set aside and the case sent back to his Court so that a proper inquiry may be made with regard to the allegations contained in the petitioner's petition to which I have referred and then after hearing the parties the case will be dealt with and disposed of in accordance with law.

The Rule should thus be made absolute. We make no order as to costs.

Graham, J.—I agree and have only a few words to add. The exercise of the Court's jurisdiction under s. 151 of the Code of Civil Procedure is purely a matter of discretion, and speaking for myself I should not ordinarily be in favour of interfering with the exercise of that discretion unless a strong case has been made out. When, however, it has once been recognized, as it has been in the Court below, that the case is one for the exercise of the residuary powers of the Court under that section, I think that the learned Munsif should have inquired into the allegations which were made on behalf of the petitioner, and should have examined the witnesses who were present in Court.

I accordingly concur in the order which my learned brother has made.

A. N. A. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1216 OF 1924.
January 25, 1927.
Present:—. Mr. Justice Iqbal Ahmad.
Musammat DHIRAJI AND OTHERS —DEFENDANTS—APPELLANTS
versus
Musammat CHANDRA KALI—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 199 (1) (a)—Ejectment suit—Question of title—Order of Revenue Court to file civil suit—Omission to implead all plaintiffs as parties to civil suit, effect of.

The mere fact of the institution of a declaratory suit in the Civil Court is not a compliance with the direction of the Revenue Court under s. 199 (1) (*a*) of the Agra Tenancy Act, unless all the plaintiffs to the ejectment suit are made defendants in the civil suit. [p. 520, col. 2.]

Second appeal from the decree of the District Judge of Gorakhpur, dated the 2nd of April, 1924.

Dr. *M. L. Agarwala*, for the Appellants.
Mr. *K. Verma*, for the Respondent.

JUDGMENT.—This is a defendants' appeal and arises out of a suit for ejectment filed in the Revenue Court under s. 58 (*a*) of the Tenancy Act by three plaintiffs, Nath Prasad, Lalta Prasad and the latter's wife *Musammat* Chandra Kali. The defence to the suit was that the defendants were in possession of the plots in dispute not as a tenant but as a proprietor. In view of the defendants' plea that they were not tenants of the plaintiffs but had a proprietary right in the land, the Revenue Court in accordance with the provisions of s. 199 (1) (*a*) of the Tenancy Act required the defendants to institute a suit in the Civil Court for the determination of the question of title raised by them.

The defendants did, in pursuance of the order of the Revenue Court, file a suit in the Civil Court within the time allowed by the Revenue Court, but they arrayed as defendants to the suit only two out of the three plaintiffs, *viz.*, Nath Prasad and Lalta Prasad and omitted to implead *Musammat* Chandra Kali as a defendant to the suit. It appears that *Musammat* Chandra Kali actually applied to the Civil Court to be made a party to the suit, but her application was rejected. The suit filed by the defendants in the Civil Court was decreed.

When after the decision of the civil suit, the Revenue Court proceeded to decide the ejectment suit, *Musammat* Chandra Kali one of the plaintiffs maintained that the defendants had not complied with the order of the Revenue Court inasmuch as, that though the defendants had instituted a suit in the Civil Court for the declaration of their proprietary title, they had omitted to implead her in that suit, and as such the Revenue Court was bound in view of the provisions of s. 199 (2) of the Tenancy Act (Act II of 1901) to decide that question of title against the defendants. This contention of *Musammat* Chandra Kali did not find favour with the learned Assistant Collector, and he held that the defendants had complied with his order and as such he was bound to decide the ejectment case in accordance with the decision of the Civil Court. On these grounds the learned Assistant Collector dismissed the plaintiffs' suit. On appeal by the plaintiffs the lower Appellate Court has reversed the decree of the learned Assistant Collector and has decreed the suit for ejectment. The lower Appellate Court has held that the omission of the defendants to the ejectment suit to implead all the plaintiffs of that suit as defendants in the civil suit constituted non-compliance with the order of the Revenue Court passed under s. 199 (1) (*a*) of the Tenancy Act. In my judgment, the lower Appellate Court was perfectly right in coming to this conclusion. The suit contemplated by s. 199 (1) (*a*) of the Tenancy Act is a suit filed by the defendant to an ejectment suit against all the plaintiffs of such a suit. If the defendant omits to implead some of the plaintiffs to an ejectment suit, he does not comply with the order of the Revenue Court. The issue as to proprietary title of the plots in dispute in an ejectment suit is an issue between all the parties to that suit, and unless all the parties to that suit are actually parties to the civil suit that is filed in pursuance of the direction of the Revenue Court, there cannot be a complete and final adjudication of that issue of proprietary title. The mere fact of the institution of a declaratory suit in the Civil Court cannot be a compliance with the direction of the Revenue Court under s. 199 (1) (*a*) of the Tenancy Act, unless all the plaintiffs to the ejectment suit are made defendants in the civil suit.

Then it is argued by Dr. Agarwala that the question of proprietary title having been determined by the Civil Court in favour of the defendants-appellants, there was no decision of the Revenue Court on the question of proprietary title and as such no appeal lay to the District Judge against the decree of the learned Assistant Collec-

tor. I am unable to agree with this contention. As *Musammat* Chandra Kali was not a party to the civil suit she did urge in the trial Court that the plea of proprietary title raised by the defendants must be decided against them, and as such a question of proprietary title was clearly in issue in the Court of first instance and that question was also in issue in the lower Appellate Court. Therefore an appeal lay to the lower Appellate Court in accordance with the provisions of s. 177 (*e*) of the Tenancy Act.

For the reasons given above, I dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2300 OF 1924.

November 17, 1926.

Present:—Mr. Justice Cammiade.

CHANDI CHARAN ROY AND OTHERS—DEFENDANTS—APPELLANTS

versus

SIRAJ MIA—PLAINTIFF—RESPONDENT.

Mortgage—Redemption—Co-owner, whether can redeem—Other co-owners, whether necessary parties—Tender—Usufruct, account of.

A person who owns a fractional interest in the equity of redemption is entitled to redeem the whole mortgage. [p. 522, col. 1.]

In a suit for redemption by a person who owns only a fractional interest in the equity of redemption it is not necessary to join the other owners of the equity of redemption as parties to the suit. [*ibid.*]

In such a suit, however, if the Court directs an account to be taken of the usufruct of the mortgaged property enjoyed by the mortgagee after the date of the tender of the mortgage-money by the plaintiff, the plaintiff should be given credit only for so much of the usufruct as relates to his share of the mortgaged property. [p. 522, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, First Court, Sylhet, dated the 17th of July, 1924, reversing that of the Munsif, Fourth Court at Habigunge, dated the 19th of December, 1923.

Mr. *Gopal Chandra Das* and Babu *Satyendra Kishore Ghose*, for the Appellants.

Mr. *Gunada Chandra Sen* and Babu *Bhuban Mohan Saha*, for the Respondent.

JUDGMENT.—This is an appeal by the mortgagees-defendants in a suit for redemption of the mortgage. At the trial the defendants had alleged that there had been a sale to them and not a mortgage but that contention of theirs has been given up. The suit was dismissed in the first Court, which found that there had been a sale. The Court of Appeal found that the transaction was a usufructuary mortgage the principal amount borrowed being Rs. 25 and the intention being that the usufruct of the land should be enjoyed in lieu of interest. That Court further found that the plaintiff had tendered the amount of the mortgage-debt to the defendant in *Pous* 1329, and that tender had been refused by the defendants. It accordingly gave a decree for redemption of the mortgage on deposit of Rs. 25 by the plaintiff within two months of the date of the decree and ordered that an account be taken of the usufruct enjoyed by the defendants from the date of the tender up to the date of recovery of possession by the plaintiff.

In appeal before me various objections have been taken to the decree of the Subordinate Judge. The first is that only one of the mortgagors has appealed and, therefore, it is contended that, he is only entitled to redeem his share of the mortgaged property. The second objection taken to the decree is that the appeal should have failed because the other mortgagors were not brought on the record either as co-appellants or as respondents and lastly an objection has been taken to the order for taking accounts on the ground that the person who was the appellant before the Subordinate Judge was not entitled to the whole of the usufruct derived from the property.

The first objection is supported by the case of *Nawab Azimut Ali Khan* v. *Jowahir Singh* (1). That decision does not help the appellants. In that case the mortgagee had acquired a fractional interest in the equity of redemption and what their Lordships of the Privy Council held was that the mortgagee could not be compelled to permit redemption of the portion acquired by him. A case decided in this Court, namely, *Girish Chunder Dey* v. *Juramoni De* (2) has also been cited. In that case the ruling in *Nawab Azimut Ali Khan's case* (1) was construed as prohibiting a joint mortgagor from claiming to redeem an entire mortgage. That ruling, however, has been dissented from in two subsequent rulings of this Court, namely, *Baikantha*

(1) 13 M. I. A. 401; 14 W. R. P. C. 17; 2 Suth. P. C. J. 316; 2 Sar. P. C. J. 573; 20 E. R. 602.
(2) 5 C. W. N. 83.

Nath Dey v. *Mohesh Chandra Dey* (3) and *Protap Chandra Dhar* v. *Peary Mohun Dhar* (4) where it is pointed out that in *Azimat Ali Khan's case* (1) the mortgagee had acquired an interest in the equity of redemption and it was only in respect of that interest that the mortgagors' prayer for redemption would be refused. In a subsequent Privy Council decision *Norender Narain Singh* v. *Dwarka Lal Munder* (5) it has also been ruled that a person who has a fractional interest in the equity of redemption is entitled to redeem the whole mortgage. So the first objection fails.

The second objection is based on the ruling in *Ragho Salvi* v. *Balkrishna Sakaram* (6). In that case the mortgagee had permitted the mortgagors to redeem the mortgage according to their respective interest in the equity of redemption, and, after several such partial redemptions, one of the mortgagors claimed to redeem the remaining portion of the mortgage. In those circumstances it was ruled that, if that mortgagor wished to redeem the whole of the remaining portion of the mortgage, it was necessary for him to bring all the persons interested in that portion on the record or otherwise he only be entitled to redeem his particular interest. That case, therefore, does not assist the appellants. I fail to see why the appellant should raise this objection about non-joinder of the other mortgagors in the appeal before the Subordinate Judge. His interest presumably is to recover the money lent by him; and, as long as he recovers that, it is immaterial to him what happens to the property. If the other mortgagors have any grievance against the person who has obtained the decree for redemption it would be for them to seek their proper remedy.

The third objection, however, is a good one. The respondent before this Court is only entitled to a fractional share of the mortgaged property and, therefore, he would only be entitled to a fraction of the usufruct. Accordingly when a decree is made, for the amount which will be payable to him on account of the usufruct enjoyed by the plaintiffs subsequent to the date of the tender, he should be given credit only for so much of the usufruct as fell to his share.

The appeal is allowed to this extent, the decree of the Subordinate Judge will be modified in the manner above mentioned and it is affirmed as regards the rest Parties should have their costs in all Courts in proportion to their success.

Z. K. *Appeal allowed.*

(3) 44 Ind. Cas. 77; 22 C. W. N. 128.
(4) 48 Ind. Cas. 669; 22 C. W. N. 800.
(5) 5 I. A. 18 at p. 27; 3 C. 397; 1 C. L. R. 369; 3 Suth. P. C. J. 480; 3 Sar. P. C. J. 771; 2 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 839 (P. C.).
(6) 9 B. 128; 5 Ind. Dec. (N. S.) 85.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS SECOND APPEAL No. 94 OF 1924

AND

CIVIL REVISION PETITION No. 803 OF 1924.

September 29, 1926.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

MUTHUKUMARASAMIA PILLAI—PETITIONER—APPELLANT

versus

MUTHUSAMI THEVAN—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 91, 92—Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale of property not belonging to judgment-debtor—Purchase by decree-holder—Application to cancel sale and issue fresh execution of decree—Limitation.

Under s. 51 (*b*) of the Civil Procedure Code an execution Court has authority and jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor for attachment and sale. [p. 523, col. 2.]

A Court sale carries no guarantee that the property sold is the property of the judgment-debtor and the auction-purchaser takes the risk and bears the loss if it is subsequently discovered that the property is not the property of the judgment-debtor. Therefore, an auction-sale of property which subsequently turns out not to belong to the judgment-debtor cannot be said to be void. [*ibid.*]

Where in such a case the decree-holder himself is the auction-purchaser and the decree is satisfied by the proceeds of the sale and the decree-holder subsequently discovers that the judgment-debtor was not the owner of the property and makes an application for cancellation of the sale and fresh execution of the decree, the application falls within the purview of r. 91 of O. XXI of the Civil Procedure Code and cannot be entertained if it is made more than thirty days after the sale. [p. 524, cols. 1 & 2.]

Appeal against the order of the Court of the Second Additional Subordinate Judge, Tinnevelly, dated the 8th of November, 1923, and made in A. S. No 52 of 1923 (A. S. No. 318 of 1923 on the file of the District Court, Tinnevelly), preferred against that of the Court of the District Munsif, Tenkasi, dated the 14th February,

1923 and made in E. P. No. 536 of 1922 (in S. C. S. No. 619 of 1915 on the file of the Court of the Subordinate Judge, Tinnevelly).

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Second Additional Subordinate Judge, Tinnevelly, dated the 8th of November, 1923, and made in A. S. No. 52 of 1923 (A. S. No. 318 of 1923 on the file of the District Court, Tinnevelly), preferred against that of the Court of the District Munsif, Tenkasi, dated the 14th February, 1923 and made in E P. No. 536 of 1922 (in S. C. S. No. 619 of 1915 on the file of the Court of the Subordinate Judge, Tinnevelly.

Mr. *P. N. Marthandam Pillai*, for the Appellant.

Mr. *R. Krishnaswami Iyengar*, for the Respondent.

JUDGMENT.—This Civil Miscellaneous Second Appeal is against the order of the lower Appellate Court declining to grant an execution application of the appellant under the following circumstances:—

The appellant obtained a decree against one Muthusami Thevan. In execution of that decree he attached certain property, brought it to sale and purchased it in Court-auction himself on 6th October, 1922. He was under the *bona fide* impression that the property belonged to his judgment-debtor, whereas it has now turned out that it really belonged to a *dayadi* of the judgment-debtor of the same name. When the Court sale was confirmed, satisfaction of the decree was recorded on 8th November, 1922. Appellant, having discovered his mistake on 18th December, 1922, applied to the executing Court to have the sale and the proceedings of the Court in satisfaction set aside, and applied for further execution by way of attachment and sale of the real property of the judgment-debtor. Both the lower Courts have held that the application is out of time, holding that the appellant cannot succeed unless he has the sale set aside under O XXI, r. 91, Civil Procedure Code, the limitation for which application is 30 days from the date of sale under Art. 166 of the Limitation Act.

The appellant's main contention is that the execution sale being *ex hypothesi* a sale of property which was not the judgment-debtor's property, is void and without jurisdiction, and, therefore, it is not necessary for him to set it aside at all. If this view is negatived, then he falls back on the argument that, as his present application is an ordinary execution application, the time limit for which is three years, it is not governed by the thirty days' limitation prescribed for the application under O. XXI, r. 91, Civil Procedure Code.

As to the first contention, we are clear that the sale is not a void one. The argument put forward is that the Court has no jurisdiction to sell in execution any property which is not the property of the judgment-debtor and s. 60, Civil Procedure Code, is called in aid. We do not think that is the proper section which gives the Court power to attach and sell property in execution of a decree. That is merely a section which distinguishes which species of a judgment-debtor's property may be sold in execution of a decree. The more proper section is s. 51 (*b*), which is general in its terms and empowers the Court on the application of the decree-holder, to attach and sell in execution any property. This section, of course, has to be interpreted with some common sense and does not mean that the Court is empowered to attach and sell property which it and all the parties know before the attachment to be not the property of the judgment-debtor. The common sense interpretation is that the Court has authority and jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor, for attachment and sale. If the contention of the appellant were accepted, it would mean that a Court in selling property in execution gives a guarantee that the property sold is the property of the judgment-debtor, which is opposed to one of the fundamental principles of Court sale. It has been invariably laid down in this country and elsewhere that a Court sale carries no guarantee that the property is the property of the judgment-debtor, and that the auction-purchaser takes the risk and bears the loss if it is subsequently discovered not to be the property of the judgment-debtor. There is, therefore, no warrant for the proposition that a sale by the Court of property which subsequently turns out not to belong to the judgment-debtor is void, and, in this view, it makes no difference that the auction-purchaser is the decree holder. The principle of *caveat emptor* will apply to the decree-holder auction-purchaser equally as to any

other auction-purchaser. The appellant cites a ruling in *Radha Kishun Lal* v. *Kashi Lal* (1) for the proposition that a decree-holder is in a more favourable position than a stranger auction-purchaser. But, if the decree is satisfied, the decree-holder is no longer in the position of a decree-holder, his status has altered into that of auction-purchaser. Suppose, for example, that he had to pay more for the property than the decree amount. He is not the decree-holder in respect of that sum and in the matter of any claim to refund of that amount on the sale being set aside, he is only in the position of an auction-purchaser and could not under the present law recover it unless he had applied within thirty days of the sale. We are not able to accept the distinction drawn in *Radha Kishun Lal* v. *Kashi Lal* (1). In fact, it is one of the decree-holder's duties to see that the property sold was the property of his judgment-debtor, and if he makes a mistake he must take the consequence. The law does not permit him to treat his sale as a void sale and ignore it and put in a further execution application as if it had never taken place. It cannot be reasonably contended that the question whether a Court has jurisdiction or not to sell the property rests on the problematic decision of a problematic claim, and that a Court which allows a claim to property sold thereby declares its own lack of jurisdiction in the proceedings of attachment and sale which led up to the claim proceeding. The logical result of that would be that the Court had no jurisdiction to decide the claim and, therefore, no jurisdiction to decide that it had no jurisdiction, a topsy-turvy result.

It follows then that, before appellant can again apply to execute the decree, which has been recorded as satisfied by the previous Court sale, he must have the sale set aside, the ground for the application being naturally that his judgment-debtor had no saleable interest in the property sold. To such an application O. XXI, r. 91 in terms applies and it must be put in within thirty days of the sale. Admittedly, appellant's application was not put in within that time. He says, however, that because his main relief sought for is further execution, he is entitled to a larger period of limitation for such a further execution application, and puts forward the analogy of a suit for possession by a person who cannot get possession unless he sets aside an adoption, in which case it has been held by the Privy Council that the limitation for the suit is not the lesser period for the suit for a declaratory decree that the adoption is invalid but the larger period of twelve years—*Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh* (2) and *Valaga Mangamma* v. *Bandlamudi Verayya* (3).

We can see no analogy between that case and the present. In the present case we are concerned with the processual law which obviously prohibits execution being taken out for a satisfied decree unless the proceedings which resulted in the record of satisfaction are set aside, and the same law says that such proceedings can only be set aside by an application within thirty days of the sale. Appellant cannot get round this limitation period by merely putting in a fresh execution application. The whole purpose of Art. 166 will be defeated if such a contention is upheld. When no application has been put in within the time fixed in r. 91, the sale is confirmed and becomes absolute under r. 92, and no one can disturb it on the grounds mentioned in r. 91.

The appellant relies strongly on a passage in a decision of the Privy Council in *Raja Thakur Barmha* v. *Jiban Ram Marwari* (4). In that case a share of a *mahal* had been proclaimed for sale subject to a mortgage and it was pleaded that, notwithstanding the words of the proclamation, the sale was not subject to the mortgage, since a correction had been published before the sale in the local Gazette. The Privy Council held that what was sold was what was proclaimed, and then remarked: "If by a mistake the wrong property was attached and sold, the only course was for the decree-holder to commence the execution proceedings over again." No question of the period of limitation within which this could be done, and no question whether the sale was a void sale and could be ignored, was raised in that case, and we do not,

(1) 76 Ind. Cas. 927; 2 Pat. 829; 1 Pat. L. R. 358; (1923) Pat. 342; 5 P. L. T. 345; A. I. R. 1924 Pat. 273.

(2) 33 I. A. 156; 28 A. 727; 10 C. W. N. 1065; 8 Bom. L. R. 722; 3 A. L. J. 695; 4 C. L. J. 405; 9 O. C. 377; 16 M. L. J. 440; 1 M. L. T. 265 (P. C.).

(3) 30 M. 308; 2 M. L. T. 178; 17 M. L. J. 182.

(4) 21 Ind. Cas. 936; 41 C. 590 at p. 600; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 26 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 118 (P. C.).

therefore, find it of any assistance. Nor does the case in *Sivarama* v. *Rama* (5) help. That turned on the language of s. 315 of the old Civil Procedure Code, which gave an auction-purchaser two chances of recovering his money if the judgment debtor had no saleable interest in the property sold, *viz*, a chance under s. 313 within thirty days before the confirmation of the sale, and another under s. 315 by application after the confirmation of the sale. But the latter remedy has been omitted in the present Code and, therefore, is no longer available. This is clearly pointed out in *Tirumalaisami Naidu* v. *Subramaniam Chettiar* (6), *Ram Saroop* v. *Dalpet Rai* (7) and *Habib-ud-din* v. *Hatim Mirza* (8). The ruling in *Ramineedi Venkata Appa Rao* v. *Lakkoju China Ayyanna* (9) was also governed by the provisions and principles of the old Civil Procedure Code. The other cases cited by the appellant seem to us to have no useful bearing on the matter.

Respondent contended before us that no Civil Miscellaneous Second Appeal lies. Even if it does, we consider that the lower Appellate Court was right and dismiss this appeal with costs. The Civil Revision Petition is also dismissed.

V. N. V. *Appeal and Petition dismissed.*

Z. K.

(5) 8 M. 99; 3 Ind. Dec. (N. s.) 70.
(6) 45 Ind. Cas. 109: 40 M. 1009.
(7) 58 Ind. Cas. 105; 43 A. 60; 18 A. L. J. 905; 2 U. P. L. R. (A.) 318.
(8) 86 Ind. Cas. 622; 6 Lah. 283; 1 Lah. Cas. 552; A. I. R. 1925 Lah. 467.
(9) 30 M. 209; 17 M. L. J. 194.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2178 OF 1924.

November 18, 1926.

Present :—Mr. Justice Cammiade.

JATINDRA NATH ROY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

INDU BHUSHAN BASU—DEFENDANT—RESPONDENT.

Landlord and tenant—Rent, suit for—Tenancy and rate of rent, admission of—Procedure—Question of title, decision of—Appeal, whether lies.

Where in a suit for rent the tenancy and the rate of rent are admitted and there is no plea of payment, the Court has no option in the matter except to decree the suit. It is not necessary for the Court in such a case to enter into the question as to what lands are comprised in the tenancy. Where, however, an Appellate Court does enter into that question in a suit for rent and dismisses the suit on the ground that the lands described in the plaint as comprised within the tenancy are not the properties of the plaintiff but the properties of the defendant, the decision of such question, although unnecessary for the purpose of deciding the suit, gives the plaintiff a right of appeal.

Appeal against the decree of the Officiating Subordinate Judge, Jessore, dated the 27th August, 1924, reversing that of the Munsif, First Court at Magwra, dated the 25th April, 1923.

Dr. *Radhabinode Pal*, for Babu *Prafulla Kamal Das*, for the Appellants.

Babu *Hemendra Chandra Sen*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiffs against the dismissal of a suit by the Court of Appeal below. The suit was for rent of a holding bearing an annual rental of Rs. 8-4-0 for the years 1325 to 1328. The total amount claimed excluding cess and damages comes to Rs. 34-0-6. The suit was decreed in the first Court but it was dismissed on appeal.

A preliminary objection has been taken to the hearing of this appeal on the ground that none of the questions which make the decision appealable have been decided by the Court of Appeal below. When we turn to the judgment of the lower Court we find that although the defendant admitted the tenancy and although he admitted the annual rental and there was no plea of payment by him, the learned Subordinate Judge dismissed the suit on the ground that the lands described in the plaint as comprised within the tenancy are not the properties of the plaintiff but are the properties of the defendant. As there is no dispute regarding the existence of the relationship of landlord and tenant or with regard to the amount of rent due, which are ordinarily the only two matters to be considered in a suit for rent, the Subordinate Judge went out of his way unnecessarily in considering what lands were or were not comprised in the tenancy. It is useless to contend that because the Subordinate Judge has decided this question unnecessarily, therefore, his judgment cannot be made appealable on account of the irrelevancy of the decision on the question of what lands are comprised in the tenancy. If he had not decided the question he must have necessarily decreed the suit and dismissed the appeal. Therefore, his decision

that the lands which are described in the plaint are the properties of the defendant and not the properties of the plaintiff gives the plaintiff the right of appeal. I, therefore, overrule the preliminary objection.

As regards the point of law arising in the case, as I have already said the rent being admitted, the tenancy being admitted and there being no plea of payment, the Court had no option in the matter and was bound to give a decree. It is not necessary for the Court to enter into the question of what lands are comprised in the tenancy.

The appeal is allowed. The decree of the Court below is set aside and the suit will be decreed with costs in all Courts with interest at per 6 cent. per annum until realization.

As the Courts below have disagreed on the subject of what lands are comprised in the tenancy that question will be left open between the parties.

Z. K. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND RENT APPEAL No. 21 OF 1926.

January 12, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

DAL CHAND—DEFENDANT—APPELLANT

versus

Musammat RAM PIARI AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Co-sharers—Suit against Lambardar—*Decree on basis of actual collection, legality of.*

It is open to the Courts in awarding a share of the profits of an estate in favour of a sharer as against a *Lambardar* to arrive at a conclusion upon the facts, that the *Lambardar* has collected more than he admits that he has collected and to give a share of the profits based upon the demands and not upon the basis of the collections recorded in the village papers. *Fateh Narain Das* v. *Abdul Rahman* (1), followed.

Appeal against the decision of the Officiating District Judge, Hardoi, dated the 24th February, 1926, modifying that of the Honorary Assistant Collector, First Class, Hardoi, dated the 18th May, 1925.

Mr. *Tulsi Prasad*, for the Appellant.

Mr. *J. K. Tondon*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for profits brought by two ladies plaintiffs-respondents, who are sharers in the village, against the defendant-appellant, who is *Lambardar* of the village. The suit was brought in a Revenue Court under the provisions of s. 108, cl. 15, Act XXII of 1886. The defence set up by the defendant appellant was in the main that the plaintiffs had collected their full share of the profits. The trial Court found upon the evidence that the plaintiffs had collected nothing, that the defendant-appellant had collected the rents in respect of the plaintiffs' share, that he had deliberately recorded in the village papers collections less than the collections which he had actually made, that he was in the habit of recording in the village papers collections less than he had actually made, that he kept books of account which he had not produced and that he had had full opportunity of collecting the rents in full. The trial Court, therefore, gave the plaintiffs-respondents a decree upon the basis of demands and not upon the basis of the collections recorded in the village papers. The learned District Judge, while disturbing the decree upon a minor point, accepted all these findings as correct.

The main point which we have to decide in the appeal before us is whether in second appeal we should disturb the decree on the ground that under the law the Courts below had no right to pass a decree upon the basis of demands in any circumstances or at any rate on the facts before them. The law upon the subject will be found in a large number of decisions of the late Judicial Commissioner's Court. These decisions have been re-considered to a certain extent by a Bench of this Court in *Fateh Narain Das* v. *Abdul Rahman* (1). At page 778* this decision laid down the following principle: "It is certainly open to the Courts in awarding a share of the profits of an estate in favour of a sharer as against a *Lambardar* to arrive at a conclusion upon the facts, that the *Lambardar* has collected more than he admits that he has collected, and to give a share of profits based upon such a finding." This is what

(1) 99 Ind. Cas. 217; 3 O. W. N. 775; A. I. R. 1926 Oudh 593; L. R. 8 A. (O.) 35.

*Page of 3 O. W. N.—[Ed

the Courts below have done here. They have found on the facts that the *Lambardar* has collected more than he admits that he has collected and have found further upon the facts that he has collected the full demand. These findings are legal findings based upon admissible evidence.

We do not find that the Honorary Assistant Collector, who tried the original suit, committed any error of procedure and we consider that he neither excluded any evidence improperly or admitted any evidence that he should not have admitted. We find that the decree has not awarded the plaintiff-respondents anything more than the amount which they claimed in their plaint. We, therefore, dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1174 OF 1924.
January 20, 1927.
Present:—Mr. Justice Iqbal Ahmad.

KAMTA PRASAD MISIR—DEFENDANT—APPELLANT
versus
BHULAI MISIR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Evidence Act (I of 1872), s. 115—Res judicata *between co-defendants—Estoppel—Prejudice, absence of, effect of.*

In order that a decision on a certain issue as between co-defendants may operate as *res judicata* in a subsequent suit in which those co-defendants are arrayed on opposite sides, it is necessary that there should be a conflict of interest between the two defendants, and a determination of the issue arising because of such conflict of interest should be necessary for awarding proper relief to the plaintiff in the suit. [p. 527, col. 1.]

Plaintiff made a gift of certain property in favour of the defendant. A suit was brought by a daughter and a daughter's son of the plaintiff for cancellation of the gift on the ground that the plaintiff was insane at the time when he made the gift. Both the plaintiff and the defendant were impleaded as defendants to that suit and successfully contested the suit. Subsequently a suit was instituted on behalf of the plaintiff by his wife to cancel the deed of gift on the same ground, namely, that the plaintiff was a lunatic:

Held, that the decision in the prior suit did not operate as *res judicata* in the subsequent suit in favour of the defendant and that the plaintiff was not estopped from proving his insanity in the subsequent suit. [p. 528, col. 2.]

Second appeal against the decree of the Subordinate Judge, Basti, dated the 7th of May, 1924.

Mr. *A. P. Pandey*, for the Appellant.
Mr. *Sankar Saran*, for the Respondent.

JUDGMENT.—This is a defendant's appeal and arises out of a suit brought by the plaintiff-respondent for recovery of possession of certain *zemindari* property by cancellation of a deed of gift dated the 15th of July, 1920, executed by the plaintiff in favour of the defendant. The plaintiff's case was that before, at the time, and ever since the date of the execution of the deed of gift the plaintiff was of unsound mind, and the defendant taking advantage of the plaintiff's unsoundness of mind fraudulently got the deed executed in his favour. The suit was brought by the plaintiff through his wife *Musammat* Pato as next friend of the plaintiff.

The defence to the suit was that the plaintiff was not of unsound mind and that the deed of gift was executed by the plaintiff while he was in full possession of his faculties and that the claim was barred by s. 11 of the Civil Procedure Code. The trial Court did not believe the allegation as to the plaintiff's unsoundness of mind and further held that the suit was barred by the principle of *res judicata* and dismissed the suit.

On appeal by the plaintiff the lower Appellate Court has held that the plaintiff was, at the time of the execution of the deed in question, of unsound mind and incapable of understanding its effect, and that the suit is not barred by the principle of *res judicata*, and on these findings has reversed the decree of the trial Court and has decreed the plaintiff's suit. Obviously the finding of the lower Appellate Court on the question of fact cannot be challenged in second appeal and has not been challenged by the learned Counsel. But the learned Counsel argues that the plaintiff was equitably estopped from maintaining the present suit. This argument is based on the following facts. Prior to the suit giving rise to the present appeal a suit was filed by *Musammat* Gajraji, daughter of, and by Mahabir, daughter

son of, the present plaintiff-respondent, for cancellation of this very deed of gift against the defendant-appellant on the very ground on which the validity of the deed has been challenged by the plaintiff-respondent in the present suit. In that suit *Musammat* Pato was the next friend of the two plaintiffs named above. Both the plaintiff respondent and the defendant-appellant of the present appeal were arrayed as co-defendants in that suit. That suit was numbered as Suit No. 874 of 1920. In that suit no guardian *ad litem* of the present plaintiff-respondent (Bhulai Misir) was appointed. Both the donor and the donee, that is the plaintiff-respondent and the defendant-appellant successfully contested that suit and that suit was dismissed. It is urged by the appellant's Counsel that, because the plea that is now being put forward by the plaintiff-respondent, was not put forward by him in the earlier suit in which he was a co-defendant with the donee, *viz.*, the present defendant-appellant, the plaintiff-respondent is not entitled to assail the validity of the deed of gift on the ground that he was of unsound mind at the time of the execution of that deed and in support of this contention reliance has been placed on the case of *Nallappa Reddi* v. *Vridhachala Reddi* (1). I am unable to agree with the contention of the learned Counsel for the defendant-appellant. The learned Counsel for the defendant appellant admits that the facts stated above do not invite the application of s. 11, Civil Procedure Code. It is further admitted by him that in order that a decision on a certain issue as between co-defendants may operate as *res judicata* in a subsequent suit in which those co-defendants are arrayed on opposite sides, it is necessary that there should be a conflict of interest between the two defendants, and a determination of the issue arising because of such conflict of interest should be necessary for awarding proper relief to the plaintiff in the suit, and that on the facts of the present case it is not open to him to argue that there was any such decision as between the co-defendants (donor and donee) of the former suit as to operate as *res judicata* in the present case. But as stated above he says that the plaintiff is equitably estopped from now alleging that he was of unsound mind at the time of the execution of the deed of gift. It is not said that because of any act, declaration or omission of the plaintiff-respondent, the defendant was prevented from putting forward any plea in the former suit that was open to him or that he was in any other way prejudiced. Indeed, the decision in the former case was in favour of the defendant appellant. The fact that the decision in the former case was in favour of the defendant-appellant is one of the facts that constitutes a distinguishing feature between the present case and the Madras case noted above. Moreover, the decision in the Madras case turned on the peculiar incidence of the relationship of the parties to a contract of indemnity, and no such relationship did exist between the present plaintiff-respondent and the defendant-appellant. As I have stated above, there is nothing to show that the defendant appellant in any way was led to change his position by the omission of the plaintiff-respondent in the former suit to attack the validity of the gift on the ground of his insanity and as such, in my judgment, the plaintiff was not estopped from maintaining the present suit.

It is needless to point out that on the findings arrived at by the lower Appellate Court there are no equities in favour of the defendant-appellant.

For the reasons given above, in my judgment, the decision of the lower Appellate Court is perfectly correct and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 25 Ind. Cas. 883; 37 M 270

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1774 OF 1926.
January 28, 1927.
Present:—Sir Shadi Lal, KT., Chief Justice.

EMPEROR—PETITIONER
versus
SARDARA SINGH—ACCUSED—RESPONDENT

Penal Code (Act XLV of 1860), s. 235—Counterfeiting of coins—Sentence.

A deterrent sentence should be passed for an offence connected with counterfeiting of coins.

Case reported by the Sessions Judge, Montgomery at Lahore.

REPORT.—The accused Sardara Singh has been convicted under s. 235, Indian Penal Code, of the offence of being in possession of instruments and material for the purpose of using the same for counterfeiting the King's coin, or knowing that it was intended to be used for that purpose. This conviction has been uphed by me on appeal, the other accused being acquitted.

The sentence awarded by the trial Court is one of one year's simple imprisonment, with a fine of Rs. 50. The reason given for awarding simple imprisonment is the youth of the accused. The prisoner's age is stated to be 23. This might be a reason for reducing the term of imprisonment, but is wholly inadequate for awarding simple imprisonment in place of rigorous imprisonment as punishment for such a serious offence.

GROUNDS. — Offences connected with counterfeit coins are detected with great difficulty and call for a deterrent sentence, the maximum provided in the section being ten years. I, therefore, recommend that the sentence be enhanced, at any rate to the extent of imposing rigorous imprisonment in place of simple imprisonment for the same term.

ORDER.—The prisoner Sardara Singh has been convicted under s. 235 of the Indian Penal Code of the offence of being in possession of instruments and material for the purpose of using the same for counterfeiting King's coin and has been sentenced to simple imprisonment for one year and a fine of Rs. 50. I have carefully considered the judgment of the trial Magistrate as well as that of the learned Sessions Judge, and I have no hesitation in holding that the conviction is fully justified.

As regards the punishment, I am of opinion that in view of the serious nature of the offence committed by the prisoner, the sentence imposed by the trial Magistrate is wholly inadequate. Accordingly I accept the recommendation made by the learned Sessions Judge and sentence the convict to rigorous imprisonment for one year in addition to the simple imprisonment already undergone. The sentence of fine and imprisonment in default of payment thereof shall stand.

R. L. *Sentence enhanced.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 162-B OF 1925.
October 14, 1926.
Present:—Mr. Kotval, O. J. C. and Mr. Prideaux, A. J. C.

JOSABALLI—APPLICANT
versus
AYUB KARIM KACHHI—NON-APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Forgery committed by person not party to proceedings—Court, whether can proceed under s. 476—Penal Code (Act XLV of 1860), s. 193.

Per *Prideaux A. J. C.*—A Court has power to sanction the prosecution of a person for forgery committed with respect to proceedings in Court, whether that person is a party to those proceedings or not. [p 531, col. 1.]

[Case-law discussed.]

An offence like forgery, committed in reference to and to support any party in civil or criminal proceedings, is really an offence against public justice. It is fabricating false evidence and would in any case be punishable under s. 193, Penal Code, and the Court can proceed against the person responsible under s. 476. [p. 530 col. 2.]

Criminal revision from an order of the Sessions Judge, West Berar, Akola, dated 29th August 1925, in Criminal Appeal No. 1 of 1924.

ORDER.

Prideaux, A. J. C.—*(February 5th, 1926.)*—There is a question in this case which, it seems to me, should be decided by a Bench of this Court. It is: "Whether s 195 (c) of the Criminal Procedure Code controls s. 476 of the same Code; or whether the two are to be read as sections independent of or merely supplementary of each other." The question is one of great importance and often arises.

The High Courts in India hold widely divergent views on this question. Allah-

abad, Patna and Bombay in one case hold one view. I may mention *Emperor* v. *Khushali Ram* (1), *Dwarka Prasad* v. *Makund Sarup* (2), *In re Bhau Vyankatesh Chakorkar* (3) and I. L. R. 1 Patna 298 *(sic)*. And in the case reported as *Narayan Shaligram* v. *Emperor* (4) I have followed Allahabad and Patna *(sic)*. On the other side, I may quote *Jadunandan Singh* v. *Emperor* (5), *In re Kallaru Ramalingam* (6), *Govinda Iyer* v. *Rex* (7), *In re Lakshmidas Lalji* (8) and *Guruswamy* v. *Ibrahim* (9).

There is also a question here as regards s. 193 (perjury) arising from the alleged forgery, which might well be decided by the Bench.

Forwarded to the Judicial Commissioner for favour of orders.

Messrs. *G. G. Hatwalne* and *J. R. Chandurkar*, for the Applicant.

Mr. *S. D. Cama*, for the Non-Applicant.

Mr. *G. P. Dick*, for the Crown.

OPINION.

Prideaux, A.J.C.—The question which I submitted for decision by a Bench is "whether s. 195 (c) of the Criminal Procedure Code controls s. 476 of the same Code; or whether the two are to be read as sections independent of or merely supplementary of each other."

The learned Counsel for the Crown supports the applicant in the present case, and contends that s. 476, Criminal Procedure Code, does not exclude cases in which witnesses are concerned. Section 476 of the Criminal Procedure Code was substituted by Act XVIII of 1923. Before the amendment I held in *Narayan Shaligram* v. *Emperor* (4) decided on 16th November, 1918, that in a case of forgery there was nothing to preclude a Judge from proceeding against the persons concerned with regard to forgery itself when the forgery has come to its notice in the course of a judicial proceeding. I further held that proceedings under s. 476 were not invalidated by the mere fact that the accused was neither a party nor a witness in the original suit. As far as perjury is concerned, s. 195, Criminal Procedure Code, makes it clear that when this offence is committed in, or in relation to, any proceeding in any Court, the person cannot be proceeded against except on the complaint in writing of such Court or of some other Court to which such Court is subordinate.

The difficulty is as regards cases of forgery committed by a person not a party to proceedings in the Court. In a case after the amendment of 1923, *In re Bhau Vyankatesh Chakorkar* (3) it was held that "in s. 195 (c) of the Criminal Procedure Code, the phrase 'a document produced or given in evidence,' means a document produced or given in evidence either by the party who is alleged to have committed the offence or by any one else." And it was held by the Allahabad High Court in *Dwarka Prasad* v. *Makund Sarup* (2) that there is nothing to prevent a Court from making a complaint under the ordinary law in respect of the offence under s. 471, Indian Penal Code, which is found to be committed either by a party or a witness. This case was also decided after the amendment. The Madras High Court held different views at different times. The Rangoon High Court in *Guruswamy* v. *Abrahim* (9) holds that it is not open to a Court to make a complaint under s. 476 of the Code of Criminal Procedure in respect of any person other than persons who are parties to the proceedings before it.

It seems to me that an offence like forgery, committed in reference to and to support any party in civil or criminal proceedings, is really an offence against public justice. It is fabricating false evidence and would, in any case, be punishable under s. 193, Indian Penal Code; and the Court can proceed against the person responsible under s. 476. But I do not think that the Legislature can have intended to prevent a Court from proceeding for an offence of forgery against the person committing it merely because he is not a party to the proceeding. It seems to me undesirable that proceedings for this class of offence should be restricted to those started by

(1) 43 Ind. Cas. 436; 40 A. 116; 15 A. L. J. 912; 19 Cr. L J. 148.

(2) 90 Ind. Cas. 290; A. I. R. 1926 All. 21; L. R. 6 A. 630 Civ. and 213 Cr.; 26 Cr. L. J. 1506; 24 A. L. J. 122.

(3) 91 Ind. Cas. 245; 49 B. 608; 27 Bom. L. R. 607; A. I. R. 1925 Bom. 433; 27 Cr. L. J. 69.

(4) 51 Ind. Cas. 202; 20 Cr. L. J. 426.

(5) 4 Ind. Cas. 710; 37 C. 250; 10 C. L. J. 564; 14 C. W. N. 330; 11 Cr. L. J. 37.

(6) 31 Ind. Cas. 653; 40 M. 100; 18 M. L. T. 488; 2 L. W. 1135; 16 Cr. L. J. 797.

(7) 50 Ind. Cas. 824; 42 M. 540; 9 L. W. 422; 36 M. L. J. 448; 20 Cr. L. J. 344; (1919) M. W. N. 459; 26 M. L. T. 92 (F. B.).

(8) 32 B. 184; 10 Bom. L. R. 28; 7 Cr. L. J. 35; 3 M. L. T. 116.

(9) 84 Ind. Cas. 439; 2 R. 374; A. I. R. 1925 Rang. 26; 26 Cr. L. J. 295.

private persons. I would hold that a Court has power to sanction the prosecution of a person for forgery committed with respect to proceedings in Court, whether that person is a party to those proceedings or not. Looking to the length of time that has lapsed and to the present application being to satisfy a private grudge and not to further the ends of justice and to the improbability of establishing the case, if true, I think the Sessions Judge was right in directing the withdrawal of the complaint and I would not interfere with that order.

Kotval, O. J. C.—In view of the conclusion of my learned colleague, with which I respectfully agree, that it is not desirable to make the complaint, it seems unnecessary to enter into a discussion of the question of law involved.

G. R. D. *Order accordingly.*

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 333 OF 1926.

September 15, 1926.

Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

In re MUTHAYA THEVAN *alias* RAMASAMI THEVAN AND ANOTHER—PRISONERS—APPELLANTS.

Criminal trial—Duty of prosecution—Prosecution, whether bound to examine all witnesses alleged to know about offence—Omission to examine in Sessions witnesses examined before Committing Court—Trial by Jury—Misdirection—Omission to mention vital points affecting credibility of prosecution witnesses, effect of.

It is not the duty of a prosecution to adopt an attitude of non-committal to any version of the case and to examine all witnesses alleged to have known something about the offence, whether or not they will support the prosecution case and whether or not the prosecution regards them as true or false. The prosecution ought to put forward a definite case and refrain from calling witnesses whom it regards as false or unnecessary. [p. 532, cols. 1 & 2.]

Emperor v. *Reed* (2), *Queen-Empress* v. *Durga* (3), *Doraiswami Udayan* v. *Emperor* (4), followed.

If witnesses have been examined in the committing Court who have not given what the prosecution regards as true evidence, it is not the duty of the prosecution to examine them in the Sessions Court. [*ibid.*].

Where in a trial by Jury a point has not been put in evidence before the Jury it is not the duty of the Sessions Judge to comment upon it in his charge. [p. 533, col. 2.]

It is the duty of the prosecution to put forward the earliest information in the case, and if it does not do so the defence is entitled to ask the Jury to draw adverse inference. [p. 533, col. 2.]

Omission to draw the attention of the Jury to matters which vitally affect the trustworthiness of some of the important witnesses amounts to a misdirection of the Jury. [p. 534, col. 1.]

Criminal appeal against an order of the Court of the Session of the Tinnevelly Division, in Case No. 35 of the Calendar for 1926 (before the Assistant Sessions Judge.

Mr. *K. S. Jayarama Iyer*, for the Appellants.

The Public Prosecutor, for the Crown.

JUDGMENT.—This appeal is by two persons convicted by a Jury by a majority of 4 to 1 of offences of house-breaking by night, robbery with hurt, and against one of them grievous hurt in committing robbery. The learned Vakil for the appellants is satisfied with the major portion of the charge to the Jury, which in fact was evidently a summing up for an acquittal. He, however, put forward three points for the consideration of this Court which will be better understood if a slight consideration of the details of the case is set out.

The general prosecution case was that on the night of 7th January, 1926, P. W. No. 1 and his family were attacked by robbers, of whom the appellants were two, who inflicted hurt on them and carried off a large wooden box belonging to P. W. No. 1's wife. In the committing Court it was sought to connect the appellants with the crime by evidence that in the box stolen were certain jewels which had been pledged with P. W. No. 1 and which had been recovered from the appellants, and witnesses to identify the jewels were called and examined. They, however, did not in that Court support the prosecution, but stated that they could not identify the jewels. When the case came up to the Sessions Court, these witnesses were dispensed with by the Public Prosecutor and not examined, and one other witness, who had been put forward in the committing Court as an eye-witness but had deposed that he had not heard about the robbery, was also dispensed with and not examined. Further, in the Sessions Court the first complaint of P. W. No. 1 made to the Village Munsif through P. W. No. 5, was not filed, and in it we understand that the names of certain wit-

nesses as eye-witnesses to the robbery are given, of whom one has not been examined at all even in the committing Court, and one, whom we have mentioned above, was examined in the committing Court, but dispensed with in the Sessions Court. The contentions for the appellant are, first, that it is a misdirection by the lower Court in that it did not insist on the prosecution examining all the witnesses who could have given information on the subject of the robbery, secondly, that it is a misdirection in that it did not tell the Jury that a number of witnesses examined in the committing Court for the prosecution had not given their support to the prosecution, and, thirdly, that it is a misdirection not to have told the Jury that the failure of the prosecution to file the original complaint justified them in inferring that that complaint, if filed, would not support the prosecution case.

A few general remarks on points Nos. 1 and 2 may be made. An extreme position has no, doubt, been taken up by some Courts that it is the duty of a prosecution to adopt an attitude of non-committal to any version of the case and to examine all witnesses alleged to have known something about the offence; whether or not they will support the prosecution case and whether or not the prosecution regards them as true or false. This position we are not prepared to adopt. For one thing, we regard it as unfair to the accused that the prosecution should be allowed to put forward a nabulous case which can be shaped as the trial goes on. Again, the result would be in our view to place the case wholly in a false light. It would compel the prosecution to put into the witness-box witnesses whom it regards as false and as prepared to mislead the Court as to the real truth, which witnesses it has no chance of cross-examining and, therefore, no chance of discrediting. We say this because it is clear that, if the prosecution attitude is non-committal, the Court could not treat such witnesses as "hostile" to the prosecution. The evidence of such witnesses, therefore, would stand untested, unshaken, and the result would be that the prosecution would become a farce, since the true evidence if it survived the test of cross-examination would be negatived by the false evidence which would not have been tested at all. If, therefore, witnesses have been examined in the committing Court who have not given what the prosecution regards as true evidence, we do not consider it the duty of the prosecution to examine them in the Sessions Court. It is always open in this country to the Court itself to call and examine any of them and always open to the defence to move the Court to do so, so that there is no fear of a failure of justice because the prosecution does not examine them. If we pursue the contention to its logical conclusion, it will follow that, when an accused has examined defence witnesses in the committing Court, who profess some knowledge of the matter under trial, it is the duty of the prosecution to examine these in the Sessions Court, as witnesses knowing something about the case. The Court would probably allow these to be treated as "hostile" to the prosecution. We should then have the spectacle of the prosecution examining and cross-examining in order to discredit in advance witnesses whom the defence wishes to examine in its favour, a procedure which this Bench has condemned in strong terms in *In re Biswanath Das* (1). The only procedure which is fair to both parties is for the prosecution to put forward a definite case and to refrain from calling witnesses whom it regards as false or unnecessary.

This view is supported by the rulings reported in *Emperor* v. *Reed* (2), and the Full Bench in *Queen-Empress* v. *Durga* (3) and in a ruling of this Court reported in *Doraiswami Udayan* v. *Emperor* (4). We are not prepared to accept the view taken in *Queen-Empress* v. *Ram Sahai Lall* (5). The ruling in *Ram Ranjan Roy* v. *Emperor* (6) is not strictly in point. There, there were two admitted eye-witnesses who had not been called and they had not even been examined in the committing Court, so that the Public Prosecutor could not say that they would not give true evidence. That case only lays down that the Public Prosecutor is bound to put before the Court the testimony of "all

(1) 100 Ind. Cas. 365.

(2) 69 Ind. Cas. 630; 49 C. 277; A. I. R. 1922 Cal. 461; 23 Cr. L. J. 742.

(3) 16 A. 84; A. W. N. (1894) 7; 8 Ind. Dec. (N. S.) 55 (F. B.).

(4) 75 Ind. Cas. 987; (1923) M. W. N. 782; 45 M. L. J. 846; 33 M. L. T. 213; 25 Cr. L. J. 75; A. I. R. 1924 Mad. 239.

(5) 10 C. 1070; 5 Ind. Dec. (N. S.) 715.

(6) 27 Ind. Cas. 554; 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170.

the available eye-witnesses". But the witnesses dispensed with in the present case are not eye-witnesses, but witnesses who say they know nothing about the robbery. It is obviously not the duty of the Public Prosecutor to put before the Court a lot of witnesses who say they know nothing about the offence. If the complainant says that these were eye-witnesses, that no doubt would re-act on the complainant's evidence, but not on the case as a whole, and this aspect of the case will be dealt with later. There is another ruling in the same Volume of the Calcutta High Court Reports *Amritalal Hazra* v. *Emperor* (7) which simply repeats that ruling laid down in the earlier case. In the case reported in *Tenaram Mondal* v. *Emperor* (8) the learned Judges held that where witnesses named as eye-witnesses in the original complaint were not examined it was a misdirection not to tell the Jury that they could presume that the evidence of these witnesses would be unfavourable to the prosecution. With due respect we are not prepared to go so far unless it has been elicited *in evidence* that these persons were cited as actual and undoubted eye witnesses, and reasons were elicited *in the evidence* why they had not been called and these reasons were not satisfactory reasons. Unless reasons are elicited, it may be that there are perfectly good reasons for not examining these persons, they may be dead or ill or absent. It would in our view, therefore, be improper to tell the Jury that they were entitled to draw inferences adverse to the prosecution unless *in evidence* it appears that no satisfactory reasons for not examining them are forthcoming.

As to the first contention for the appellants then, we hold that it is not part of the duty of the prosecution to examine witnesses whom it regards as false or unnecessary. It is always open to the defence to elicit in evidence why witnesses alleged to have some knowledge of the offence have not been examined and to comment unfavourably on the reasons advanced if they are not satisfactory. On point one, therefore, we hold there was no misdirection.

(7) 29 Ind. Cas. 513; 42 C. 957; 21 C. L. J. 331; 16 Cr. L. J. 497; 19 C. W. N. 676.

(8) 61 Ind. Cas. 1003; 25 C. W. N. 142; 33 C. L. J. 180; 22 Cr. L. J. 475.

As to point 2 we cannot say that it is the duty of the Court to inform the Jury that several witnesses in the committing Court examined for the prosecution did not support the prosecution case. These witnesses were not before the Jury so that the Jury could decide for themselves whether their evidence was true or false, and to ask the Jury to assume that their evidence in the committing Court was true, which is what the contention amounts to, would be very improper. Further, the defence did not choose to elicit this point from any witness and, therefore, it is not *in evidence*. We conceive it to be no part of the Judge's duty to put to the Jury matters which are not in evidence. It was a simple thing for the defence to have elicited the fact from P. W. No. 1 or any other witness, and, if the defence in the Sessions Court, which was in the hands of a competent Vakil, did not think it advisable to elicit his fact, the Judge would certainly be going out of his way to elicit it unless he himself thought that it was a matter of importance for the Jury to know, and, if he did not think, then he would have elicited it in the evidence. It was, therefore, a matter purely for the Judge's discretion whether he allowed such a matter to be put in evidence or not, and the fundamental principle must be that where a point has not been put *in evidence* before the Jury it is not the duty of the learned Judge to comment upon it in his charge. We hold there is, therefore, no misdirection on this point.

As to the third point we think it is more important. It is the obvious duty of the prosecution to put forward the earliest information in the case, and if it does not do so the defence is entitled to ask the Jury to draw adverse inference. In this case a curious procedure has been adopted. The person who made the earliest complaint P. W. No. 5 was only tendered for cross-examination and the Village Munsif to whom the complaint was made was not examined at all. Certainly here was a matter for adverse comment, but the Judge has merely passed over the matter with a casual remark that the complaint has not been filed. We think this point should have been put to the Jury in much stronger fashion. When the prosecution does not choose to file P. W. No. 1's complaint that omission will re act strongly on the credibility of his present story and that should

have been pointed out to the Jury. Had the complaint been filed, the Judge should have gone on to say that P. W. No. 1 cited in it as eye-witnessess several persons who have not been examined, and that that was another point for the Jury to consider in deciding on the credibility of P. W. No. 1.

The fact that witnesses cited in the *charge-sheet* as eye-witnesses were not examined is to our minds unimportant, and the defence could not claim that the Judge must put the charge-sheet to the Jury as if it was evidence. If the defence wanted to comment on statements in the charge-sheet it should have elicited appropriate facts from the investigating officer when he was in the witness-box and thus secured that these facts were put in evidence.

Another point of some importance which the Judge has not put to the Jury is that P. W. No. 4 who deposed that he saw the thieves escaping with the box and knew them, did not mention their names to the Sub-Inspector when examined the next day. On this point and the omission to file the complaint, points which vitally affect the trustworthiness of two out of four direct eye-witnesses to the crime, we think there has been a serious omission of important matters which amounts to a misdirection, and that the Jury was, therefore, not properly charged. We must, therefore, allow this appeal.

In the circumstances of the cases considering that the learned Judge was evidently summing up for an acquittal we do not think that this is a case for ordering a re-trial. The conviction of appellants and the sentence passed on them are cancelled. The appellants will be set at liberty.

V. N. V. *Conviction set aside.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 649 OF 1926.
CRIMINAL REVISION PETITION No. 649 OF 1926.
October 7, 1926.
Present:—Mr. Justice Curgenven.
In re MENNAKANTI ROSAYYA AND OTHERS—ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 16—Bench of Magistrates—President voting against finding of guilt, whether incompetent to give casting vote on question of sentence

The fact that the President of a Bench of Magistrates was among those who thought the accused were not guilty, does not render him incompetent to vote on the question of sentence, on the accused being found guilty by a majority of the Bench.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the Court of the First Class Bench of Magistrates of Narasaraopet in Summary Trial No. 671 of 1925.

Messrs. *V. L. Ethiraj* and *A. S. Sivakaminathan*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The fact that the President of the Bench was among those who thought the accused were not guilty was no reason why on their being found guilty by a majority of the Bench, he should not vote on the question of sentence. That being so, his casting vote settled the sentence at Rs. 25 instead of Rs. 10 and so far as I can see the procedure in doing so was perfectly legal. The criminal revision case is dismissed.

V. N. V. *Revision dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 445 OF 1926.
December 8, 1926.
Present:—Mr. Justice Cuming and Mr. Justice Gregory.
MONOHAR ALI—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—False evidence—Evidence quite immaterial—Complaint not advisable.

When a false statement made by a witness is clearly immaterial and nothing hinges on it, the case is not a fit one for making a complaint under s. 476, Criminal Procedure Code. [p. 535, col. 1.]

Babus *Jitendra Kumar Sen Gupta* and *Raj Kumar Chakravarti*, for the Accused.

Mr. *Khundkar*, for the Respondent.

JUDGMENT.—This is a complaint made by the Sessions Judge of Noakhali under s. 476, Criminal Procedure Code, against one Monohar Ali on the ground that this person gave false evidence in his Court. In his complaint the learned Judge states that Monohar appears to have given false evidence before him in the Sessions Case No. 1 of April, 1926, having made

the following statement "I know Golam Rahaman, son of Idris constable's sister. He married P. W. Monu *Chowkidar's* sister now dead". The learned Judge is of opinion that this statement that "Monu *Chowkidar's* sister now dead" is false because it was contradicted by Manu *Chowkidar* himself. He states that his sister is not dead but has been divorced and is still living. It may here be stated that the case in which this false evidence is alleged to have been given was a case of theft brought against Noab Ali by one Nazir Ahmed. It was alleged in that case that Noab Ali had entered Nazir Ahmed's house and stolen a number of articles. Mr. Khundkar, the Counsel for the Crown, admits that whether Monu *Chowkidar's* sister was alive or whether she was dead had nothing whatever to do with the case and nothing in the case turned upon it. Obviously, therefore, whether she was alive or dead made no difference whatever in the case. If the false statement made is clearly immaterial and if nothing hinges on it then clearly this is not a fit case for making a complaint for the prosecution of the witness.

The result is we must order that this complaint should be withdrawn.

A. N. A. *Order accordingly.*

OUDH CHIEF COURT.

CRIMINAL REVISION No. 12 OF 1927.

January 26, 1927.

Present:—Sir Louis Stuart KT., Chief Judge.

RAGHUPAT SINGH—ACCUSED—APPLICANT

versus

EMPEROR THROUGH MATHURA SINGH—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 497, 498—Enticing married woman—Marriage, nature of evidence necessary to prove—Precedents as to sufficiency of evidence, value of—Evidence Act (I of 1872), s. 50.

A Court, under the provisions of s. 50 of the Evidence Act, while not directed to exclude evidence of opinion as expressed by conduct to prove a legal marriage is directed not to base a finding that such a marriage has taken place upon the evidence of opinion alone. Outside that, a Court is at perfect liberty to arrive at a decision as to whether a legal marriage is in existence upon all relevant and admissible evidence, which is placed before it in the due course of law, and will decide upon such evidence whether such a marriage is or is not proved, when after considering the matter before it, it either believes it to exist or considers existence so probable that a prudent man ought, in the circumstances of a particular case, to act upon the supposition that it does exist. [p. 535, col. 2; p. 536, col. 1.]

It is not usually profitable for a Court in dealing with evidence in one case to endeavour to obtain much in the way of guidance from the way in which another Court dealt with different evidence in another case. [p. 535, col 2.]

Application for revision against an order of the Sessions Judge, Fyzabad, dated 12th January, 1927, upholding that of the Magistrate First Class, Fyzabad, dated 22nd January 1926.

Mr. *Niamat Ullah*, for the Applicant.

JUDGMENT.—In this application for revision it is urged that Raghupat Singh, who has been convicted of enticing away a married woman and sentenced under the provision of s. 498 Indian Penal Code, has been wrongly convicted because there is not sufficient evidence in law to prove the marriage of the woman. The evidence to prove the marriage of the woman is the evidence of her father-in-law, the evidence of herself and the evidence of the Headman of the village. Both the father-in-law and the Headman were present at the ceremony of marriage. It is urged by the learned Counsel, who presents the application, that in view of the decisions in *Empress* v. *Pitambur Singh* (1), *Empress of India* v. *Kallu* (2), *Queen-Empress* v. *Pirthi* (3) and *Emperor* v. *Phikku* (4), this evidence is not sufficient to support in a criminal case the fact that the marriage took place. Reference has been made to the provisions of s. 50 of the Indian Evidence Act. In my opinion it is not usually profitable for a Court in dealing with evidence in one case to endeavour to obtain much in the way of guidance from the way in which another Court dealt with different evidence in another case. It is, of course, perfectly clear that in a prosecution under s. 497 or s. 498 of the Indian Penal Code it must be proved to the satisfaction of the Court that there is in existence a legal marriage before conviction can take place and a Court, under the provisions of s. 50 of the Indian Evidence Act, while not directed to exclude evidence of opinion as expressed by conduct to

(1) 5 C. 566; 5 C. L. R. 597; 3 Shome L. R. Cr. R 13; 2 Ind. Dec. (N. S.) 968.

(2) 5 A. 233; A. W. N. (1883) 1; 3 Ind. Dec. (N. S.) 205.

(3) 3 O. C. 342.

(4) 89 Ind. Cas 464; 2 O. W. N. 586; 26 Cr. L. J. 1376; A. I. R. 1925 Oudh 701.

prove such a marriage, is directed not to base a finding that such a marriage has taken place upon the evidence of opinion alone. Outside that, a Court is at perfect liberty to arrive at a decision as to whether a legal marriage is in existence upon all relevant and admissible evidence, which is placed before in the due course of law, and will decide upon such evidence whether such a marriage is or is not proved, when after considering the matter before it, it either believes it to exist or considers existence so probable that a prudent man ought, in the circumstances of a particular case, to act upon the supposition that it does exist. Evidence which will satisfy one Court may not satisfy another, and any attempt to lay down a provision that such evidence as does not satisfy a particular Court shall be insufficient in the future to prove a similar fact before any other Court is to my mind an attempt to make law rather than interpret it. Here there is evidence of two eye-witnesses and the woman herself to the effect that she married the complainant, and that the marriage is still in existence, and, furthermore, there is the somewhat striking point that the applicant himself admits that she is a married woman; but in spite of these facts it is suggested that in view of the opinions of the learned Judges, who were parties to the previous decisions the conviction should be set aside. I am unable to consider that their views are in any way a guide in this case. I see no reason to interfere either upon the ground of sentence or upon any other point. I, therefore, reject this application.

G. H. *Application rejected.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1212 OF 1926.
January 24, 1927.

Present :—Mr. Justice Addison.

QAIMI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 75, 379, 419—Previous conviction for theft—Subsequent conviction for false personation—Enhancement of sentence.

Previous convictions for theft and burglary cannot be taken into account for enhancing the sentence, under s. 75, Penal Code, where the subsequent offence committed by the accused is cheating by personation falling under s. 419, Penal Code.

Appeal from an order of the Sessions Judge, Shahpur at Sargodha, dated the 3rd September, 1926.

Mr. *Din Diayal Kapur*, for the Government Advocate, for the Crown.

JUDGMENT.—The appellant pleaded guilty to a charge under s. 419, Indian Penal Code, and was sentenced to seven years' rigorous imprisonment under that section, read with s. 75 of the Indian Penal Code. His grounds of appeal, which were sent from Jail, are to the effect that he was drunk when he represented as a witness for the defence in a particular case that he was another person. It has been clearly established that he did falsely represent himself to be another person when giving evidence for an accused in a particular case, and he was properly convicted under s. 419, Indian Penal Code, an offence to which he pleaded guilty. I maintain his conviction.

He has been previously convicted as follows:

(1) he was sentenced to six months' rigorous imprisonment on the 17th of March, 1915, under s. 457, Indian Penal Code,

(2) he was sentenced to two years' rigorous imprisonment on the 9th of December, 1918, under s. 380, Indian Penal Code, and

(3) he was sentenced to two years' rigorous imprisonment and a fine of Rs. 300 on the 31st January, 1921, under s. 429, Indian Penal Code.

It seems somewhat anomalous that previous convictions for theft and burglary should be taken into account in increasing his sentence in the present case where what he did was to appear in Court and falsely represent himself to be another person when he was giving evidence on behalf of a particular accused. The maximum sentence under s. 419, Indian Penal Code, standing by itself, is three years' rigorous imprisonment. In the circumstances I accept the appeal to the extent of reducing the sentence under s. 419/75, Indian Penal Code, to four years' rigorous imprisonment.

R. L. *Sentence reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 635 OF 1926.

November 10, 1926.

Present:—Mr. Justice Iqbal Ahmad.

NAZIR AHMAD—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 114, 330—Stimulating commission of offence by remarks and suggestions—Abetment—'Instigation'.

While some persons were voluntarily causing hurt to another, the accused who was standing by expressed his approval of the conduct of the assailants and suggested that the victim should be given a sound beating. It was found that blows were inflicted after the accused's remarks:

Held, that the accused stimulated the commission of the offence and, therefore, was guilty of abetment.

Instigation necessarily connotes some active suggestion or support or stimulation to the commission of the act itself.

Appeal from an order of the Sessions Judge, Kumaon.

Mr. *L. M. Roy*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The applicant, Nazir Ahmad, was convicted under s. 330 read with section 114 of the Indian Penal Code by the Assistant Sessions Judge of Pilibhit and was sentenced to six months' rigorous imprisonment and was further ordered to pay a fine of Rs. 500.

The case against him was that when Nisar Husain, Rahim Baksh and Nishana were maltreating the complainant Dori for the purpose of committing extortion, he tacitly, if not actively instigated the commission of the offence by those persons, by expressing approval of their conduct in maltreating a tenant and by suggesting that the tenants having lost their heads, they should be given a sound beating. The point argued before me by the learned Counsel for the applicant is that the facts disclosed by the evidence of the prosecution witnesses with regard to the part taken by Nazir Ahmad do not constitute the offence of which he has been convicted. It is argued that the remark of Nazir Ahmad to the effect, that tenants ought to be beaten, was a mere expression of an opinion approving the actions of the persons who were actually engaged in beating Dori and did not in any sense amount to an instigation by him for the commission of the offence of extortion. I find myself unable to agree with this contention. It has been found by the learned Sessions Judge that blows were inflicted after Nazir Ahmad made the remarks noted above. As was observed in the case of *Raghunath Dass* v. *Emperor* (1), "instigation necessarily connotes some active suggestion, or support or stimulation to the commission of the act itself". I am not, after hearing the evidence of the prosecution witness, relating to the part played by Nazir Ahmad, and after going through the observations of the learned Sessions Judge on this point, prepared to hold that the learned Sessions Judge was wrong in coming to the conclusion that by the remarks that Nazir Ahmad made on that particular occasion he did not stimulate the commission of the offence by the applicants in the connected case, and as such the conviction of Nazir Ahmad must stand.

But at the same time I cannot overlook the fact that it is only technically that Nazir Ahmad is being held guilty of the offence for which he has been convicted. There is nothing to show, that when he uttered the remarks noted in the judgment of the Court below, he ever intended thereby to induce Nisar Husain and other to further beat the complainant. In this view, I think that a sentence of one month's rigorous imprisonment would meet the ends of justice in this case. Accordingly I reduce the sentence passed on Nazir Ahmad from six months' rigorous imprisonment to one month's rigorous imprisonment. The fine imposed on Nazir Ahmad, if paid, will be refunded to him.

A. N. A. *Sentence reduced.*

(1) 54 Ind. Cas. 997; 5 P. L. J. 129; 1 P. L. T. 60; (1920) Pat. 76; 21 Cr. L. J. 213.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NOS. 615 AND 700 OF 1926.

CRIMINAL REVISION PETITION NOS. 508 AND 585 OF 1926.

December 2, 1926.

Present:—Mr. Justice Wallace.

DR. *Mir* ANWARUDDIN—COMPLAINANT—PETITIONER

versus

FATHIM BAI ABIDIN AND ANOTHER—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499, Excep. 9—Defamation—Privilege of Advocate—Presumption of good faith—Malice, effect of.

When a lawyer is acting in the course of his professional duties and is thus compelled, subject to

the disciplinary action of the Court, to put forward everything which may assist his client, good faith is to be presumed; bad faith is not to be assumed merely because a statement by him is *prima facie* defamatory, but there must be some independent allegation and proof of private malice from which in the circumstances of the case the Court considers itself justified in inferring that the statement was not made because it was necessary in the interests of the client but that the occasion was wantonly seized as an opportunity to vent private malice. [p. 539, col. 1.]

Even in cases where some private malice is gratified by the publication of the statement, if such publication was imperatively called for in the interests of his duty to his client, the presence of such malice will not negative the presumption of good faith. [p. 539, col. 2.]

A Vakil appearing for the defence in an action for defamation, in the course of his argument made statements in Court, oral and written, to the effect that the defamatory statement was in substance true and had been set out as a fact in a reported judgment of the High Court in certain proceedings for professional misconduct against the Advocate. On a charge of defamation against the Vakil and his client:

Held (1) that, in the absence of anything to show that the client instructed the Vakil in the definite terms used by him in his argument, the client was not guilty of any offence; [*ibid.*]

(2) that the Vakil made the statement in good faith and came within the 9th Exception to s. 499, Penal Code, inasmuch as the truth of the statement was an essential element of the defence and the Vakil would have been gravely lacking in his duty to his client if, when he had its truth definitely set out in a public law report, he omitted to bring that to the notice of the Court before whom he was arguing. [*ibid.*]

Petitions, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Chief Presidency Magistrate, Egmore, dated 22nd July, 1926, and 29th July, 1926, and passed in Application No. 2618 of 1926 and the order of the said Court, dated 30th July, 1926, 12th August, 1926, 13th August, 1926, and 24th August, 1926, and passed in Application No. 1770 of 1926.

Mr. *V. L. Ethiraj*, for the Petitioner.

Mr. *K. P. Krishnan Menon*, for the Crown.

ORDER.—These are two petitions to revise the orders of the Chief Presidency Magistrate dismissing under s. 203 of the Criminal Procedure Code two complaints by the petitioner for defamation. The counter-petitioner in Criminal Revision Case No. 700 is a Vakil of this Court. The petitioner, who is an Advocate of this Court, was prosecuting in his own name two cases of defamation, one against Murad Ali and one against Fathim Bai Abidin, the statements complained of being both of the same nature, to the effect that the complainant had infected his wife with venereal disease. In the course of his argument for the defence in Murad Ali's case his Vakil, the counter-petitioner in Case No. 700, made an oral statement that the defamatory statement was in substance true and had been set out as a fact in a judgment of this Court reported in *In the matter of an Advocate of the High Court* (1). In the course of his argument for the defence in the other case, the same Vakil put in to the Magistrate written notes of defence arguments which contained the same statement. The petitioner charged the Vakil for defamation on the footing of this oral statement and these written notes of argument, and charged also the accused in the 'notes of argument' case for defamation in that she had instructed her Vakil to publish in his argument for defence the defamatory matter. These complaints have been dismissed and the petitioner comes up in revision.

The second Case No. 615 of 1926 may be shortly disposed of There is no evidence to show what the instructions of the lady to her Vakil were and this Court cannot assume against her that she instructed him in the definite terms used by the Vakil in his argument. That complaint was, therefore, rightly dismissed and I dismiss Criminal Revision Case No. 615.

As to case No. 700, the Magistrate has dismissed that complaint mainly on his view of the law as it stands at present that a complaint for defamation against a lawyer for matters uttered in Court in the course of his professional duties cannot be entertained. In an early Full Bench case in this Court *Sullivan* v. *Norton* (2), it was laid down that such utterances by a lawyer in the course of his professional duties and required by his duty to his client are absolutely privileged. This Full Bench ruling has not been overruled but undoubtedly another Full Bench decision in *Tiruvengada Mudali* v. *Tripurasundari Ammal* (3), though not referring to this Full Bench case, has doubted the correctness of the application to criminal law in India of the English

(1) 76 Ind. Cas. 873; 18 L. W. 823; 45 M. L. J. 639; 46 M. 903; 25 Cr. L. J. 281; A. I. R. 1924 Mad. 265; 33 M. L. T. 110 (F. B.).

(2) 10 M. 28; 3 Ind. Dec. (N. S.) 770 (F. B.).

(3) 96 Ind. Cas. 978; 51 M. L. J. 112; (1926) M. W. N. 606; 49 M. 728; 27 Cr. L. J. 1026; A. I. R. 1926 Mad. 906; 25 L. W. 207.

Common Law doctrine of absolute privilege. If I may say so with respect, I share that doubt and am of opinion that the Indian law on the subject is to be found within the four corners of the Indian Penal Code. I am, however, sitting as a Single Judge, bound by the *Sullivan* v. *Norton* (2), case which has not been overruled and have two alternative courses open to me, either to dismiss the petition on the ground that it is covered by the Full Bench case or to refer the Full Bench case for re-consideration. The latter I am not prepared to do in this case because it appears to me that, even on the interpretation of the Indian law of defamation as set out by various High Courts in reported rulings, the present complaint is not maintainable. There is a course of such decisions which interpreting the 9th Exception to s. 499, Indian Penal Code, definitely lays down that, when a lawyer is acting in the course of his professional duties and is thus compelled, subject to the disciplinary action of the Court, to put forward everything which may assist his client, good faith is to be presumed, and bad faith is not to be assumed merely because the statement is *prima facie* defamatory, but that there must be some independent allegation and proof of private malice from which in the circumstances of the case the Court considers itself justified in inferring that the statement was not made because it was necessary in the interests of the client but that the occasion was wantonly seized as an opportunity to vent private malice. This is the general principle to be gathered from the decisions of the High Court of Bombay, *In re Nagarji Trikamji* (4), of Calcutta *Nikunja Behari Sen* v. *Harendra Chandra Sinha* (5), of Patna *Nirsu Narain Singh* v. *Emperor* (6) and *McDonnell* v. *Emperor* (7) of Rangoon. I entirely agree with this exposition of the law.

I take it that this principle implies and carries with it this other principle that even the presence of malice will not override the presumption of good faith where the statement which was made obviously necessary in the interests of the client, and where the lawyer could not omit to make it without gravely imperilling the interests of his client and would in fact not be discharging his duty to his client unless he made it; that is, that, even though some private malice is gratified by the publication of the statement, if such publication was imperatively called for in the interests of his duty to his client, the presence of such malice will not negative the presumption of good faith. That principle seems to me to apply directly to the present case. The petitioner complains that the Magistrate has not heard all the evidence that he was prepared to adduce on the matter of independent malice due to personal enmity. I am prepared to assume that to be so. Even so, if the counter-petitioner's duty to his client imperatively demanded that the statement should be made, good faith is present, sufficient good faith to remove the offence out of the category of defamation. That the counter-petitioner's duty to his client imparatively demanded that the statement should be made, seems to me unquestionable. The truth of the statement complained of in the cases in which he was appearing for the defence was an essential element of the defence and the Vakil would have been gravely lacking in his duty to his client if, when he had the truth of that statement definitely set out in a public Law Report he omitted to bring that to the notice of the Court before whom he was arguing. It has, of course, been pointed out that the Law Report merely deals with the "matter of Mr. A" without setting out the present petitioner's name in full. But the petitioner has never argued that the report does not refer to him, nor in the circumstances of the case was such an argument possible. The case was fully reported in the newspapers at the time and no Court could or would have listened to an argument that the Law Report did not refer to the present petitioner. I am clearly of opinion, therefore, that the publications complained of were imperatively necessary for the conduct of the defence in the cases in which the counter-petitioner was appearing professionally and that, therefore, they were made in good faith and cannot be made the subject of a charge for defamation. I am, therefore, not prepared to interfere, and dismiss this petition also.

V. N. V. *Petitions dismissed.*

(4) 19 B. 340; 10 Ind. Dec. (N. S.) 230.

(5) 20 Ind. Cas. 1008; 41 C. 514; 14 Cr. L. J. 528; 18 C. W. N. 424.

(6) 97 Ind. Cas. 354; 27 Cr. L. J. 1090; 7 P. L. T. 608; (1926) Pat. 314; A. I. R. 1926 Pat. 499.

(7) 92 Ind. Cas. 737; 27 Cr. L. J. 321; A. I. R. 1925 Rang. 345; 4 Bur. L. J. 147; 3 R. 524.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 907 OF 1926.
December 8, 1926.
Present :—Mr. Justice Cuming and Mr. Justice Gregory.
RADHIKA MOHAN DAS—PETITIONER
versus
HAMID ALI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 74 (4), 190, 250—False report by Excise Officer—Order for compensation—'Complaint'—'Police report.'

An order for compensation may be made under s. 250, Criminal Procedure Code, against an Excise Officer who makes a false and frivolous report to a Magistrate.

The report of an Excise Officer is a complaint within s. 4 (*h*), Criminal Procedure Code, and is a Police report only for the purposes of s. 190 of the Code.

Mr. *Heramba Chandra Guha* and Babu *Surendra Mohan Ghose*, for the Petitioner.

Mr. *Kundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The facts of the case are as follows: The petitioner is a Sub-Inspector of Salt and Excise. On receipt of certain information he prosecuted the opposite party for selling liquor without a license. On trial the opposite party was acquitted. The Court held that the case was false and ordered the Sub-Inspector to pay Rs. 51 as compensation to the opposite party under s. 250. Against this order the petitioner has moved this Court and was granted a Rule on the ground that the case not having been instituted on complaint or information to a Police Officer or Magistrate as contemplated under s. 250 of the Criminal Procedure Code the order directing payment of compensation is *ultra vires*.

The argument put forward by the petitioner is this. The Excise Officer acted upon the information of an informer. He then under s. 73 and s. 74 of the Excise Act investigated the matter and under s. 74 (4) submitted a report to the Magistrate, that under s. 74 (4) the report is a Police report and so he is in the same position as a Police Officer making a report to the Magistrate. Section 250 contemplates that it is the person who made the complaint to the Magistrate or the person giving information to the Police who is to be held liable under s. 250 and hence that in the case of an Excise Sub-Inspector it is the informer who is liable to pay the compensation. His contention really amounts to this. That in a case like this the Sub-Inspector is in the position of a Police Officer who makes a report to the Magistrate after investigating an information made to him by some person or other. The simple answer to this argument is that this report of the Sub-Inspector of Excise to the Magistrate is a Police report only for the purpose of s. 190 of the Criminal Procedure Code. Section 74 (4) says it shall be deemed to be a Police report for the purposes of s. 190. The logical deduction from this is that for other purposes the report is not a Police report. It is quite clear that it falls within the definition of complaint in s. 4 (*h*), Criminal Procedure Code, for it is obviously an allegation made to the Magistrate in writing with a view to his taking action under the Code, that some person known or unknown has committed an offence. It is, no doubt, added that this does not include the report of a Police Officer. But the report of the Excise Sub-Inspector is only deemed to be a Police report for the purpose of s. 190, Criminal Precedure Code, and not for the purpose of s. 4 (*h*). So far as s. 250, Criminal Procedure Code, is concerned s. 74 (4) has no application, and the information given to an Excise Officer is not for the purpose of s. 250 information given to a Police Officer.

Even if the report to the Magistrate by the Excise Officer be not a complaint, it is information given to a Magistrate and the Excise Officer is the person on whose complaint or information the accusation was made.

The result is the Rule must be discharged.

A. N. A. *Rule discharged.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 640 OF 1926.
July 14, 1926.
Present:—Mr. Justice Fforde and Mr. Justice Addison.
EMPEROR—PETITIONER
versus
BAKHSHAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562—First offender—Power of Second Class Magistrates—Punjab Government Notification No. 431 of 1910.

By virtue of the Punjab Government Notification No. 431 of 1910 Magistrates of the Second Class in the Punjab are competent to exercise the powers conferred by s. 562 of the Criminal Procedure Code. [p. 541, col. 2.]

Emperor v. *Jawali* (1), dissented from.

Case reported by the District Magistrate, Multan, with his No. 1697 of 20th April, 1926.

FACTS.—The case was reported on the following grounds:—" That the Magistrate, Second Class, was not competent to award a sentence under s. 562, Criminal Procedure Code. On the analogy of *Emperor* v. *Jawali* (1), I submit the file to the High Court with the recommendation that the order of the Magistrate be set aside and the case remanded for a fresh order to be passed in accordance with law."

Mr. *R. C. Soni*, for the Government Advocate, for the Petitioner.

ORDER.

Fforde, J.—The facts out of which this revision has arisen may be stated shortly:—

One Bakhshan was on the 25th of February, 1926, convicted of theft under the provisions of s. 379 of the Indian Penal Code by a Magistrate invested with Second Class powers. The Magistrate applying the provisions of s. 562 of the Code of Criminal Procedure directed that the offender be released on his entering into a bond with surety in the sum of Rs. 200, to appear and receive sentence when called upon during a period of six months, and in the meantime to keep the peace and be of good behaviour.

The District Magistrate has, under the provisions of s. 438 of the Code of Criminal Procedure, reported the matter to this Court, with a recommendation that the order of the trial Magistrate be set aside, and the case remanded for a fresh order to be passed in accordance with law. The learned District Magistrate has adopted this course by reason of a judgment of Moti Sagar, J., in *Emperor* v. *Jawali* (1). The learned Judge in that case held that a Second Class Magistrate was not competent to act under the provisions of s. 562, and that his proper course would have been to have submitted the case to a First Class Magistrate, or a Sub-Divisional Magistrate, for orders with his report, if he was of the opinion that the case was a fit one for the exercise of powers under that section and he accordingly remanded the case to the trial Magistrate to take the proper steps. The learned Judge in coming to this conclusion was not informed that Magistrates of the Second Class have been specially empowered by the Local Government to exercise the powers conferred by s. 562 of the Code of Criminal Procedure. This is a matter upon which the District Magistrate in that case should have satisfied himself before taking steps under s. 438 of the Criminal Procedure Code. The notification in question is contained in Part I of the *Punjab Government Gazette* of April 22nd, 1910, at page 303. The notification itself which is dated the 18th of April, 1910, and numbered 431 (Home) reads as follows:—

"The Lieutenant-Governor of the Punjab is hereby pleased to invest all Magistrates of the Second Class in the Punjab with the power to exercise all or any of the powers conferred upon a Court by the provisions of s. 562 of the Code of Criminal Procedure, 1898."

As it is perfectly clear from this notification that Magistrates of the Second Class are competent to invoke the provisions of s. 562 of the Code of Criminal Procedure, it follows that in the present case the trial Magistrate has acted with perfect propriety and in accordance with law. His order, therefore, must stand, and the recommendation of the District Magistrate be refused.

Addison, J.—I agree.

A. N. A. *Revision dismissed.*

(1) 81 Ind. Cas. 948; 5 Lah. 36; A. I. R. 1924 Lah. 154; 25 Cr. L. J. 1124.

PATNA HIGH COURT.

CRIMINAL REVISIONS NOS. 534 AND 550 OF 1924.

January 28, 1925.

Present:—Justice Sir B. K. Mullick, KT. and Justice Sir John Bucknill KT.

DESHI SUGAR MILL—PETITIONER

versus

TUPSI KAHAR AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Public nuisance—Contamination of river water by industrial concern—Evidence of contamination—Complaint against several persons—Evidence against particular wrong-doers, necessity of—Order prohibiting discharge, whether can be passed.

An order prohibiting the discharge into a river of

an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream, can be made under the second paragraph of s. 133 (1), Criminal Procedure Code. [p. 542, col. 2]

It is not admissible for a tribunal to assume that, even if a nuisance is proved but not as against any particular party complained of as causing it, an order prohibiting such nuisance can be issued against all parties against whom complaints are made. [p. 543, col. 1.]

Where nuisance is complained of against two persons it is necessary to prove substantially, before an order could be made against either or both of them, that either or both caused the nuisance. [*ibid*]

Although it is of the utmost importance that sources of public watersupply must be maintained pure and free from pollution by industrial factories, yet such pollution must be convincingly proved against a wrong-doer before any order can be passed against him. [*ibid.*]

The question whether the water of a river has been contaminated by the effluents of an industrial concern is one which calls for scientific enquiry and cannot be decided merely upon the opinion of the neighbouring villagers. [p. 543, col. 2.]

Criminal revisions from an order of the Second Class Sub-Deputy Magistrate, Siwan, dated the 25th July, 1924.

Messrs. *S. Hasan Imam Akbari* and *Sultanuddin Husain*, for the Petitioner.

Messrs. *S. P. Varma* and *Hareshwar Prasad Sinha*, for the Opposite Party.

JUDGMENT.

Bucknill, J.—In this matter there were two applications in criminal revisional jurisdiction. They have been substantially heard together; they both raise substantially the same point. Application No. 534 of 1924 is made by the Manager of New Sugar Mill, Siwan; Application No. 550 of 1924 is made by the Manager of Deshi Sugar Factory, Siwan. Both these sugar factories or mills are situated on the bank of the river Daha; the New Sugar Mill is a good deal (some few miles) lower down the river than the Deshi Sugar Factory and the former has only been in existence some four years; the latter is an older institution. In April of last year a petition was filed before the Sub-Divisional Officer of Siwan which is in the Sarna District by nearly a hundred persons living in the neighbourhood of the river complaining that the river had been polluted by the Mills' effluents; they alleged that some cattle had died as a result, so they thought, of drinking the river water; they stated that they were afraid that there might be an outbreak of disease and they prayed that action might be taken against the two Mills under the provisions of s. 133 of the Criminal Procedure Code. The Sub-Divisional Officer thought fit to refer the matter to an Honorary Magistrate for a report and this gentleman reported that he thought that there had been some contamination of the river by refuse matter which had been allowed to be discharged from the Mills, but that it was difficult to say from which. The Sub-Divisional Officer ordered on the 10th of May that notice should be issued on the Managers of both Mills to appear before him to show cause why they should not be prohibited under s. 133 of the Criminal Procedure Code from polluting the water of the river by discharging into it noxious and dirty water from their factories. Both parties eventually appeared and an order was passed directing the Managers under what purported to be sub-s. (1) of s. 133 of the Criminal Procedure Code to discontinue, prior to the 28th of May last, draining into the river dirty or noxious water and to abate the nuisance thus caused on that account. It was further ordered in the alternative that the applicants should move the Sub-Deputy Magistrate of Siwan to have the order set aside or modified. The applicants did appear before the Sub-Deputy Magistrate and evidence was heard on both sides. As a result the Sub-Deputy Magistrate made the orders absolute. The applicants then moved the Sessions Judge against this order but the Sessions Judge refused to refer the matter to the High Court and rejected the application.

Now, it is true that certain small legal points were raised before the Sessions Judge, but they have not been seriously pressed before this Court, the applicants preferring to rely upon a more cogent argument. It was, however, pointed out that under the provisions of s. 133 (1) of the Criminal Procedure Code the first paragraph regarding the removal of a nuisance from a river was, perhaps, hardly applicable to the case of the pollution of a river by an effluent from a factory. It is not now very material whether that is so or not; for it is quite clear that the second paragraph of the sub-section in question gives ample power to make an order prohibiting the discharge into a river of an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream. What, however, is now urged on behalf

in particular of the New Suger Mill is that there was no evidence whatever of any real value that there had in fact been any contamination of the water of the river by any effluent from the factory; but that, on the other hand, there was overwhelming and scientific evidence on the part of the New Sugar Mill to show that that Mill discharged nothing noxious into the stream.

The Deshi Sugar Factory, which observing that no complaint had ever been taken against their factory, or as to the condition of the stream prior to the appearance on the bank of the New Sugar Mill, pointed out that no attempt had been made to prove that any discharge from their (the Deshi) Factory, was noxious.

The conclusions are clear: firstly, that if examination of the waters of the river below the New Sugar Mill showed no contamination, the Deshi Factory, which is rather higher upstream, was not a culprit any more than the new Sugar Mill. Secondly, that in law it is not admissible for a tribunal to assume the attitude that, even if a nuisance is proved but not as against any particular party complained of as causing it, an order prohibiting such nuisance can be issued against all parties against whom complaints are made. To illustrate this principle in this case: even if it had been shown (which, incidentally on the evidence does not appear to have been the case) that a nuisance existed due to contamination of the water of the river by what was a noxious effluent from the Sugar Mills, it would be necessary to prove substantially, before an order could be made against either or both of the Mills, that the effluent from either or both was noxious. Unless this is done it is obvious that a totally illegal and unjust order might be made against one or other of the Mills which may have done absolutely nothing wrong.

It need hardly be said that it must be recognized by every one that it is of the utmost importance that sources of public water supply must be maintained pure and free from pollution by industrial factories; but such pollution must be convincingly proved against a wrong-doer before any order can be passed against him.

There is no evidence which Mill contaminated the water and the evidence of contamination by effluent from Sugar Factories at all was, in my opinion, not supported by any adequate testimony.

[His Lordship then discussed the evidence and continued:—]

The Civil Surgeon and the Chemist think pollution of the river (if there is any deterioration) is due to vegetable growth, little flow at certain seasons and other incidental causes. Whilst, as I have occasion to repeat, it is most important to preserve sources of water supply pure, it is necessary, if charges of pollution are to be successfully prosecuted against parties alleged to be contaminating such sources, that convincing proof of such pollution be brought home to their doors.

This has certainly not been done here; the complaints and evidence in support thereof do not even purport to do so against either Mill individually, nor in my opinion on the evidence do they in fact do so against either or both.

But there is nothing to prevent further steps being taken but the evidence should be properly prepared; samples of the effluents actually flowing from any industrial concern suspected of contaminating the river should be taken and analysed and, if it then be found that these samples contain matter which (taking into perspective the volume of the effluent and the volume of the river) would be deleterious to the water of the river when utilized for domestic purposes, the case is clear.

But the matter is, it must be emphasized, one which calls for scientific enquiry and cannot be decided merely because a number of persons, in April or May when the river is very low and hardly flowing, think that the stagnation and impurity of the water, an outbreak of illness or the loss of some cattle may be due to the presence near of two sugar mills.

I have no hesitation in coming to the conclusion that the orders must in both these cases be quashed, firstly, because it is not competent to make orders of the kind made against two parties simply because it is thought that either (or perhaps both) may be in fault: and, secondly, because the scientific evidence (which is all that matters in these cases) in my

view is at present overwhelmingly in favour of the applicants.

Mullick, J.—I agree.

A. N. A. *Order quashed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1528 OF 1926.

January 21, 1927.

Present:—Mr. Justice Campbell.

SHERA—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 522—Trespass not attended by force—Restoration of possession, legality of.

When an act of criminal trespass was not attended by criminal force, or show of force or by criminal intimidation, possession of the property trespassed upon cannot be restored to the complainant under s. 522, Criminal Procedure Code.

Hari Chand v. *Emperor* (1), followed.

Case reported by the District Magistrate, Hoshiarpur, with his No. 3987 of September, 1926.

REPORT.—One Bulaqi instituted a complaint on the 13th of July, 1925, against one Shera in the Court of the Naib Tahsildar of Dasuya, exercising powers of a Magistrate of the Third Class, under s. 447 of the Indian Penal Code. The allegation was the complainant who is blind, obtained possession of a certain area of land under the decree of a Civil Court, and that subsequently the accused cultivated this land without his permission. It was not alleged that the act of trespass was attended by criminal force, or show of force or by criminal intimidation. In convicting the accused and fining him Rs. 5 only, the Magistrate ordered that possession should be restored to the complainant under s. 522 of the Code of Criminal Procedure.

GROUNDS.—In view of the facts as explained above it is quite evident that the Magistrate's order passed under s. 522 of the Code of Criminal Procedure was without jurisdiction, *Hari Chand* v. *Emperor* (1) is in point. It is accordingly recommended that the order in question may be set aside. The Magistrate admits that he made a mistake and a copy of his report in Urdu is appended.

ORDER.—There is no appearance. For the reasons stated by the learned District Magistrate the order under s. 522, Code of Criminal Procedure, is set aside.

R. L. *Order set aside.*

(1) 51 Ind. Cas. 472; 16 P. R. 1919 Cr.; 20 Cr. L. J. 488.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 426 OF 1926.

CRIMINAL REVISION PETITION No. 348 OF 1926.

October 24, 1926.

Present:—Mr. Justice Jackson.

In re PERIA PONNUSWAMI GOUNDAN AND ANOTHER—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 339—Restraining horse on which person is riding—Wrongful restraint.

Restraining a horse on which a person is riding so as to prevent him from proceeding at the moment of restraint is wrongful restraint within the meaning of s. 339 of the Penal Code.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class Bench of Magistrates, Pollachi *Taluk* in Summary Trial No. 20 of 1926.

Messrs. *V. L. Ethiraj* and *A. S. Sivakaminathan*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—It is argued that restraining a horse on which a person is riding is not wrongful restraint as defined by s. 339, Indian Penal Code. If the person is prevented from proceeding at the moment of restraint the terms of the section are satisfied. It is no defence that he might have got off the horse, and walked in the same direction.

The petition is dismissed.

V. N. V. *Petition dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1213 OF 1925.

July 12, 1926.

Present:—Mr. Justice Campbell and Mr. Justice Addison.

GURDIAL SINGH—APPELLANT

versus

GURBAKHSH SINGH AND OTHERS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Assignment of decree—Benami *assignment—Beneficiary's right to execute.*

Where a decree has been transferred to a particular person under an instrument in writing, no other person claiming that he was the real owner under the transfer and that the transferee named therein was a mere *benamidar* for him, can apply for execution of the decree under O. XXI, r. 16 of the Civil Procedure Code.

Palaniappa Chettiar v. *Subramania Chettiar* (1), followed.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 3rd February, 1925.

Messrs. *Tek Chand, Jagan Nath Aggarwal* and *Dharam Das*, for the Appellant.

Messrs. *Badri Das, D. C. Ralli* and *Daulat Ram*, for the Respondents

JUDGMENT.—On the 26th February, 1915, Daulat Ram obtained a decree against Guranditta Mal. On the 18th February, 1919, Daulat Ram died leaving a son Gurbakhsh Singh by a pre-deceased wife and a widow named *Musammat* Raj Kumari. A posthumous son was born later named Rajindar Kumar and he is now dead. On the 9th September, 1919, Gurbakhsh Singh representing himself to be the only heir of his deceased father Daulat Ram executed a registered deed in favour of Ram Singh Kabli assigning to him that portion of the decree which remained unsatisfied, for Rs. 80,000. On the 25th January, 1921, Gurbakhsh Singh filed an application for execution of the decree making no mention of the assignee. The application remained pending, and on the 4th February, 1924, Gurdial Singh presented an application under O. XXI, r. 16 alleging that the assignment in favour of Ram Singh by Gurbakhsh Singh was *benami* and that he was the real transferee, and prayed that his name should be substituted as decree-holder in place of that of Gurbakhsh Singh.

Objections were raised to this latter application and eventually it was rejected by order of the Court, dated the 3rd February, 1925. Gurdial Singh has presented the present appeal.

It is doubtful whether the application of Gurdial Singh fulfilled the requirements of O. XXI, r. 16 as an application for execution of the decree but, assuming that it did so, it was nevertheless incompetent since there was no transfer by assignment in writing in favour of Gurdial Singh. It has been ruled recently by the Madras High Court in *Palaniappa Chettiar* v. *Subramania Chettiar* (1) that, where a decree has been transferred to a particular person under an instrument in writing, no other person claiming that he was the real owner under the transfer and that the transferee named therein was a mere *benamidar* for him, can apply for execution of the decree under the terms of O. XXI, r. 16, Code of Civil Procedure. We agree with this interpretation of the rule and it seems to us that the Legislature has deliberately provided that in an execution Court only that person claiming to be an assignee of a decree shall be recognised who is able to produce a written instrument of assignment in his favour, and that there shall be no facilities for prolonging execution proceedings by investigations into complicated disputes between a decree-holder and an alleged assignee or between rival assignees. It would often happen that the judgment debtor is not concerned at all with the merits of such a dispute, but only with its duration.

We dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

(1) 88 Ind. Cas. 409; 48 M. 553; 48 M. L. J. 419; 21 L. W. 545; A. I. R. 1925 Mad. 701.

MADRAS HIGH COURT.

REFERRED CASE No. 17 OF 1925.

March 9, 1925.

Present:—Mr. Justice Krishnan, Mr. Justice Ramesam and Mr. Justice Beasley.

CHEEDELLA CHENCHAYYA—PLAINTIFF

versus

ANNUREDDI PICHIREDDI—DEFENDANT.

Madras Village Courts Act (I of 1889), s. 53—Court Fees Act (VII of 1870), Sch. II, Art. 6—Stamp Act (II of 1899), as amended by Madras Stamp (Amendment) Act (VI of 1922), Sch. IA, Art. 46—Security-bond executed under s. 53 of Madras Village Courts Act—Stamp duty.

Article 6 of Sch. II to the Court Fees Act as amended applies only to bail-bonds and other instruments of obligation under the Criminal Procedure Code or under the Civil Procedure Code. A security-bond

executed by a surety under s. 53 of the Madras Village Courts Act in respect of property attached and which the surety undertakes to return or to pay a sum of money on a certain event, does not come under Art. 6 of Sch. II to the Court Fees Act and is not exempt from payment of Court-fees. Such a document comes under Art. 46 of Sch. IA to the Madras Stamp (Amendment) Act and should bear the same duty as a bottomry bond for the amount secured.

Case stated under s. 60 of the Indian Stamp Act of 1899 by the District Munsif, of Kavali and submitted through the District Judge of Nellore, in Suit No. 359 of 1923, on the file of the Panchayat Court, Kavali (O. P. No. 19 of 1925 on the file of the Court of the District Munsif, Kavali, against the order of the said Panchayat Court, Kavali, in execution petition in the said Suit No. 359 of 1923 on its file.

Mr. *K. S. Desikan, Amicus Curiæ.*

The Government Pleader, for the Government.

JUDGMENT.—This case has reference to a security-bond taken by a Village Court under s. 53 of the Madras Village Courts Act I of 1889. The question raised is what stamp this document should bear? At present the document bears no stamp at all. When the Village Court was asked why this document was taken without any stamp they replied that, in their opinion, the document fell within Art. 6 of the Court Fees Act and that as Government had exempted the Court-fees payable under the Court Fees Act in Village Courts this document required no stamp at all. This opinion does not seem to be correct. Article 6, Sch. II to the Court Fees Act as amended applies only to bail-bonds and other instruments of obligation under the Criminal Procedure Code or under the Civil Procedure Code, 1908. Now this bond cannot be treated as a bond under the Civil Procedure Code for the Code does not apply to the Village Courts at all. That has been so ruled by a Bench of this Court in *Kandoth Sankaran Nair* v. *Karayi Kuzhakeproth Atchuthan* (1). It follows, therefore, that to decide the stamp that this document should bear we must look to the Stamp Act. It falls under Art. 46 of Sch. IA of the Madras Stamp Act as amended which speaks of "security-bonds or mortgage-deeds executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof." The further words need not be quoted. Here the security-bond was executed for property received and which the executors undertook to return or to pay Rs. 40 instead. Under Art. 46 this document should have borne the same duty as a bottomry bond for the amount secured and the proper stamp seems to be 6-annas. This is our answer to the reference. The document would be admissible in evidence all the same if the stamp duty and the penalty is paid. Apparently when exempting from Court-fees all documents filed in the Village Courts an omission was made as regards this particular document. If this is so, it will always be open to the Government to put it right by the necessary notification. As the law at present stands we are of opinion as above stated that the document should have borne a 6-annas stamp.

V. N. V. *Reference answered.*

(1) 73 Ind. Cas. 793; 46 M. 734; 44 M. L. J. 643; (1923) M. W. N. 353; 32 M. L. T. 403; 18 L. W. 19; A. I. R. 1923 Mad. 651.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1134 OF 1924.

January 6, 1927.

Present:—Mr. Justice Iqbal Ahmad.

Syed MUSA IMRAN—DEFENDANT—APPELLANT

versus

BHAGWAN DAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Suits Valuation Act (VII of 1887), s. 11—Under-valuation, objection to—Appeal—Appellate Court, duty of—Under-valuation affecting forum *of appeal—Disposal of suit on merits, whether prejudicially affected.*

Under s. 11 of the Suits Valuation Act an Appellate Court is only required to record reasons if it holds that the suit was over-valued or under-valued and that the over-valuation or under-valuation has prejudicially affected the disposal of the suit on the merits, but it is not required to record reasons in writing for holding that the under-valuation or over-valuation has not prejudicially affected the disposal of the suit. [p 547, col. 2.]

The disposal of a suit cannot be deemed to have been prejudicially affected on the merits within the meaning of s. 11 of the Suits Valuation Act, merely because of a change in the *forum* of appeal consequent upon the under-valuation or over-valuation. [*ibid.*]

Second appeal from the decree of the Additional Subordinate Judge, Moradabad, dated the 12th of April, 1924

Mr. *A. Sanyal*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This is a defendant's appeal and arises out of a suit for posses-

sion of a certain village that was alleged to have been leased by the defendant to the plaintiffs for a period of nine years on the 3rd of February, 1920. The annual rent reserved by the lease was Rs. 400. The suit was valued at Rs. 400 and was filed in the Court of the Munsif. One of the pleas taken in defence was that the village in dispute was worth about Rs. 20,000 and that the suit was not cognizable by the Munsif. This plea was overruled by the learned Munsif and eventually he passed a decree in the plaintiffs' favour. The defendant filed an appeal against the decree of the trial Court in the Court of the District Judge. One of the pleas urged in the lower Appellate Court was that the learned Munsif had no jurisdiction to try the suit and as such, the decree passed by him was a nullity. This plea was overruled by the lower Appellate Court and the appeal was dismissed. In second appeal before me the decree of the lower Appellate Court has been assailed by the learned Counsel for the appellant on two grounds. In the first place he has urged that the lower Appellate Court has erred in law in overruling the point of jurisdiction urged before it without assigning any reason for holding that the under-valuation of the suit by the plaintiffs-respondents did not prejudicially affect the disposal of the suit on its merits. The second point urged by the learned Counsel is that the value of the subject-matter of the suit being Rs. 20,000 if the suit had been properly valued, it would have been tried by a Subordinate Judge and an appeal against his decision could lie only in the High Court and as, because of the under-valuation of the suit, the case was tried by a Court inferior in grade to the Court of the Subordinate Judge and the appeal was heard not by the High Court but by the District Judge, it was clear that the under-valuation did prejudicially affect the disposal of the suit.

In my opinion, there is no force in either of the contentions advanced on behalf of the appellant. Section 11 of the Suits Valuation Act prohibits an Appellate Court from entertaining an objection, that by reason of the under-valuation of a suit, a Court not having jurisdiction to try the same exercised jurisdiction with respect thereto, unless the objection was taken in the Court of first instance at or before the date on which the issues were framed, or the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit was under valued and that the under-valuation thereof has prejudicially affected the disposal of the suit on the merits If the objection as to jurisdiction was taken in the Court of first instance before the framing of the issues, and the Appellate Court is not satisfied either that the suit was under-valued or the under-valuation has prejudicially affected the disposal of the suit, and has before it the materials necessary for the decision of the appeal, it is authorised by cl. (2) of s. 11 of the Suits Valuation Act to dispose of the appeal as if there had been no defect of jurisdiction in the Court of first instance. The Appellate Court is only required to record reasons, if it holds that the suit was over-valued, or under-valued, and that the over-valuation or under-valuation has prejudicially affected the disposal of the suit, but it is not required to record reasons in writing for holding, as the lower Appellate Court has done in the present case, that the under-valuation had *not* prejudicially affected the disposal of the suit. The lower Appellate Court having held that the decision of the suit was not affected by the under-valuation it rightly adopted the procedure enjoined by cl. (2) of s. 11 of the Suits Valuation Act and, in my opinion, the first ground argued by the learned Counsel is untenable. The second ground urged by the learned Counsel is concluded by authorities. It has been held in *Narayani Ammal* v. *Secretary of State for India* (1) that "the mere change of *forum* consequent on the under-valuation cannot of itself be treated as prejudicially affecting it." To the same effect is the decision in *Naduvil Edom Karnavan* v. *Cheriya Parvathi Nethiyar* (2). In the last mentioned case it has also been held that "the disposal of a suit cannot be deemed to have been prejudicially affected on the merits, merely because of a change of the *forum* of appeal consequent upon the under-valuation." A similar view was taken in the case of *Raghava Chariar* v. *Raghava Chariar* (3)

The learned Counsel for the appellant has relied on a decision of the Punjab

(1) 41 Ind. Cas. 167.

(2) 73 Ind. Cas. 87; 18 L. W. 1; 45 M. L. J. 135; (1923) M. W. N. 489; 46 M. 431; A. I. R. 1924 Mad. 6; 33 M. L. T. 5.

(3) 8 Ind. Cas. 545; 20 M. L. J. 726; 8 M. L. T. 404.

Chief Court reported as *Cheloo* v. *Kali Das* (4). In that case it was held that "when an inferior Court disposes of a case which should have been heard by a superior Court, there is ground for thinking that the parties are prejudiced." If it was intended to lay by that decision that, the mere fact that a suit that ought to have been tried by a Court of a superior grade was tried by a Court of inferior grade because of an under-valuation, is enough to lead to the conclusion that the under-valuation has prejudicially affected the disposal of the suit. I am, with all respect, unable to agree with that decision. Section 11 of the Suits Valuation Act contemplates cases which because of an under-valuation have been decided by a Court of an inferior jurisdiction to the one which would have decided the suit, if it had been rightly valued. If the mere fact of the trial of the suit by an inferior Court was enough to lead to the conclusion that the disposal of the suit has been prejudicially affected, sub-cl. (*b*) of cl. (1) of s. 11 would not have been worded as it is worded. In my judgment, the decision of the lower Appellate Court is perfectly correct and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(4) 44 Ind. Cas. 816; 21 P. R. 1918.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1351 OF 1922.

January 18, 1927.

Present:—Mr. Justice Fforde and Mr. Justice Campbell.

MESSRS. ISHAR DAS-DHARAM CHAND DEFENDANTS—APPELLANTS

versus

Messrs. KANNU MAL-GHAMANDI LAL —PLAINTIFFS—RESPONDENTS.

Sale of goods—Acceptance of goods by purchaser—Goods not according to contract—Suit for refund of sale price, maintainability of—Conditions precedent—Purchaser, when entitled to reject goods.

Where a purchaser has accepted delivery of goods he cannot sue for the recovery of the sale price on the ground that the goods do not answer the description contracted for, his only remedy being a suit for damages for breach of the contract. [p. 549, cols. 1 & 2.]

The mere fact that the numbers on the bales of the goods supplied do not correspond to the numbers given in the invoice or that the goods were not shipped direct to a particular port, but only *via* another port, does not entitle a buyer to reject the goods where these terms are not expressly made conditions precedent. [p. 548, col. 2.]

First appeal from the decree of the Sub-Judge, First Class, Delhi, dated the 6th May, 1922.

Lala *Moti Sagar*, R. B., and Mr. *Mehr Chand Mahajan*, for the Appellants.

Lala *Sardha Ram Kapur*, R. S., and *Lala Balwant Rai*, for the Respondents.

JUDGMENT.

Fforde, J.—By a contract in writing dated the 27th of August, 1919, the defendants agreed to sell and the plaintiffs agreed to buy 15 bales of unbleached Japanese long cloth, 44 inches in width and 38 yards in length, described as quality No. 5151 at Rs. 28, goods to be shipped in 3 lots with 60 days' grace by February 1919 shipment. It is conceded on both sides that by "February 1919 shipment in 3 lots" is meant that the goods were to be shipped in the months of February, March and April respectively in lots of five bales in each shipment.

On the arrival of the first two lots the plaintiffs refused to accept them upon various grounds. The defendants then brought a suit for non-acceptance and got a decree in respect of these two consignments. The remaining five bales arrived on the 8th July, 1919, an appropriate date under the contract,—and notice of arrival was duly sent to the plaintiffs upon that date. Some correspondence ensued and ultimately the plaintiffs took delivery of these five bales on the 3rd September, 1919. On delivery of these five bales the plaintiffs paid the agreed price. No further steps, so far as the evidence before us goes, were taken by either party to this contract until the 2nd of January, 1920, when the present suit was brought by the buyers for the recovery of the purchase price.

The case was tried by a Sub-Judge of the First Class, Delhi, who found in favour of the plaintiffs. The learned trial Judge took the view that the goods were not of the description contracted for inasmuch as the bale numbers, when the bales were produced in Court, did not correspond to the numbers placed upon the bales by the shippers, and on the further ground that the goods had been shipped *via* Bombay to Karachi instead of direct to Karachi.

Mr. Moti Sagar's first objection to the decree of the learned trial Judge is that a suit for the recovery of the price of goods

sold and delivered does not lie, inasmuch as the plaintiffs had accepted delivery, and, accordingly, could only sue for damages for breach of contract in the event of their being able to satisfy the Court that they had, in fact, sustained damages by reason of the goods not answering the description contracted for. Mr. Sardha Ram, who appears for the plaintiffs contends that the goods were not finally accepted as his clients after examination definitely rejected them. But in support of this contention there is no evidence whatsoever. Mr. Sardha Ram relies upon some remarks made by Sundar Lal, P. W. No. 16, in the course of his cross-examination. The statement in question is as follows:—

"When the goods were delivered, the purchasers complained that the goods were late and were purchased in the market in Bombay. Several settled and there is litigation going on with others. Gordhan, Makhan settled but cannot say how. Plaintiff also brought the same complaints. I did not write to the proprietors regarding these complaints. Seth Ram Richpal came to Delhi and I informed him of the complaint and he said that he would himself see to it."

There is thus no evidence that, beyond making certain complaints about the mode in which these goods had been shipped, there was any rejection of the goods by the plaintiffs after they had been delivered. Though they were delivered on the 3rd of September, 1919, nothing was done by the plaintiffs, no letter was written, no notice sent—until the action was brought on the 2nd of January 1920. The goods, therefore, remained in the plaintiffs' possession for four months during which time they had every opportunity to examine them and ascertain whether or not they corresponded to the contract. They also had ample time in which to write a simple letter definitely stating that having examined the goods they refused to accept them. In the absence of any notice of such refusal the plaintiffs must be deemed to have accepted the goods.

I may further add, that even if it had been established that the numbers on the bales did not correspond to the numbers given in the invoice this in itself would not entitle the buyers to reject the goods. There is no term in the contract between the parties making it a condition precedent to the contract that the bales should bear any particular number. Similarly the plaintiffs' contention that the goods were shipped first to Bombay, even if established by evidence, would not give them a right of rejection provided the goods were of February shipment and corresponded in quality, nature and description to the goods contracted for. The contract merely provided that the goods should be available to the plaintiffs at the Karachi Godown and they were so available. It follows that even on the plaintiffs' own case they had no right to reject the goods and their only remedy was to sue for damages for breach of contract if they considered themselves to be in a position to prove that the goods were not in fact those which they agreed to buy.

Mr. Sardha Ram has argued in the alternative that this action should now be treated as one for damages for breach of contract.

The objection to this suggestion is that there is no evidence whatsoever of any damages sustained by the plaintiffs. There is no evidence that the goods were not of the nature and quality and description contracted for. The plaintiffs did not even open the bales to see if they were the goods which they had bought. Their only contention is a purely technical one that the numbers of the bales were not those supplied to them in the invoice, and secondly, that they were booked to Bombay instead of Karachi. The only evidence on the question of these bale numbers is that at the time, when they were produced in Court four months after they had been in possession of the plaintiffs, the bale numbers had been altered; and so far as shipment to Bombay is concerned, it is conclusively proved that these goods were sent to Karachi and unloaded there.

Under these circumstances it seems to me that the plaintiffs must wholly fail, and I would accordingly accept the appeal, set aside the judgment and decree of the lower Court, and enter judgment for the defendants dismissing the plaintiffs' suit with costs throughout.

Campbell, J.—I agree.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 211 OF 1926.

January 3, 1927.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Banerji.

GANGA PRASAD AND ANOTHER—ACCUSED—APPELLANTS

versus

MADHURI SARAN AND ANOTHER—RECEIVER—RESPONDENTS.

*Provincial Insolvency Act (V of 1920), ss. 42, 69—Prosecution for offences under the Act—Procedure—Framing of charge—Fraudulent concealment—False accounts—Liability of partner for acts of other partners—S. 69 wider than English Law—Sentence—*Quasi *penalty under s. 42.*

Partners are often responsible in law under the Insolvency Act, for acts of other members of the partnership. It may be proved that, in spite of the fact that business is carried on by the head of a firm and that he is dead, nonetheless, the other partners were so deeply involved, that they must be held equally responsible for his acts, even though he was the moving spirit. [p., 551, col. 2; p. 552, col. 2.]

Although circumstances could be proved in a business concern, where the method of keeping books is such that even though the absence of the principal person is shown, the subordinate might be equally guilty, yet, where it is sought to establish the charge of keeping false accounts against any particular partners of a firm, it must be proved as a fact who were the persons actually responsible for keeping such books. [p. 552, col. 2.]

Some of the offences under the Insolvency Act are in their nature special, and directed against offences specially committed with a view to defeat the objects of the Act, and require to be dealt with some care. [p. 550, col. 2.]

It is desirable in a prosecution for an offence under the Insolvency Acts to frame the charges strictly in the language of the section which defines the offence, together with the particulars of the conduct of the insolvent relied upon to establish the charges, just as is done in a formal charge of an offence, particularly an offence of embezzlement or falsification of books under the Penal Code. [*ibid.*]

Section 69 of the Provincial Insolvency Act, which deals with penalties, is peculiar to India inasmuch as it embraces acts 'whether before or after making an order of adjudication.' Under English Law these penalties are confined to conduct after presentation of the petition. [p. 555, col. 2.]

It must be borne in mind in a prosecution under the Insolvency Act for falsification of accounts, even where they are false, or so badly kept, as to amount not merely to negligence, but to a suggestion of dishonesty, that s. 42 itself provides and defines a *quasi* offence, with regard to the keeping of books, which if established, is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it. [p. 553, col. 1]

First appeal from the order of the District Judge, Budaun, dated the 20th December, 1926.

Mr. *Nihal Chand* and Dr. *N. C. Vaish* for the Appellants.

Mr. *Mushtaq Ahmad*, for the Respondents.

JUDGMENT.—This is an application against the conviction and sentence under the Insolvency Act by the District Judge of Budaun for offences committed under s. 69 of that Act. It is really a criminal case, pure and simple, relating to special offences created by special legislation, and it has been quite rightly expedited on that ground by an order of a Judge of this Court The charges were of three kinds, but also included general conduct, indicating a fraudulent attempt by a father, now deceased, and his two sons, who carried on business together, to defeat and delay their creditors. The District Judge was obviously very angry with them, and discussed their conduct as having been scandalous. We agree with that description.

But some of these offences under the Insolvency Act are in their nature special, and directed against offences specially committed with a view to defeat the objects of the Act, and require to be dealt with some care.

The first charge is that these insolvents, in December, 1921, removed cloth worth Rs. 20,000 to their relations in Bisauli, with a view to take it out of the reach of their creditors.

The second charge is that, on the 8th of January, 1922, they wilfully withheld production of their accounts.

The third charge is that generally, during the conduct of their business, they wilfully kept false accounts.

If we may say so, it would be an assistance to Judges, who have to deal with these matters, if they were to frame the charges strictly in the language of the section, which defines the offence, together with the particulars of the conduct of the insolvent relied upon to establish the charges, just as is done in a formal charge of an offence, particularly an offence of embezzlement or falsification of books under the Penal Code.

The petition in this case was filed by creditors. That is not only unusual but makes a slight difference where conduct has to be investigated earlier in date than the petition, because where the insolvent himself files his petition it is not difficult to attribute to him an intention to go through the Insolvency Court, and, therefore, to imply, from his compromising

acts, a desire to defeat his creditors when he chooses to create his own insolvency. But the special circumstances in this case show that although it was a creditor's petition, the debtors had every reason to expect, indeed to anticipate that such would be the inevitable result of the proceedings, which were pending against them in 1921. It is clearly shown that they were in serious trouble as far back as in 1919. It has been decided against them that, just about the same time as the act complained of in charge (1), they executed a mortgage, which has been held by the Insolvency Court and the High Court to have been void under s. 53 of the Insolvency Act. A suit had been started against them in Bombay on the 8th of December for Rs. 14,000. An attachment was obtained before judgment on the 23rd of December, 1921, and was communicated to them some time in January. The charge is that they removed a very valuable quantity of cloth in 5 or 6 carts on the 22nd of December, the day before the attachment was obtained, and the day before they entered into a fraudulent transaction in respect of the mortgage in question. Conduct of this kind leads to only one inference. They had every reason to anticipate that proceedings would be taken against them to realise their asset and distribute it amongst their creditors. At this point Mr. Nihal Chand has rightly drawn attention to the fact that evidence depends upon the testimony of one witness. In the case of an honest trader, who is able to give a clear answer, and who is charged with wicked concealment of this kind, the evidence of one witness might naturally be considered wholly insufficient. But the evidence of the witness derives corroboration from the circumstances which have been relied upon in the other charges, with which we will deal in a moment, and from their contemporaneous conduct in regard to the execution of the mortgage. For example, before the petition, namely in January, 1922, a decree had been obtained against them in the Court of the Munsif, and a Vakil, as an officer of the Court, was sent down to take possession of certain account-books. This incident is the subject of charge (2). Whether their conduct amounted to an offence, or not, it is clear from the findings of the District Judge that it reflects very gravely upon their credibility and throws a light upon their general conduct. It also appears from the judgment of the High Court, delivered in October, 1925, that an *interim* Receiver was appointed after the presentation of the petition, and that he went down and found the insolvent absent and their house locked, that he failed to obtain their books, and that Ganga Prasad, one of the partners, said that his father had gone on a pilgrimage. Mr. Nihal Chand also contended that very observation, to which we have just referred, indicates that the conduct of the father in keeping back the books, and the conduct of the insolvents in removing the cloth, was really the act of the father, who is now dead. He died during these insolvency proceedings. We are not going to say that that would not be a good defence on the merits Sons are sometimes responsible for the acts of their fathers, and partners are often responsible in law—and even on the criminal side, and certainly under the Insolvency Act, for acts of other members of the partnership. But as Mr Justice Banerji pointed out during the argument, the real answer to this point is that it was not the defence raised by the insolvents, who preferred to deny the whole transaction and claimed that their conduct throughout had been honest. We hold with regard to this charge that it is established, and that the learned Judge was right and that the sentence of six months awarded by him must be upheld.

So far as we know this is the first case which has come before this Court, where the conduct, amounting to an offence under s 69, has been conduct before the Insolvency proceedings have commenced. Section 69, which deals with penalties, is peculiar to India, inasmuch as it embraces acts "whether before or after making an order of adjudication." Under the English legislation, from which much of this legislation is derived, these penalties are confined to conduct after the presentation of the petition. But a comparison of the language of the two sections shows that the provision in the Indian Act is a special provision for cases in this country. If it were intended to confine the conduct entirely to conduct in the insolvency proceedings, the Legislature must have said 'after the presentation of the petition. But, while the general language, namely, "before the making of an order", is sufficiently wide to cover almost any distance of

time, the definition of the specific acts complained of narrows down the generality of the foregoing provision, so as to confine the offences strictly to matters affecting the investigation of the insolvent's affairs under the Act, the duties to be performed by him under the Act, the distribution of his property, or money, between the creditors, and the concealment or making away with property, or falsification of his books, with the intention of defeating the objects of the Act. We are quite satisfied that the making away with the cloth before the order of adjudication, was in this case done fraudulently with intent to diminish the sums to be divided amongst the general body of creditors.

With regard to the other charges, we are of opinion that they do not come within s. 69 at all. The second charge is really one of disobedience, or resistance to the enforcement of a decree in the Munsif's Court. This was before the adjudication, but, in our opinion, it had nothing to do with the investigation of their affairs, or with defeating the objects of the Insolvency Act. Even if they had produced their accounts in consequence of that order, there is nothing to show that the investigation of their affairs would have been any more complete, or simpler than it has been, and there is no finding, and no evidence to justify the inference that that refusal had any effect upon the investigation of their affairs which has taken place during the insolvency proceedings.

The third charge is even more difficult to sustain under the circumstances, as we understand, it relates to conduct with reference to a bale of English cloth on the 21st of May, 1921, and to the allegation that in reference to this bale, they kept false accounts. It might be true that some body in this firm did. We do not decide it. We assume it for the purpose of our decision. It was a very long time before the creditors began exercising pressure which resulted in the insolvency petition, and we are unable to infer, and we do not think the Judge himself inferred, or had any evidence from which he could infer a knowledge in May, 1921, by the debtors that they were going to be insolvent within a short time, or that they had any intention, whatever else their intention was, to defeat, delay, or obstruct the insolvency proceedings.

The same difficulty arises over a transaction of one thousand rupee *hundi*. That transaction does not strike us as necessarily fraudulent, or indeed as particularly unusual. No doubt, the learned Judge did not believe the story of the re-sale. He obviously thought that, if there had been a re-sale, there ought to have been entries in the ledger, but that omission would be mere negligence, and if there was a re-sale the failure to enter either debit or credit entry would not in the least render the investigation of their affairs more difficult. Whereas the failure to enter the Rs. 1,000, even if there was no re-sale according to the experience of one member of the Bench, at any rate would be nothing very much out of the common. It is possible that too much has been made of this incident; but there is another answer to it, which the learned Judge overlooked.

You may prove, as we think it was proved, that in spite of the fact that business is carried on by the head of the firm, and that he is dead, nonetheless the other partners were so deeply involved, that they must be held equally responsible for his acts, even though he was the moving spirit. That is our view of the removal of the cloth covered by the first charge, and it may be that circumstances could be proved in a business concern, where the method of keeping the books was such that even though the absence of the principal person was shown, the subordinate might be equally guilty—but in this case there is no evidence as to who in fact kept the books, what actual system was adopted of making entries, and who was actually responsible, whether individually or collectively, according to the ordinary course of business. It is suggested that it was the father. If he was solely responsible, it would be clearly wrong to punish the sons criminally for his fault. All we can say is that, where there are three partners, and it is sought to establish this charge against any one or two of them, it must be proved as a fact who were the person, or persons, actually responsible for keeping such books. On this ground we think this charge also breaks down, and that with reference to charges 2 and 3 we must allow the appeal, set aside the convictions and cancel the sentences.

We cannot interfere with the sentence but we will make this exceptional direction that, if the accused feel disposed, they may, in spite of the District Judge's pre-

vious order, and our present order, apply to the learned Judge to ameliorate the sentence by reducing it to simple imprisonment. We leave it to him, because he is more familiar with the conditions of the people and the two forms of imprisonment than we are. At any rate the learned Judge may consider himself free to consider any application of that sort, if made to him, on the merits.

It is to be borne in mind, and must always be borne in mind, in dealing with these questions of books, even where they are false, or so badly kept, as to amount not merely to negligence, but to a suggestion of dishonesty, that s. 42 itself provides and defines a *quasi* offence, with regard to the keeping of books, which, if established, is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it.

A. N. A. *Appeal allowed in part.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1761 OF 1923.

July 30, 1926.

Present:—Mr. Justice Devadoss.

LAKSHMI AMMAL—DEFENDANT No. 5—APPELLANT

versus

DEVADASI NAYADU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105, O. IX, r. 13—Application to set aside ex parte *decree, dismissal of—Final appeal against decree—Right to raise same points.*

Where a defendant against whom an *ex parte* decree has been passed applies to set it aside on grounds mentioned in O. IX, r. 13 of the Civil Procedure Code and fails to get relief but does not contest the order by way of appeal, he is not entitled to raise the same point in the final appeal against the decree. Nor can he, in such appeal, object to the evidence on which the lower Court has relied in support of its finding.

Badvel Chinna Asethu v. *Vattipalli Kesavayya* (1) and *Bava Levvai Sahib* v. *Ammeenammal* (2) followed.

Second appeal against the decree of the District Court, Ramnad at Madura, in A. S. No. 23 of 1923, preferred against that of the Court of the Principal District Munsif, Srivalliputtur, in O. S. No. 772 of 1921.

Mr. *Venkatarama Iyer*, for the Appellant.

Mr. *Watrap S. Subramanier*, for the Respondents.

JUDGMENT.—The first point urged in this second appeal is that the defendant against whom an *ex parte* decree had been passed and who had applied to set aside the decree and failed in getting relief, is entitled to raise the same point in the appeal against the decree. This point is covered by authority. *Vide, Badvel Chinna Asethu* v. *Vattipalli Kesavayya* (1). Mr. Venkatarama Iyer for the appellant disputes the correctness of this position and wants this point to be argued before a Bench of two Judges. This decision was followed by me and Oldfield, J., in *Bava Levvai Sahib* v. *Ammeenammal* (2) and the only decision which he says supports him is that reported in *Nand Ram* v. *Bhupal Singh* (3). In that case the point did not directly arise. There the application was under s. 115. In the course of the judgment the learned Judges remark that it is open to the defendant to raise the same question in appeal against the decree. With great respect, I am unable to agree with them and seeing that the point is covered by the decisions of this Court, I do not think I shall be justified in placing his case before a Bench of two Judges.

The next point urged is, that there is no evidence to support the finding on the point as to the priority of the sale-deed. There is the evidence of the plaintiff, P. W. No. 1. to the effect that his sale deed was executed before the sale-deed in favour of the 5th defendant. When there is evidence to support the findings and when the 5th defendant did not appear to contest the suit in the lower Court, it is not open to him to object to the evidence on which the lower Courts have relied.

In the result the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 60 Ind. Cas. 215; 39 M. L. J. 697; 12 L. W. 507; (1920) M. W. N. 780; 29 M. L. T. 63.

(2) 79 Ind. Cas. 968; 45 M. L. J. 805; A. I. R. 1924 Mad. 107.

(3) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1213 OF 1924.

January 17, 1927.

Present:—Mr. Justice Boys and Mr. Justice Kendall.

Haji IDRIS—PLAINTIFF—APPELLANT

versus

EAST INDIAN RAILWAY Co.—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Risk Note B—

Theft of heavy merchandise—Want of efficient patrol —'Wilful neglect.'

Three bales of piece-goods weighing five maunds each were stolen from a sealed wagon in the Howrah goods yard between dark and 11 o'clock of a particular night. Nothing further was known about the circumstances under which the theft took place, except that the goods yard was large in extent and that the public was not ordinarily allowed free access thereto:

Held, that it was impossible to conceive that if there had been anything approaching an efficient patrol of the yard, a theft of such bulky merchandise could have been carried through successfully, and that the Company could, therefore, be held guilty of wilful neglect within the meaning of Risk Note B.

Second appeal from the decree of the District Judge, Allahabad, dated the 19th May, 1924.

Mr. *Mushtaq Ahmad*, for the Appellant.
Mr. *L. P. Zutshi*, for the Respondents.

JUDGMENT.—In this case three bales of piece-goods weighing five maunds each were stolen from a sealed wagon in the Howrah goods yard. The theft was discovered at 11 o'clock on the night of the 6th of April, 1921. It presumably, therefore, took place between dark and that hour. The goods had been entrusted to the Railway by the plaintiff under the Risk Note Form B and in this particular case it was necessary for the plaintiff to show either wilful neglect by the Railway Co., or that there was theft, or connivance at theft by a Railway servant or servants. Nothing is known, other than those facts which we have stated, of the circumstances under which the bales disappeared, except that it must be a matter of common knowledge that the goods yard is large in its extent, being the goods yard at Howrah; also, of course, there is evidence and it must be a matter of common knowledge that the public is not ordinarily allowed free access thereto. The Court of first instance, for reasons which it gave, came to the conclusion that there was wilful neglect by the Railway Co., and decreed the plaintiff's suit. The lower Appellate Court has reversed this decree. The real important fact in this case is that the three bales, two of which only were the property of the plaintiff, were as the learned Judge of the Appellate Court says:—"Bulky and heavy articles and it is said they would weigh about five maunds each, that is to say, it would require two or three men to remove each bale." This consideration weighed very powerfully with the trial Court, and very properly so. The learned Appellate Court brushes this argument aside in the following passage:—"Much is made of the fact that the bales removed were heavy and would have required two or three men to carry them and could not have been carried very quickly, and that in the process of carrying them the people carrying them would expose a good deal to view. But I do not think that this shows either gross negligence or connivance on the part of those who are put to guard the yards, for the yards must cover a very large area and as a general rule such places are not very well lighted; and although, of course, the thieves take certain amount of risk is inevitable in a thief's calling; and in this particular branch of stealing I do not think that the risk at detection is really very great, for the thieves can always drop their burden and run. In that case, of course, that particular theft is frustrated, but the thieves are by no means necessarily caught, and can easily proceed to business again the next night, probably with better fortune."

We think that the whole of this passage suggests an entire misconception of the real consideration to be weighed. The question is not whether a thief who was disturbed in the act of his offence could easily escape, but whether he could easily carry through his enterprise and get away with the property. The fact then that he could easily escape is no reason for rejecting the argument deduced from the extremely bulky and heavy nature of the property stolen. It is impossible to conceive that if there had been anything approaching an efficient patrol of the yard, a theft of such bulky merchandise could have been carried through successfully. Putting aside, therefore, the facility with which the thief could escape if disturbed in his act as being no reason for rebutting the other evidence of wilful neglect, we find that there is no sufficient reason for the lower Appellate Court having disturbed the finding of the trial Court.

We think, therefore, that this appeal must be allowed. It is allowed accordingly. We set aside the decree of the lower Appellate Court and restore that of the Court of first instance and the appellant will have his costs all through, including costs in the lower Appellate Court and in this Court.

A. N. A. *Appeal allowed.*

MADRAS HIGH COURT.
FULL BENCH.

CIVIL APPEAL No. 61 OF 1924.
September 1, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Krishnan and Mr. Justice Curgenven.

R. E. MAHOMED KASIM & CO. THROUGH R. A. ABDUL KADIR, THE AUTHORIZED AGENT OF ITS PROPRIETOR—PLAINTIFF—APPELLANT

versus

SEENI PAKIR *bin* AHMED AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 13 (b)—Foreign judgment—Ex parte *judgment without trial on evidence—Suit on judgment, maintainability of—'Judgment on the merits.'*

A suit does not lie in British India on a foreign judgment given on default of appearance of the defendant on the plaint allegations without any trial on evidence. Such a judgment is not one on the merits of the case within the meaning of s. 13 (*b*) of the Civil Procedure Code. [p. 560, col. 2; p. 561, col. 1.]

Keymer v. *Viswanatham Reddi* (1) and *Oppenheim* v. *Mahomed Haneef* (3), followed.

Janoothassan Sait v. *Mahomed Ohuthu* (4), overruled.

Appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura, dated the 8th November, 1923, in Original Suit No. 21 of 1923 (O. S. No. 20 of 1922 on the file of the Court of the Subordinate Judge, Ramnad).

This appeal coming on for hearing on the 1st and 2nd March, 1926, before Krishnan and Venkatasubba Rao, JJ., upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the case and upon hearing the arguments of Messrs. *A. Krishnaswami Ayyar* and *E. Vinayaka Rao*, for the Appellant, and Mr. *K. V. Krishnaswami Ayyar*, for Respondent No. 1 and Mr. *N. Kunjithapatham Ayyar*, for Respondents Nos. 1 and 3 to 6 and the Respondent No. 2 not appearing in person or by Pleader and the case having stood over for consideration till 11th March, 1926, the Court made the following

ORDER OF REFERENCE TO A FULL BENCH.

Krishnan, J.—The suit from which this appeal has arisen was brought by the plaintiff on a judgment of the Supreme Court of Penang obtained by him against 1st and 2nd defendants and one Pichai Haji, deceased, whose legal representatives are defendants Nos. 3 to 6 That suit was on a deed of composition Ex. F executed by the said three persons for money due on dealings in Penang. Though they were British Indian subjects, they were at the time of the suit in Penang, resident within the jurisdiction of the Penang Court. At the hearing of that suit they did not appear in Court to contest it. They were declared to have been properly served, the present 1st defendant having been served personally and the two others by substituted service. In accordance with a rule of procedure of that Court by which, in suits in which defendants, being properly served, do not appear and contest, judgment is given for the plaint—claim without any trial, judgment was entered up in favour of the plaintiff as a matter of course. It is on that judgment the present suit is brought.

The Subordinate Judge dismissed the suit holding that judgment was obtained against the defendants in Penang Court "by procuring a false and fraudulent return of service of the writs of summonses obtained against them" and that in fact the defendants had not been served at all and that it was against natural justice to recognize such a judgment in our Courts. I am unable to agree that there was any real defect in the service of summons. The issue raised in the present suit, Issue No. 1, has reference only to service on the 1st defendant. That issue is "Has the decree in O. S. No. 714 of 1921 on the file of the Supreme Court of Penang been obtained against the 1st defendant by procuring a false and fraudulent return of service of the writ of summons on him?" The verified report of the process-server to the Penang Court was that he was personally served, Ex. D. The only evidence we have now, *viz.*, that of P. W. No. 1 is that he was personally served. The 1st defendant did not go into the box and deny it. I think that on this evidence it must be held that the 1st defendant was personally served. As regards the other two defendants who were served by substituted service, no issue was raised, but the Subordinate Judge has held that substituted service was bad. What appears from the affidavits of the process-server which have been admitted in evidence without objection and the evidence of P. W. No. 1, is that the 1st and 3rd defendants in that suit had moved away from Queen Street where they usually lived to a street quite close by, called King Street, after their shop was attached and sealed up and that they were living in 71, King Street, at the

time the summonses were taken out. Though the summonses were addressed to 70, Queen Street, the process-server took them to the place in King Street where they were reported to be and not finding them returned the summonses unserved. It was on this that substituted service was applied for and granted. There is nothing fraudulent in the application. It was entirely for that Court to decide whether substituted service should have been granted. Substituted service was effected by affixing in 71, King Street and on the Court notice board. I can see no fraud or mistake in these proceedings. If there was any error, the defendants in the suit being resident foreigners, should have applied to the Penang Court to set the matter right, but nothing of that sort was ever done. Against the evidence on the plaintiff's side there is no counter-evidence of any value. Second defendant also did not go into the box or contradict plaintiff's evidence. The evidence of D. Ws. Nos. 2 and 3 does not seem to me to be of any value. There is no justification in my opinion, for the Subordinate Judge's finding that the defendants had not been served at all.

It has, however, been broadly argued by the learned Vakil for the respondents that the judgment of the Penang Court being a judgment by default cannot form the basis of a suit in this country. He relies upon s. 13 of the Civil Procedure Code, cl. (*b*) and contends that the judgment not having been given on the merits of the case, is not binding on the defendants. He concedes that an *ex parte* decree given by a Court after taking evidence and finding that the plaintiff's claim is proved on such evidence, may be a decree on the merits, but he urges, that, as in the present case, no such evidence was taken, but the Penang Court under its rules of procedure entered up judgment for plaintiff on the defendants' default of appearance, such a judgment could not be treated as one on the merits of the case. He has relied on *Keymer's case*, *Keymer* v. *Viswanatham Reddi* (1), in support of his contention. In that case the Privy Council in agreement with this Court's judgment in *Peruri Visvanatha Reddi* v. *Keymer* (2) held that a judgment in England obtained after the defence was struck off for default in not answering interrogatories and after the suit had thus become an undefended one, was not a judgment on the merits and a suit founded on it in this country must fail. There was also another case reported as *Oppenheim* v. *Mahomed Haneef* (3) where a suit had been brought in Madras on an *ex parte* judgment in England, given on an award passed there; the suit was also based on the award itself as well as on the original cause of action. The main point decided in that case was that the English award could not be impugned here on the ground of irregularity, but it was taken for granted in it that the suit so far as it was based on the English judgment that followed on the award could not be maintained as it was a judgment by default.

On the other hand, there is a recent decision of a Bench of this Court in *Janoohassan Sait* v. *Mahomad Ohuthu* (4) which held that a judgment though passed in an *ex parte* proceeding was one on the merits and formed a proper basis for a suit here. That was a Ceylon case where also a similar rule prevails as in Penang, entitling the Court to give a decree without any trial when the defendants being served do not appear; though the Ceylon rule gives power to the Judge to take evidence if he thinks fit, there is nothing to show that in the particular case any evidence was taken. It is difficult to reconcile this view with the view expressed in the cases in *Keymer* v. *Viswanatham Reddi* (1) and *Oppenheim* v. *Mahomed Haneef* (3). The *Keymer's case* (1) has been sought to be distinguished in *Janoothassan Sait* v. *Mahomad Ohuthu* (4) on the ground that in the former case, defendant had filed a defence which was subsequently struck off, whereas, in a case where defendant does not appear, there is no defence raised, and it is suggested that in such cases there is a presumption that the defendant admits the claim. I am not satisfied that this is a proper distinction. Their Lordships do not put the case on any such narrow basis in *Keymer* v. *Viswanatham Reddi* (1). It is difficult to say that there is any decision on the merits when a

(1) 38 Ind. Cas. 683; 40 M. 112; 15 A. L. J. 92; 21 M. L. T. 78; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. R. T. 175; 44 I. A. 6 (P. C.).

(2) 27 Ind. Cas. 386; 39 M. 95; 27 M. L. J. 670.

(3) 74 Ind. Cas. 616; 45 M. 496; 26 C. W. N. 642; 16 L. W. 33; 30 M. L. T. 291; 4 U. P. L. R. (P. C.) 36; A. I. R. 1922 P. C. 120; (1922) M. W. N. 396; 43 M. L. J. 422; 24 Bom. L. R. 1245; 36 C. L. J. 444; 49 I. A. 174 (P. C.).

(4) 82 Ind. Cas. 425; 47 M. 877; 47 M. L. J. 356 20 L. W. 677; A. I. R. 1925 Mad. 155.

decree is given mechanically in accordance with a prescribed rule.

A number of English decisions were cited to us wherefrom it would appear that suits on foreign judgments are allowed in England though they are judgments by default. My learned brother has referred to them and I need not do so again. It does not seem, however, to be necessary to refer to them in detail as we are governed by the language of s. 13 of the Civil Procedure Code in dealing with the binding character of foreign judgments in this country. Whatever the English view might be, the question what the Indian Law is, though not of frequent occurrence, is of much importance, and in view of the decision in *Janoothassan Sait* v. *Mahomad Ohuthu* (4) I think it is desirable that it should be settled by a Full Bench. I would, therefore, refer to the Full Bench the following question:—

"Does a suit lie in this country on a foreign judgment given on default of appearance of the defendant on the plaint allegations without any trial on evidence?"

The other points in the case are reserved for further disposal after the Full Bench have given their opinion.

Venkatasubba Rao, J.—I agree that the judgment cannot be supported on the ground on which it is based. As my learned brother has fully dealt with that point, I do not propose to cover the same ground. If the ground on which the judgment is founded, is the only ground available to the defendant, I should, without hesitation, reverse the decision and allow the appeal; but the defendant's learned Vakil seeks to support the judgment on another ground, namely, that a foreign judgment by default of appearance cannot be the foundation of an action in an Indian Court. The question is—does a foreign judgment given in default of appearance, operate as *res judicata* under s. 13 of the Civil Procedure Code? The answer to this question depends, in my opinion, upon the view to be taken as to whether the law as contained in this section is or is not identical with the English Law on the point.

I cannot accede to the argument that under the English Law a foreign judgment obtained by default of appearance cannot be pleaded in Bar. In *Douglas* v. *Forrest* (5) an action was brought in the English Courts upon a Scotch judgment obtained in default of appearance. The defendant was a native of Scotland and the debt was contracted in that country. The debtor was out of Scotland at the time, had not been personally served and had no notice of the proceedings. By the Scotch Law a person against whom such a decree was pronounced might at any time within forty years dispute the merits of such decree. Best, C. J., held that the decree was consistent with principles of justice and would, therefore, support an action in an English Court.

To the same effect is the decision in *Vanquelin* v. *Bouard* (6). The French Court of the *Tribunal de Commerce* pronounced judgment against defendant for default of appearance and it was contended that this foreign judgment was not binding upon an English Court, as under the Law of France, it would become void and of no effect, as a matter of course, upon the defendant merely entering an opposition to it. Erle, C. J., overruled this contention observing that the mere fact that a judgment is in a certain event liable to be set aside, does not prevent its being the foundation of an action in the English Courts. A further plea was taken in that case (the 13th plea) that the French Court had no jurisdiction. Keating, J., while disallowing the plea, observed that the defendant ought not to be allowed to deny facts which it was competent to the foreign Court to try and must be assumed to have been tried.

In *Pemberton* v. *Hughes* (7) the *Vanquelin case* (6) was referred to with approval by the Court of Appeal. This was not a suit on a foreign judgment but its validity was put in issue. The plaintiff claimed to be the widow of Pemberton alleging that a decree for divorce with her former husband Erwin had been pronounced by the proper Court in Florida in an undefended action by the husband against the wife. The defendant in the English Court pleaded that at the time when the plaintiff went through the form of marriage with Pemberton, she was still the wife of Erwin and that consequently she was not the widow of Pemberton and was not entitled to the relief

(5) (1828) 4 Bing. 686; 130 E. R. 936; 1 Moo. & P. 963; 6 L. J. C. P. (o. s.) 157; 29 R. R. 695.

(6) (1863) 15 C. B. (N. S.) 341; 143 E. R. 817; 33 L. J. C. P. 78; 9 L. T. 582; 10 Jur. (N. S.) 566; 12 W. R. 128; 3 N. R. 122; 137 R. R. 540.

(7) (1899) 1 Ch. 781; 68 L. J. Ch. 281; 47 W. R. 354; 80 L. T. 369; 15 T. L. R. 211.

claimed. Lindley, M. R., after referring to the fact that in *Vanquelin* v. *Bouard* (6) *the defendant allowed judgment to go by default*, observed, that the Court of Common Pleas rightly overruled the plea of want of jurisdiction based on the ground that the French action had been brought in a wrong Court in France. In regard to foreign judgments, it was held that the only jurisdiction which matters, is the competence of the Court from an international as distinguished from a purely Municipal point of view. Rigby, L. J., and Vaughan Williams, L. J., also approved of the decision in the *Vanquelin case* (6).

That a suit lies in an English Court upon a foreign judgment obtained by default, is assumed in *Nouvion* v. *Freeman* (8). The point there decided was, that a judgment known as "Remate Judgment" in a Spanish Court cannot be the foundation of an action. The proceedings in the foreign Court are merely in the nature of "Executive" proceedings in which the defendant can plead only certain limited defences and under the Spanish Law, in respect of the same subject-matter, either party can take ordinary proceedings in which the whole merits may be gone into and the "Remate Judgment" may be superseded by the final "Plenary Judgment." It is on account of the nature of the "Remate Judgment" that the House of Lords held that the foreign judgment there in question could not be the basis of an action in an English Court. There are observations in the judgments of Lord Herschell and Lord Watson, which clearly imply, that the mere fact that a foreign judgment was given in default of appearance does not render it any-the-less binding upon the parties to that judgment. Stating the principle on which the enforcement of foreign judgments proceeds, Lord Herschell declares that the foundation of the rule is that a final adjudication has been given where "*the whole merits of the case are open, at all events to the parties, however much they may have failed to take advantage of them.*" Lord Watson observes to the same effect that the reason for making a foreign judgment conclusive, is either because there had already been an investigation by the foreign Tribunal "or *because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence.*" If the defendant, therefore, had the opportunity of defending the action, the fact that he did not actually defend it, is immaterial.

I have not the slightest doubt that under the English Law a suit lies upon a foreign judgment given in default. On behalf of the defendant two cases have been strongly relied on. *The Delta* (9) and *The Challenge and the Due d' Aumale* (10). These cases are distinguishable and, at any rate, I am satisfied that on the point in question they cannot, at the present day, be regarded as authoritative. In the first of the two cases, *The Delta* (9), the judgment was based upon the ground that "the suit in the Court of Commerce had not passed into a *res judicata* but was only a *lis alibi pendens.*" The learned Judge says expressly that it is upon this ground that his judgment is principally founded, although, he adds that there is a second reason, namely, that the foreign judgment was not given *on the merits of the case but on matters of form only.* In regard to *The Challenge and the Due d' Aumale* (10), the basis of the judgment was, that the defendants were not bound to submit to the jurisdiction of the Court in France and that they did not in fact submit to that jurisdiction. The plea of *res judicata* based on such a judgment by default was disallowed. *The Challenge and the Due d' Aumale* (10), therefore, only applies to a case where the defendant was not a subject of or resident of the country in which the foreign judgment was obtained.

As I have said, the weight of authority in England is clearly in favour of holding that a foreign judgment by default operates as *res judicata.*

The question then arises, is the law in India different? Under *s. 13 of the Civil Procedure Code*, a foreign judgment is declared to be conclusive except in certain cases specified in six clauses. For the present purpose the relevant clauses are cls. (*b*) and (*d*). Clause (*b*) says that a foreign judgment shall not be conclusive where it has not been given *on the merits of the case.* Clause (*d*) says that it shall not be conclusive where the proceedings in which the judgment was obtained are *opposed to natural justice.* There can be no doubt that the exception relating to natural jus-

(8) (1890) 15 A. C. 1; 59 L. J. Ch. 337; 62 L. T. 189; 38 W. R. 581.

(9) (1876) 1 P. D. 393; 45 L. J. P. 111; 35 L. T. 376; 26 W. R. 46.

(10) (1904) P. D. 41; 73 L. J. P. 8; 89 L. T. 481; 9 Asp. M. C. 497.

tice is recognized in the English cases. The decisions to which I have referred fully bear this out; but it seems to me, however, that the further limitation in s. 13 that the foreign judgment should have been given on the merits of the case, is a departure from the English rule. The only English cases where there was any reference to the merits of the case, are *The Delta* (9) and *The Challenge and Due d' Aumale* (10) and it was assumed in these two cases that if the validity of the foreign judgment is to be judged by its being on the merits, a judgment by default does not satisfy that test and cannot, therefore, be the foundation of an action in an English Court.

In *Keymer* v. *Viswanatham Reddi* (1) the defendant was originally sued in an English Court. His defence was struck out as he refused to answer interrogatories and judgment was given against him. Their Lordships of the Judicial Committee held that a suit did not lie in an Indian Court upon the English judgment so given. Their Lordships say:—

"He (the defendant) was *treated as though he had not defended*, and judgment was given upon that footing. It appears to their Lordships that no such decision as that can be regarded as a decision given on the merits of the case within the meaning of s. 13, sub-s. (*b*)."

The implication in this passage that the foreign judgment would be inconclusive had the suit been never defended at all is, as I have pointed out, not in consonance with the English Law on the point and I must, therefore, take it that in their Lordships' opinion the reference to merits in s. 13 (*b*) makes the Indian Law more stringent in this respect. When the same case was before the Madras High Court Sir John Wallis, C. J., and Seshagiri Ayyar, J., expressed also the opinion that under the Code an *ex parte* judgment is not conclusive for the reason that there has been no trial on the merits. They indicate that that this view may not be in accordance with the more recent English cases but as they are construing a section of the Code they are bound to give full effect to it.

In *Oppenheim* v. *Mahomed Haneef* (3) the point came up for decision but was not decided. The plaintiff based his suit upon a foreign judgment as well as on the antecedent cause of action. Coutts Trotter, J., as he then was, sitting on the Original Side, assumed on the authority of *The Keymer case* (1), that a suit did not lie in an Indian Court on a foreign judgment by default but held that on the alternative cause of action the plaintiff was entitled to a decree Before the Judicial Committee the view of Coutts-Trotter, J., on the first point was not challenged and their Lordships were invited to deal only with the second point.

Thus we have that in the first of the Privy Council cases the observation is in the nature of an *obiter dictum* and in the second Privy Council case the point was assumed and not challenged.

Notwithstanding this, I should be prepared to hold (agreeing with my learned brother) that s. 13, cl. (*b*), enacts a rule different from that which obtains in England and that an *ex parte* foreign judgment does not operate as *res judicata;* but I find that a different view has been taken by Phillips, J., in a considered judgment (Madhavan Nair, J., concurring) *Janoothassan Sait* v. *Mahomad Ohuthu* (4) and that another Bench consisting of Phillips and Ramesam, JJ., have, without discussion, followed this case (see Appeals Nos. 144 and 145 of 1922 unreported). In view of what I have said, I think that the question as framed by my learned brother should be referred to a Full Bench for its opinion.

In making this reference I must advert to an argument advanced by the defendants' learned Vakil. He sought to make a distinction between two classes of *ex parte* decrees, (1) where by the procedure of the Court the plaintiff must adduce some evidence, generally oral, although there is default of appearance by the defendant; (2) where upon a special form of writ, formal proof is dispensed with and judgment is given as a matter of course. It is contended that in the first case the judgment can be said to be on the merits whereas it is different in the second case. I must say that I cannot follow this distinction. In the one case the plaintiff proves his claim by adducing formal evidence; in the other case there is the implied admission of the claim by the defendant who while it is open to him to contest it allows judgment to go by default. I cannot accept this intermediate position; it may be that either of the two views is correct, but I find nothing in principle to justify the distinction sought to be made.

This appeal coming on for hearing, upon

perusing the grounds of appeal, the judgment and decree of the lower Court and the material record in the case and the Order of Reference to a Full Bench and upon hearing the arguments of Messrs. *A. Krishnaswami Ayyar* and *E. Vinayaka Rao*, for the Appellant, and Mr. *K. V. Krishnaswami Ayyar*, for Respondent No. 1 and Mr. *N. Kunjithapatham Ayyar*, for Respondents Nos. 1 and 3 to 6 and Respondent No. 2 not appearing in person or by Pleader, the Court expressed the following

OPINION.

Coutts Trotter, C. J.—This case has been dealt with so fully by the referring Judges that I propose to say very little. The suit was brought on a foreign judgment, namely, a judgment of the Supreme Court of Penang. At the hearing of that suit the defendants did not appear in Court to contest it but it has been held that the summonses have been properly served in accordance with the views obtaining in that Court. In that Court where the defendant does not appear after proper service of summons judgment is given without trial and without taking any evidence. It seems to me impossible to argue that that is not clearly within the decision and even the wording of the Privy Council in *Keymer* v. *Viswanatham Reddi* (1). It was argued—and very likely correctly argued—that the English Law was different. The answer to that is we are bound by the Statute on which the decision in *Keymer's case* (1) was based. That statutory provision is s. 13 (*b*) of the Code of Civil Procedure under which an exception to the conclusiveness of a foreign judgment in a British Indian Court is where it has not been given on the merits of the case. As I understand Mr. Alladi Krishnaswami Ayyar's argument, he says that it is not like the case of the defendant's defence being struck out for not answering interrogatories or being out of time or anything of the kind; for that may be held not to be a defence on the merits because *ex hypothesi* the position is the defendant was precluded from going into the alleged merits which he had set up and he says it is quite different where the defendant does not appear at all because that is a clear intimation by him that he admits the validity of the plaintiff's claim and that is just as good as if the plaintiff has actually proved it by evidence. I think the decision of their Lordships of the Privy Council impliedly excludes any such distinction and I regret to say that I cannot agree with the attempt made by two learned Judges of this Court to draw this distinction in *Janoothassan Sait* v. *Mahomad Ohuthu* (4) and I think that that case must be regarded as no longer law.

Krishnan, J.—I agree with the learned Chief Justice that our answer to the Full Bench reference must be that the foreign judgment is not conclusive as it has not been given on the merits of the case and that the suit, therefore, does not lie on it. I have dealt at length with this point in the referring order and I have nothing further to add except to give expression to my opinion which I withheld in that order as the matter was to be placed before the Full Bench. I have no doubt whatever that under s. 13 (*b*) of the Code of Civil Procedure a decree obtained on default of appearance of the defendant without any trial on evidence is a case where the judgment must be held not to have been given on the merits of the case.

The matter, it seems to me, is concluded by the judgment of the Privy Council in *Keymer's case* (1). It was taken as settled in the subsequent case *Oppenheim* v. *Mahomed Hanef* (3). After that the attempt in *Janoothassan Sait* v. *Mahomad Ohuthu* (4) to distinguish the Privy Council case on the ground that it was a special case where the defence had been put forward but struck out, interrogatories not having been answered by the defendant, is not tenable. I should like to add also that I would not entirely agree with my learned brother Venkatasubba Rao, J., regarding the concluding paragraph of his reference that there is no distinction between a case in which a decree is given without any trial whatever and a decree in a case in which even though defendant did not appear the matter was tried in full on evidence and the plaintiff proved his case. In the latter class of cases it may well be argued that they are cases which have been decided on the merits and do not fall within s. 13 (*b*). However, that matter does not really arise here, for this case is clearly one where the decision was given without any evidence at all, but under the rules governing the Penang Court under which, where the defendant does not appear, a decree is given as a

matter of course. I agree with the order proposed by the learned Chief Justice.

Curgenven, J.—I agree that the observations of the Privy Council in *Keymer's case* (1) cover a case of this nature in which no evidence was given and, therefore, the decision was not upon the merits. The decision in *Janoothassan Sait* v. *Mahomad Ohuthu* (4) appears to me to run counter to those observations and must be dissented from. I agree, therefore, that the question referred to us should be answered in the negative.

V. N. V. *Answered in the negative.*
A. N. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 405 AND 406 OF 1923.

August 30, 1924.

Present:—Mr. Baker, J. C.

RAMCHANDRA—PLAINTIFF—APPELLANT

versus

SADASHEO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 92—Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale—Decree satisfied before confirmation—Application to set aside sale—Limitation.

Although after the confirmation of an auction-sale, the auction-purchaser's title dates back to the date of the sale, yet where the sale has not been confirmed he cannot be held to represent the interests of the parties to the suit. [p. 562, col. 2.]

Where before the confirmation of an auction-sale, the decree is admitted by the decree-holder to be satisfied, it ceases to exist as a decree capable of execution, and the very foundation of the powers of the Execution Court, namely, the existence of a decree capable of execution, having disappeared, the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered. [p. 562, col. 1.]

Where in such a case the judgment-debtor makes an application that the sale should be set aside, the application does not fall within the purview of r. 92 O. XXI of the Civil Procedure Code and is not governed by Art. 166 of Sch. I to the Limitation Act. [p. 563, col. 1.]

Appeal against a decree of the Additional District Judge, Nagpur, dated the 5th September, 1923, in Civil Appeals Nos. 64 and 65 of 1923.

Mr. *W. R. Puranik*, for the Appellants.

Mr. *D. T. Mangalmurti*, for the Respondents.

JUDGMENT.—These two appeals are on the same point and may be disposed of in one judgment.

The facts are that Sadasheo, the respondent No. 1, obtained two decrees against Madhorao, respondent No. 2, and in execution thereof the property of the judgment-debtor Mahadeo Rao was sold and purchased by the appellant Ramchandra on 9th April, 1923. After the expiry of 30 days from the sale but before the confirmation of the sale the decree-holder intimated full satisfaction of the decree out of Court and the judgment-debtor deposited 5 per cent. of the purchase-money for payment to the auction-purchaser and asked that the sale should be set aside.

The decree was declared fully satisfied and the purchase-money deposited by the auction-purchaser was ordered to be refunded. The auction-purchaser presented an application on 9th June, 1923, for confirmation of the sale on the ground that the requirements of O. XXI, rr. 89 and 92, of the Civil Procedure Code, were not complied with and that the judgment-debtor's application of 7th June, 1923, was barred by Art. 166 of the Limitation Act.

The first Court rejected the auction-purchaser's application as the decree was already satisfied. On appeal the Additional District Judge, Nagpur, was of opinion that as s. 65 of the new Civil Procedure Code does not contain any such restriction with respect to the decree subsisting at the date of the confirmation of sale, as was found in the old Civil Procedure Code, s. 316, and as O. XXI, r. 92 (2) requires that no order shall be passed regarding the sale unless notice is given to all persons affected and no notice was given to the auction-purchaser, and having regard to O. XXI, r. 89 and Art. 166 of the Limitation Act, the auction-purchaser was within his rights in asking for a confirmation of sale in his favour, notwithstanding the previous satisfaction of the decree, as the judgment-debtor had not deposited 5 per cent. of the purchase-money within 30 days of the sale.

But in view of the ruling of this Court in *Nilkanth* v. *Yeshwant* (1) which lays down that confirmation of a sale cannot be ordered in such a case, the Additional Dis-

(1) 65 Ind. Cas. 331; 18 N. L. R. 134; A. I. R. 1922 Nag. 248.

trict Judge felt constrained to dismiss the appeal

The auction-purchaser makes this second appeal.

The case of *Nilkanth* v. *Yeshwant* (1) lays down that where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution. The very foundation of the powers of a Court to execute a decree, namely, the existence of a decree capable of execution, having disappeared, the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered.

This case follows *Khushal Chand Premraj Marwadi* v. *Nandram Sahebram Marwadi* (2) and *Mul Chand* v. *Mukta Prasad* (3).

It is contended on behalf of the appellant that this case is distinguishable from the present case, as within a month of the date of the sale an application to set it aside was made and the amount was deposited by the decree-holder, and, therefore, steps were taken within the time required under Art. 166 of the Limitation Act. There was, however, no application by the judgment-debtor and the case has been expressly decided without reference to any such application. The case, therefore, is not distinguishable on that account.

It is further contended on behalf of the appellant that the cases quoted in *Nilkanth* v. *Yeshwant* (1) are under the old Civil Procedure Code and the case in *Mul Chand* v. *Mukta Prasad* (3) is a case in which the decree ceased to exist because the Appellate Court reversed the decree.

It is further pointed out that the view expressed in *Khushal Chand Premraj Marwadi* v. *Nandram Sahebram Marwadi* (2) as to a private sale effected during the pendency of the proceedings before the Collector has been dissented from by the Privy Council in *Gaurishankar Balmukund* v. *Chinnumiya* (4). That, however, is a point which does not arise.

It is further contended that the effect of the decision in *Nilkanth* v. *Yeshwant* (1) is to make the provisions of Art. 166 of the Limitation Act nugatory and is also against the provisions of O. XXI, r. 92, Civil Procedure Code, which have been held peremptory.

On behalf of the respondents it is contended that the second appeal by the auction-purchaser would not lie, as the sale has not been confirmed and he is not the representative of the judgment-debtor or the decree-holder. The appeal, however, could be treated as an application for revision.

It would appear that although after the confirmation of the sale the auction-purchaser's title dates back to the date of the sale, yet where the sale has not been confirmed, he cannot be held to represent the interests of the parties in suit. Order XXI, r. 92, of the Civil Procedure Code, deals with applications made under r. 89, r. 90 or r. 91, and provides that where no application is made under these rules, or where such application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute.

In the present case the application made cannot be regarded as falling under these rules. Order XXI, r. 89, contemplates an application by the judgment-debtor for setting aside the sale on payment of 5 per cent. of the purchase money, and for payment to the decree-holder of the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. In the present case no such application was made by the judgment-debtor; the application for setting aside the sale was made by the decree-holder, and the judgment-debtor deposited only 5 per cent. for payment to the purchaser. Rules 90 and 91 have, of course, no application. It would appear, therefore, that the present case is not covered by the provisions of O. XXI, r. 92.

Turning now to Art. 166 of the Limitation Act, which provides 30 days from the date of the sale for an application for setting aside the sale in execution of a decree. It is stated in Rustomji's Limitation Act that this Article refers to applications under O. XXI, rr. 72, 89, 90 and 91, Civil Procedure Code. I have already dealt with rr. 89, 90 and 91. Rule 72 refers to purchases by decree-holders, and also has no application. It will, therefore, appear that the present case is one which is not covered

(2) 12 Ind. Cas. 572; 13 Bom. L. R. 977; 35 B. 516.

(3) 10 A. 83; A. W. N. (1887) 287; 6 Ind. Dec. (N. S.) 56.

(4) 48 Ind. Cas. 312; 14 N. L. R. 181; 35 M. L. J. 733; 16 A. L. J. 993; 25 M. L. T. 64; 23 C. W. N. 350; 29 C. L. J. 201; 46 C. 183; 1 U. P. L. R. (P. C.) 14; 21 Bom. L. R. 541; 9 L. W. 327; 45 I. A. 219 (P. C.).

by any of the rules of the Civil Procedure Code.

This is not a case which is likely to occur very often, and I am not impressed by the argument for the appellant that by collusion between the decree-holder and the judgment-debtor the auction-purchaser is likely to be put to a loss. A collusion between the decree-holder and the judgment-debtor, when matters have proceeded to the length of the sale, is not likely to be a matter of frequent occurrence. It has been held in *Hukum Chand Boid* v. *Kamalanand Singh* (5) that the Civil Procedure Code is not exhaustive.

It has been contended that once the amount of the sale has been deposited in the Court, the decree-holder should not be allowed to accept payment in any other manner by a private arrangement between himself and the judgment-debtor. I am unable to accept this view.

In these circumstances, while the Civil Procedure Code makes provision for an application by the judgment-debtor to set aside the sale, it does not seem to provide for an application of the kind, with which we are concerned in the present appeal. This being so, I am not impressed by the argument that the effect of the ruling in *Nilkanth* v. *Yeshwant* (1) is to make O. XXI, r. 92, Civil Procedure Code, of no effect, or to nullify Art. 166 of the Limitation Act. I, therefore, think that the present case is governed by the ruling in *Nilkauth* v. *Yeshwant* (1) with which I see no sufficient reason to disagree. The existence of the decree capable of execution having disappeared, the Court's powers in execution also ceased, and confirmation of the sale which is a proceeding in execution cannot be ordered. The interests of the auction-purchaser are sufficiently protected by the payment of 5 per cent. of the purchase-money to him.

I, therefore, confirm the decrees of the lower Appellate Court in both cases and dismiss the appeals with costs.

Z. K *Appeals dismissed.*

(5) 33 C. 927 at pp. 930, 931; 3 C. L. J. 67.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1819 OF 1923.

January 20, 1927.

Present:—Mr. Justice Iqbal Ahmad.

SITA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ROSHAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Suit for possession against defendants claiming to be in possession jointly, dismissal of—Appeal—Death of one respondent—Legal representatives not brought on record—Abatement, extent of.

Where a suit to recover possession of immovable property from two defendants, both of whom claim to be jointly in possession of the property, is dismissed by the trial Court and during the pendency of an appeal by the plaintiff one of the defendants-respondents dies and his legal representatives are not brought upon the record within the prescribed period, the appeal abates not only as against the legal representatives of the deceased respondent, but also against the surviving respondents. [p. 564, col. 1.]

Second appeal against a decree of the Subordinate Judge, Mainpuri, dated the 24th September, 1923.

Mr. *G. Agarwala*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit for possession of a house and for recovery of damages on the allegation that the house belonged to the plaintiff-appellants, and that the defendants had taken unlawful possession of the same and having demolished a portion of the house were constructing a new house.

The defence to the suit was that the defendants were building a house on an *uftada* piece of land that belonged to the *zemindar* with the latter's permission, and that there was no house of the plaintiffs on that piece of land at the time that the defendants were permitted by the *zemindar* to build a house. The defence found favour with the trial Court and it dismissed the plaintiffs' suit, and the decree of the trial Court has been affirmed by the lower Appellate Court.

When the appeal was called on for hearing, a preliminary objection was taken by the learned Counsel for the respondents, that, because of the omission of the plaintiff appellants to bring upon the record one of the legal representatives of Roshan Lal, one of the deceased respondents, within the time allowed by law, the entire appeal had abated. This objection is based on the following facts. The suit was originally

instituted against two defendants, Roshan Lal and Shanker Lal, and both of them were arrayed as respondents in the present appeal. During the pendency of the appeal in this Court Roshan Lal died, leaving as his legal representatives two persons Shanker Lal and Prem Narain. Shanker Lal being already a party to the appeal a note was made on the record on the application of the plaintiff-appellants, that he is also a legal representative of Roshan Lal, but Prem Narain was not brought upon the record as a legal representative of Roshan Lal. It is argued by the learned Counsel for the respondents that Prem Narain not having been brought upon the record, the appeal abated not only as against Roshan Lal, the deceased respondent, but abated as a whole, and in support of the argument reliance has been placed by him on the case of *Daya Ram Ojha* v. *Ram Narain* (1).

In my judgment the preliminary objection is well founded and must prevail. It is provided by O. XXII, r 4 that where one of two or more defendants dies, and right to sue does not survive against the surviving defendant or defendants alone, and within the time limited by law no application is made to bring upon the record the legal representatives of the deceased defendant "the suit shall abate *as against the deceased defendant*." This rule is made applicable to appeals by O. XXII, r. 11, Civil Procedure Code. True it is that the words "as against the deceased defendant" were not to be found in the corresponding section of the old Code, *viz.*, s. 368 of Act XVI of 1882. But notwithstanding the introduction of these words in the new Code, it does not necessarily follow that the omission of an appellant to bring upon the record the legal representatives of one of several respondents to an appeal, on whose death the right to continue the appeal does not survive against the surviving respondent or respondents alone, may not, in certain cases, cause an abatement of the entire appeal. One class of cases in which the omission to bring the legal representatives of one of several respondents, who dies during the pendency of the appeal, causes an abatement of the entire appeal is that where the respondents to the appeal are the plaintiffs in the suit in whose favour a joint decree was passed as against the defendant-appellants. Instances of this class of cases are to be found in the cases reported as *Sheikh Dendoo* v. *Sheikh Sachoo* (2), *Sardari Lal* v. *Ram Lal* (3) and *Kali Dayal Battacharjee* v. *Nagendra Nath Parkashi* (4). The reason, why the omission to bring upon the record the legal representatives of one of the deceased plaintiff-respondents was held in these cases to cause an abatement of the entire appeal, was that if the appeal was heard as against the surviving respondents and was allowed and their claim was dismissed, there will come into existence two decrees inconsistent with the other, *viz.* (1) the decree of the Appellate Court dismissing the claim of the surviving plaintiff-respondents and (2) the decree of the Court below in favour of the deceased plaintiff-respondent against whom the appeal had abated. In other words the result of holding in such cases that the appeal had not abated in its entirety may be to set aside the decree appealed against in respect of some of the plaintiffs while leaving that decree intact as regards the other plaintiffs. If the decree was a joint decree in favour of all the plaintiff respondents, the defendants, even if the appeal were allowed against the surviving plaintiff-respondents, would not be entitled to the property in dispute as against the legal representatives of the deceased plaintiff-respondent against whom the appeal had abated.

The principle underlying the cases noted above applies to the present case. If the appeal were to be heard and decided as against the surviving respondent and were to be allowed, two inconsistent decrees will come into existence, *viz*, (1) the decree of this Court granting the plaintiffs a decree for possession of the property in dispute against the surviving respondent, and (2) the decree of the lower Appellate Court dismissing the plaintiffs' claim that has become final between the deceased respondent and the appellants. The necessary consequence of two such inconsistent decrees standing side by side will be that the decree of this Court will be incapable of execution inasmuch as the plaintiffs cannot be put in actual possession of the property in dispute

(1) 85 Ind. Cas. 563; A. I R. 1925 All. 623.

(2) 72 Ind. Cas. 2; A. I. R. 1924 Cal. 399.

(3) 57 Ind. Cas. 199; 1 Lah. 225; 1 Lah. L. J. 225; 143 P. L. R. 1920.

(4) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N 44.

because there is in existence the decree of the lower Appellate Court dismissing the plaintiffs' claim as against the deceased respondent as regards every portion of the property in dispute.

The appeal must fail on the merits as well. The only ground on which the decree of the lower Appellate Court is assailed by the learned Counsel for the plaintiff-appellants is that in accordance with the provisions of the *wajib-ul-arz* relating to houses in occupation of *raiyats* in the village, the plaintiffs were entitled to a decree notwithstanding the finding of the lower Appellate Court that the house of the plaintiffs fell down about 15 years prior to the institution of the suit.

The *wajib-ul-arz* provides "in case of the houses of the *raiyats* or residences remaining un occupied or being abandoned or there remaining no marks of them, we (the *zemindars*) are entitled to let them to others, to demolish them or, to build or to get built new houses (in their places)." It would appear from this that a *zemindar* has a right to occupy a house or to let it to others if it has remained un-occupied or has been abandoned by a *raiyat* who owned the house. The lower Appellate Court has found as a fact that the house in dispute was abandoned by the plaintiffs more than 15 years ago and remained un-occupied since then, and that, as a matter of fact, the house fell down about that time. On these findings the plaintiffs had no right to the reliefs claimed by them and the suit has been rightly dismissed by the Courts below.

The appeal fails and is dismissed with costs.

Z. K. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 252 OF 1925.
November 29, 1926.
Present:—Mr. Findlay, J. C., and Mr. Prideaux, A. J. C.

MAROTI—AUCTION-PURCHASER—APPLICANT
versus
VITHOBA—JUDGMENT DEBTOR AND ANOTHER—DECREE-HOLDER—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 92—Execution of decree—Sale—Dismissal of execution before confirmation, effect of—Sale, whether can be confirmed.

Where a decree-holder and a judgment-debtor come to a settlement and agree to a dismissal of the execution case before an auction-sale is confirmed, there is no decree left capable of execution and the Executing Court becomes *functus officio* and the sale cannot be confirmed. [p. 566, col. 1.]

The position is different where the sale is confirmed and the parties to the decree come to a settlement while legal proceedings are pending for the reversal of the order of confirmation. [*ibid.*]

Revision from an order of the District Judge, Nagpur, dated the 25th June, 1925, in Civil Appeal No. 24 of 1924.

Mr. *G. G. Hatwalne*, for the Applicant.

Mr. *W. R. Puranik*, for the Non-Applicants.

ORDER.—The facts of this case are not in dispute and are sufficiently clear from the application. The learned District Judge, as he was bound to do, dismissed the appeal of the applicant in his Court on the strength of the decision in *Nilkanth* v. *Yeshwant* (1). It has, however, been urged before us that the said decision of Kotval, A. J. C., is an incorrect one and did not take into account the question of the rights of third parties which might meanwhile have arisen.

For our own part, we do not find it necessary, in the circumstances of the present case, to consider at length the propriety or otherwise of the reported case in question. In the present instance, at the time the judgment-debtor and the decree-holder came to a settlement between themselves, the sale had not been confirmed. It is, no doubt, true, as has been urged on behalf of the applicant, that he had at the moment an inchoate right which had again come into being as a consequence of his appeal pending in the Court of the District Judge, Nagpur, but we are of opinion that the filing of the said appeal could not detract from the inherent right of the decree-holder and the judgment-debtor to settle the matter between themselves in view of the fact that the sale had not at the moment been confirmed: *cf. Ram Prasad Rai* v. *Mahesh Kant Chowdhury* (2). We are aware of the decision of Hallifax, A. J. C., in *Ramchandra* v. *Lakshman* (3), but for

(1) 65 Ind. Cas. 331; 18 N. L. R. 134; A. I. R. 1922 Nag. 248.

(2) 65 Ind. Cas. 122; 1 Pat. 232 at p. 234; 3 P. L. T 445; A. I. R. 1922 Pat. 525.

(3) 92 Ind. Cas. 803; 9 N. L. J 3; A. I. R. 1926 Nag. 298.

our own part the present case seems to us practically on all fours with the decision of Baker, J. C., in *Ramchandra* v. *Sadasheo* (4), and following the latter decision we are of opinion that the present application must fail.

We desire to add that the view we take on the legal point involved also squares with the equities of the case. All that the auction-purchaser loses in a case like the present is the interest on the money which has been locked up in deposit, and this is, in the circumstances, no great hardship. In our view, however, the judgment-debtor and the decree-holder having come to a settlement before the sale had been confirmed, there was no decree left capable of execution and the Executing Court was *functus officio*. The position would, needless to say, have been very different if the sale had been confirmed and the parties to the decree had come to a settlement while legal proceedings were pending for the reversal of the order of confirmation.

So far as the present case is concerned, we do not find it necessary to consider at length whether the rule laid down by Kotval, A. J. C, in *Nilkanth* v. *Yeshwant* (1) is too widely expressed or not.

For the above reasons the present application fails and is dismissed. The applicant must bear the non-applicant's costs. We fix Rs. 50 as Pleader's fee.

G. R. D. *Application dismissed.*

(4) 100 Ind. Cas. 561.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 895 OF 1924.

January 19, 1927.

Present:—Mr. Justice Mukerji and Mr. Justice Ashworth.

Babu GANGA PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUKHDEO SAHU—DEFENDANT—RESPONDENT.

Pleadings and practice—Suit to recover rent on basis of lease—Lease not proved—Appeal, second—Part performance, doctrine of, whether can be relied upon.

Plaintiff instituted a suit to recover rent of certain shops from the defendant on the basis of a lease. The suit was dismissed on the ground that a valid contract of lease had not been proved. In second appeal it was contended that the suit should be decreed in spite of the absence of a valid contract of lease on the basis of the doctrine of part performance:

Held, that the original ground on which the suit was based having failed the plaintiff could not be allowed, in second appeal, to set up a new case. [p. 567, col. 1.]

Second appeal against a decree of the District Judge, Benares, dated the 11th of March 1924.

Mr. *N. K. Malaviya*, for the Appellant.

Mr. *Mukhtar Ahmad*, for the Respondent.

JUDGMENT.

Mukerji, J.—The facts involved in this second appeal are very simple. The plaintiffs, who are the appellants before us, let out two shops to the respondent on foot of a *kabuliyat* executed by the respondent on the 10th of April, 1922. The term fixed was two years. The respondent gave a notice to the appellants, saying that he was vacating the premises and left them. He paid a portion of the rent. The plaintiffs claim rent for the entire two years after giving credit for the rent actually paid.

The respondent pleaded that he was not liable to pay the rent after he vacated the premises and he offered to pay the balance due by him, up to the date of his leaving.

The first Court decreed the suit in its entirety. But the lower Appellate Court dismissed it, except for the amount admitted and held that the respondent could not be forced to pay the rent for the entire period of two years. The learned Judge relied on the case of *Kedar Nath* v. *Shankar Lal* (1).

In this Court the only ground of appeal taken was that in spite of there being only a *kabuliyat*, a void contract for lease did exist. In argument this point is given up. But it is urged that on the doctrine of part performance the plaintiffs are entitled to succeed.

The learned Counsel for the appellants has argued that it was in good faith that the plaintiffs omitted to execute a lease in favour of the respondent and on that account, they should not be deprived of the benefit of the contract.

In my opinion the point now taken should not be allowed to be urged. As indicated above, the doctrine of part performance can be applied only if the proper facts were before us. There is no evidence under what circumstances the appellants omitted to execute the lease. If the

(1) 78 Ind. Cas. 934; 22 A. L. J. 185; 46 A. 303; A. I. R. 1924 All. 514; L. R. 5 A. 80 Civ.

question had been tried and if it had been found that they deliberately omitted to execute a lease in favour of the respondent, it could certainly not be urged with success by the appellants that the doctrine of part performance should be invoked in their favour. I am not prepared to allow this ground to be taken for the first time in second appeal, specially as sufficient materials are not before us for the disposal of the contention.

I would dismiss the appeal with costs.

Ashworth, J.—I concur. Even though the question, whether the plaintiffs can sue upon the incomplete or inchoate lease may be solely a question of law, nevertheless as it was not raised in either of the first two Courts I consider that it is improper to allow the question to be raised in second appeal. The evidence was not tendered or recorded from the point of view of a claim based on part performance of a contract and it is undesirable to consider such a claim on the basis of evidence tendered and recorded for another purpose.

By The Court.—The appeal is dismissed with costs.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 699 OF 1926.

January 21, 1927.

Present:—Mr. Justice Dalip Singh.

MESSRS. PAHLAD DAS-CHHOTE LAL—DEFENDANTS—PETITIONERS

versus

MESSRS S. R. SOHAN LAL & Co.—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 107—C. i. f. contract—Property when passes—Tender of Bill of Lading—Re-sale by seller.

In case of a *c. i. f.* contract before a seller can claim right of re-sale it is essential for him to prove that he has performed his part of the contract by delivery or tender of the Bill of Lading or other relative shipping document to the buyer.

Petition for revision of a decree of the Judge, Small Cause Court, Delhi, dated the 5th July, 1926.

Lala *Sardha Ram*, R. S., for the Petitioners.

Mr. *Nawal Kishore*, for the Respondents.

JUDGMENT.—This is a revision from the Small Cause Court's order in a suit brought by plaintiff for the balance of the price of certain goods which were sold by him and which he re-sold on the defendant's failure to take delivery. The Small Cause Court decreed the suit. The defendant had raised various pleas. Among them in para. 13 he raised the plea that the plaintiff had not given him any notice of the arrival of the goods, nor had given the shipment patterns, nor had tendered the Bill of Lading. The contract was a *c. i. f.* contract and clause No. 1 of the indent is as follows:

"We hereby agree to purchase from you the under-mentioned goods at the limits and terms stated below and for reimbursement we authorise you or your correspondents to draw upon us at 30 days' sight with all relative shipping documents attached for payment. In case of need seller's invoice to be taken in lieu of drafts which drafts we engage and bind ourselves to accept on presentation and pay at maturity etc."

The Court held that there had been no presentation of the draft. There was only one witness produced on this point, and the Court rightly or wrongly considered his evidence unconvincing. I, therefore, hold that it is a finding of fact that the draft was not presented. The Court, however, held that the property had passed to the defendant, and, therefore, under s. 107 of the Contract Act statutory right had been given to the plaintiff for re-sale.

In revision it is contended that there was no proof that the Bill of Lading was ever tendered or any relative shipping documents were tendered to the defendant along with the draft. As the contract was a *c. i. f.* contract, it was essential for the plaintiff to prove that he had performed his part by delivery or tender of these documents. He has failed to prove this and there is an issue as to whether the plaintiff has performed his part of the contract. I cannot hold that the plaintiff was not given an opportunity to prove this point. As it is, therefore, not shown that the Bill of Lading or the Insurance Policy was ever presented to the defendant or the Bill of Lading was ever endorsed in his favour, I cannot hold that the property in the goods had passed to the defendant. It follows that no right of re-sale accrued to the plaintiff under s. 107 of the Contract

Act, and the suit of the plaintiff, therefore, fails, and I accept the revision and dismiss the plaintiff's suit. In the circumstance of the case, however, I am not prepared to give the defendant his costs in the Court below, and I only allow him his costs in this revision.

R. L. *Application accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 972 OF 1924.

November 24, 1926.

Present:—Mr. Justice Iqbal Ahmad.

KESHO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ROOPAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Sale-deed—Wrong item of property inserted by mistake—Suit for rectification time barred—Title of purchaser—Oral evidence to prove real item—Evidence Act (I of 1872), s. 92 proviso 1—Registration Act (XVI of 1908), s. 49—Absence of registered deed of sale, effect of—Part performance—Equity.

Even though a remedy by way of rectification of an instrument is open to a party when through mutual mistake of the parties, an instrument in writing does not truly express their intention, yet, if, notwithstanding the mutual mistake, the property actually intended to be transferred has passed to the possession of the vendee, the vendee's title to the property cannot be challenged simply because the instrument has not been rectified within three years from the date of the discovery of the mistake by the vendee. It is always open to the vendee to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him, and the vendee is entitled to lead oral evidence to show the mistake in the instrument in view of the provisions of proviso 1 to s. 92 of the Evidence Act. [p. 569, col. 1.]

Astulla v. *Sadatullah* (1), followed.

Bijoy Chand Mahtab Bahadur v. *Secretary of State for India* (2), distinguished.

Where a vendor has got the consideration for the sale of a particular item of immoveable property and the transaction has been acted upon by the parties, the title of the vendee to the property sold cannot be defeated by the mere fact that a wrong item was shown in the sale-deed by mistake and that in consequence there was no registered document to evidence the sale of the item of property really intended to be sold. [p. 569, col. 2.]

When the actings and conduct of the parties are founded upon, as in the performance or part performance of an agreement, the *locus pœnitentiæ* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. [p. 570, col. 1.]

Second appeal against a decree of the District Judge, Benares, dated the 5th March, 1924.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Gadadhar Prasad*, for the Respondents.

JUDGMENT.—The controversy in this appeal relates to old plot No. 1166 corresponding to new plot No. 1501. The said plot admittedly belonged to Roopan Singh defendant-respondent. The plaintiff's case was that Roopan Singh, by a sale-deed, dated the 23rd of November, 1907, sold the said plot along with certain other plots to Mahadeo Singh, the predecessor-in-title of the plaintiffs, but by mistake in lieu of plot No. 1166, plot No. 1167 was entered in the sale-deed. The plaintiffs alleged that notwithstanding this mistake their names were recorded as against plot No. 1166 by the Revenue Court, and the entry in their favour continued up to 1329 *F.*, when on an application of Roopan Singh defendant-respondent that entry was corrected and Roopan Singh's name was entered against the said plot That plot from before the execution of the sale-deed has all along been in possession of a mortgagee and as such the relief claimed by the plaintiffs was for a declaration of their title to that plot.

The defence to the suit was two-fold. Firstly, it was denied by the defendants that there was any mistake in the sale-deed and it was asserted that, as a matter of fact, plot No. 1166 was never intended to be sold to Mahadeo Singh, and the latter in collusion with the scribe of the sale-deed got the said plot entered in the sale-deed. It was further pleaded that the proper remedy of the plaintiffs was to have sued for rectification of the sale-deed and this not having been done within three years from the date of the accrual of the cause of action, the suit was time-barred.

Both the pleas urged in defence found favour with the trial Court and it accordingly dismissed the plaintiffs' suit.

On appeal by the plaintiffs the lower Appellate Court has found as a fact that the defendants intended to sell plot No. 1166, but by mistake instead of that plot No. 1167 was entered in the sale-deed. But that Court has held, that the proper remedy of the plaintiffs was to have brought a suit for the rectification of the instrument within three years from the date

that the plaintiffs discovered the mistake, and this not having been done, the plaintiffs were no longer entitled to ask the relief that they prayed for in the plaint. In support of this conclusion two reasons have been assigned by the learned District Judge. In the first place he observed that as an immoveable property can only be transferred by a registered instrument, and as in the sale-deed in favour of Mahadeo Singh the plot in dispute is not entered the plaintiffs cannot claim a title to the said plot. He further observed that oral evidence to vary the terms of the sale-deed in favour of Mahadeo Singh was inadmissible and hence it must be taken that plot No. 1166 was never transferred to Mahadeo Singh.

I am unable to agree with the lower Appellate Court. True it is that a remedy by way of rectification of an instrument by a suit is open to a party, when through fraud or mutual mistake of the parties an instrument in writing does not truly express their intention. But this does not mean that if, notwithstanding the mutual mistake, the property actually intended to be transferred has passed to the possession of the vendee, the vendee's title to the property can be challenged simply because the instrument has not been rectified within three years from the date of the discovery of the mistake by the vendee. It will always be open to the vendee, if his title is challenged by the vendor, to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him. In fact the vendee is entitled, in view of the provisions of proviso 1 to s. 92 of the Indian Evidence Act, to lead oral evidence to show the mistake in the instrument. The mere failure of the vendee, to have the instrument rectified within three years from the date of the discovery of the mistake, cannot have the effect of extinguishing his title to the property intended to be conveyed to him, though not properly described in the sale-deed. This was the view taken in the case of *Astulla* v. *Sadatullah* (1).

Reliance has been placed on behalf of the respondents on the case of *Bijoy Chand Mahatab Bahadur* v. *Secretary of State for India* (2). That case, in my opinion, is distinguishable from the present case. In that case the suit was for the rectification of an instrument and for certain consequential reliefs, and it was held that the suit for rectification of the instrument having been brought more than three years from the date when the plaintiff became aware of the mistake was barred by Art. 96 of the First Schedule to the Limitation Act. The suit giving rise to the present appeal was not a suit for rectification of an instrument but was for a declaration of the plaintiffs' title to a plot against which their names had been entered in the Revenue Court and were expunged on the application of the defendants. The cause of action for the present suit accrued to the plaintiffs when their names were expunged and the names of the defendants were entered in the revenue papers, and the suit being within six years from that date was well within time.

True it is that a sale of immoveable property of the value of one hundred rupees or upwards can be made only by a registered instrument, but the mere fact, that there is no such sale-deed with respect to plot No. 1166 in favour of the plaintiffs, does not disentitle them to the relief prayed for in the plaint. Plot No. 1166 being in possession of a mortgagee, the vendee obviously without the redemption of the mortgage, could not get actual possession of the same. In order to give effect to the transaction of sale, all that could be done was to get the name of the vendee substituted in place of the vendor in the revenue papers, and this was done after the execution of the sale-deed. The entry of the plaintiffs' names in the revenue papers as against plot No. 1166 continued for a period of ten years. In short, notwithstanding the mistake in the description of the plot intended to be sold to the vendee, the vendee's name was entered in respect of the plot actually intended to be sold and in view of the finding of the lower Appellate Court on the question of fact, it cannot be denied that the vendor got the consideration for plot No. 1166 and as such, it is clear that the transaction was acted upon by the parties. This being so, the case is governed by the rule of law laid down in the case of *Mahomad Musa* v. *Aghore Kumar Ganguli* (3). It was

(1) 41 Ind. Cas. 747; 28 C. L. J. 197.
(2) 48 Ind. Cas. 972.
(3) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

observed in that case that "When the actings and conduct of the parties are founded upon, as in the performance or part performance of an agreement, the *locus pœnitentiæ* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon."

In my judgment, notwithstanding the fact that the plaintiffs did not sue for rectification of the instrument they were, under circumstances of the present case, entitled to the reliefs sought.

Accordingly, I allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit in terms of relief (*a*) prayed for in the plaint with costs in all Courts including in this Court fees on the higher scale.

A. N. A. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 20 OF 1926.
February 4, 1927.
Present:—Mr. Justice Hasan and Mr. Justice King.

RAM SHANKAR—DEFENDANT—APPELLANT
versus
MANDANKANI PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 39 (2)—Tenants-in-common—Right to partition—Jurisdiction of Civil Court.

Section 39, sub-s. (2) of the U. P. Land Revenue Act is intended for the purpose of protecting the rights of the landlord and does not prohibit co-tenants from obtaining a decree for partition of their holding between themselves. [p. 571, col. 1.]

The principle that a joint occupancy tenant is entitled to sue for, and a Civil Court is competent to grant, a decree for partition of a joint occupancy holding, though, if the *zemindar* is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the *zemindar* and the occupancy tenants as they stood prior to the partition, applies also to a partition between statutory tenants-in-common. [p. 571, col. 2.]

Karingan v. *Harihar Dutt* (1) and *Muhammad Baksh* v. *Mana* (2), relied on.

Second appeal against a decree of the District Judge, Rae Bareli, in Regular Civil Appeal No. 144 of 1925, dated the 6th October 1925, confirming that of the Additional Subordinate Judge, Rae Bareli, dated the 29th November, 1924.

Mr. *Ali Zaheer*, for the Appellant.

Mr. *H. Hussain* for Mr. *Rada Krishna*, for Respondent No. 1.

JUDGMENT.—This second appeal arises out of a suit for partition of an agricultural holding.

The land in suit was held under a lease by Ram Ghulam, who died in 1911. Plaintiff No. 1 is his grandson and plaintiff No. 2 and the three defendants are his sons. Under s. 48 of the Oudh Rent Act, 1886, the five sons of Ram Ghulam were entitled to retain occupation of his holding for the unexpired term of the lease. It is admitted that the five sons of Ram Ghulam did jointly hold the land after his death.

It has been found by the Court below that in 1914 a division of the family effects was made between the sons of Ram Ghulam, and this was sufficient to cause a disruption of the joint family, but the agricultural holding remained undivided. The only result of the disruption of the joint family was that the sons of Ram Ghulam continued to hold the land not as joint tenants, but as tenants-in-common.

Defendant No. 3, Ram Shankar, is the only contesting defendant He alleged that after Ram Ghulam's death, his sons were ejected from the holding and fresh leases were granted by the landlord in the name of Ram Shankar only. His position was that as he holds the land in his name only, the plaintiffs could not claim any share. It was also argued that tenancy land could not be partitioned. It has been found by the Court below that the parties were not ejected from the land in suit. We must hold, therefore, that all the sons of Ram Ghulam remained in possession as tenants-in-common, since their tenancy was not terminated by ejectment, relinquishment or abandonment.

It is true that fresh leases were granted by the landlord to Ram Shankar alone in 1328 *Fasli*, 1329 *Fasli* and 1330 *Fasli* respectively. If the landlord had ejected the heirs of Ram Ghulam, and had then given fresh leases to Ram Shankar only, the plaintiffs certainly would have had no valid claim to any share in the holding. But when we find that all the heirs undoubtedly succeeded to the interests of Ram Ghulam and continued to hold the land as tenants-in-common, the mere fact, that the landlord

granted leases of the land to one of the heirs, would not have the effect of ejecting the co-tenants or depriving them of their rights. There is nothing to show that plaintiffs' father and the other co tenants abandoned the holding, although they left the management of it to Ram Shankar.

We hold, therefore, that the plaintiffs have a subsisting tenancy right in the land in suit, having succeeded as heirs of their father, and not having been ejected and not having relinquished or abandoned the holding. On this view they are entitled to the share in the holding which they claim.

It has further been argued before us that a Civil Court has no jurisdiction to grant a decree for the partition of an agricultural holding. The argument is based on the provisions of s. 39, sub-s. (2) of the U. P. Land Revenue Act, 1901, which runs as follows :-

"No division of a holding occupied by two or more tenants, and no distribution of the rent payable in respect thereof, shall be recorded, unless the consent of the landholder and of all the tenants concerned has been attested before a Revenue Court or the *Qanungo*."

The very same argument was considered by a learned Judge of this Court in the case of *Karingan* v. *Harihar Dutt* (1). The Court held that s. 39 sub-s. (2) does not mean that no division of a holding held by two or more tenants can be effected. It only says that if such a partition has been arrived at and the distribution of the rent has taken place, it shall not be recorded in the revenue papers until the consent of the land-holder has been obtained. It is clear that this provision of law is intended for the purpose of protecting the rights of the landlord.

We fully agree with this view. The landlord obviously will not be affected by any partition of a holding between co-tenants to which he was not a party. The partition will not be recorded in the revenue papers unless and until the landlords's consent is obtained. But this does not mean that the co tenants are prohibited from obtaining a decree for partition of their holding between themselves.

The jurisdiction of the Civil Court to grant a decree for partition of a tenancy holding and the right of a co-tenant to sue for partition were fully discussed by a Bench of the Allahabad High Court in the case of *Muhammad Baksh* v. *Mana* (2). The Court held that a joint occupancy tenant is entitled to sue for, and a Civil Court is competent to grant, a decree for partition of a joint occupancy holding, though, if the *zemindar* is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the *zemindar* and the occupancy tenants as they stood prior to the partition.

The same principles would apply to a partition between statutory tenants-in-common.

Following these rulings, we hold that the plaintiffs have a right to claim partition of their share in the tenancy holding and the Civil Court has jurisdiction to grant the decree prayed for.

We accordingly uphold the decree of the Court below and dismiss the appeal with costs.

G. H. *Appeal dismissed.*

(1) 92 Ind. Cas. 34; 3 O. W. N. 58; 13 O. L. J. 53; L. R. 7 A. (O.) 71; 1 Luck. 30

(2) 18 A. 334; A. W. N. (1896) 82; 8 Ind. Dec. (N. S.) 929.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1443 OF 1926.

January 17, 1927.

Present:—Mr. Justice Iqbal Ahmad.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

ANANT RAM CHOPRA—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), s. 54--Rule prescribing particular mode of packing for consignments to be carried at Railway risk, validity of.

A Railway Company is a common carrier and is bound to accept consignments of goods for despatch, but if the consignments are despatched at Railway risk it is entitled to take reasonable precautions to protect itself from loss. If the conditions laid down by a Railway for despatch of goods at Railway risk are not complied with by the consignor, the Railway can refuse to accept the consignment at its own risk. [p. 572, col. 2.]

The test for determining as to whether a particular rule made by a Railway Administration is or is not valid is to see whether the rule is a reasonable one and is not inconsistent with the Railways Act. [p. 573, col. 1.]

There is nothing in the Railways Act that prohibits a Railway Administration from insisting on a particular mode of packing in the case of consignments despatched at Railway risk. The fact that another mode of packing is as secure as the one enjoined by a rule framed by the Railway Administration is irrelevant for the purpose of determining the validity of such rule. [*ibid.*]

Second appeal against the decree of the District Judge, Aligarh, dated the 31st July, 1926.

Mr. *G. W. Dillon*, for the Appellant.
Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—This is a defendant's appeal, and arises out of a suit brought by the plaintiff-respondent for a declaration that a rule, recently introduced by the authorities of the East Indian Railway, providing that a consignment of locks of less than one maund in weight can only be booked at Railway risk, if it is packed in a $\frac{3}{4}$ inch thick wooden box, with two wooden battons on each of the four sides and further if the box is also secured with wire bands of which the centre one is sealed by the despatcher is illegal, *ultra vires* and unenforceable, and that the defendant Railway has no right to refuse to book at railway risk consignments of locks packed securely in an iron box or otherwise. The plaintiff also prayed for an injunction restraining the Railway Company from enforcing the rule noted above.

The plaintiff's case was that he and other Aligarh lock merchants used to despatch consignments of locks of less than a maund in weight packed in iron boxes, and that the mode of packing adopted by them was comparatively more secure than that prescribed by the Railway Authorities, and that the Railway Administration was not competent to prescribe a particular method of packing as a condition precedent to the booking of consignments at Railway risk.

The defence to the suit was that the suit was not maintainable, that the method of packing adopted by the lock merchants of Aligarh was insecure, and gave opportunities for various acts of fraud being committed, resulting in claims being made against the Railway Administration and that the rule in question was framed in the exercise of the powers vested in a Railway Administration by the Indian Railways Act and was perfectly valid.

The trial Court held, that the iron packing employed by the Aligarh merchants was as good as the wooden packing now required by the new rules, and that in making the new rule, the Railway Administration was actuated more by a consideration of its own interests than those of lock merchants, and that the Railway Authorities have no right to refuse goods which are properly packed, and cannot enforce a rule requiring that the goods must be packed only in a particular manner. On these findings it passed a decree in the plaintiff's favour in terms of the reliefs payed for in the plaint.

On appeal by the defendant the decision of the trial Court has been affirmed by the lower Appellate Court.

I am unable to agree with the decisions of the Courts below. It is, no doubt, true that the Railway Company is a common carrier and is bound to accept consignments for despatch; but if the consignments are despatched at Railway risk, it is entitled to take reasonable precautions to protect itself from loss. A Railway Administration is authorised by s. 54 (1) of the Indian Railways Act (Act IX of 1890) to impose, subject to the control of the Governor-General in Council, conditions not inconsistent with the Act or with any general rules thereunder "with respect to the receiving, forwarding or delivering of any animals or goods." It is maintained by the learned Counsel for the defendant-appellant that the rule, the validity of which is assailed by the plaintiff-respondent, was made in pursuance of the powers vested in a Railway Administration by s. 54 of the Indian Railways Act, and that the rule is not inconsistent with the Act or with any general rule thereunder and as such is perfectly valid. It is argued by the learned Counsel for the respondent that the rule in question is inconsistent, with s. 72 of the Indian Railways Act, as that rule is calculated to limit the responsibility cast on a Railway Company as a common carrier by that section. Section 72 of the Indian Railways Act deals with the measure of the general reponsibility of a Railway Administration as a common carrier of animals and goods, and provides that agreements purporting to limit that responsibility are void, unless signed by or on behalf of the person sending or delivering the goods and are in a form approved by the Governor-General in Council. It is nowhere provided by s. 72 of the Indian Railways Act that a Railway Administration is not entitled to impose conditions as regards the form of packing as a condition precedent to the acceptance of goods by it for carriage at its own risk as a common carrier. It is bound to accept consignments for despatch, but it is entitled to impose reasonable conditions for the purpose of protecting itself from loss. If such conditions are not complied with by the consignor, it may refuse to accept the consignment at its own risk. But even then it will be open to the consignor to despatch

the same at his own risk. As was pointed out in the case of *Jalim Singh Kotary* v. *Secretary of State for India* (1) that "a Railway Company has cast upon it by s. 72 of the Indian Railways Act the duties of an ordinary bailee, but it may determine the conditions under which those duties may vest." It appears to me that the proper test for determining as to whether a particular rule made by a Railway Administration is or is not valid, is to see whether that rule framed is a reasonable one and is not inconsistent with the Indian Railways Act. There is nothing in the Act that prohibits a Railway Administration from insisting on a particular mode of packing, if consignments are to be despatched at its own risk. The fact that another mode of packing is as secure as the one enjoined by a rule framed by the Railway Administration appears to me to be irrelevant for the purpose of determining the validity of that rule. The learned Munsif has pointed out in his judgment that if the rule in question is held to be valid "there will be nothing to prevent it (Railway Company) from next ruling that the locks will be carried by it at its risk only if they are packed in crocodile suit cases." Such a rule, if framed by the Railway Administration, will, undoubtedly, be invalid as it will be calculated to unduly limit the duty that the law casts upon the Railway Administration as that of a common carrier. The rule now in question does not appear to me to be one that the Railway Administration was not authorised to make by virtue of the powers vested in it by s. 54 of the Indian Railways Act and as such, in my judgment, the Courts below were wrong in decreeing the plaintiff's suit.

The result is that I allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Z. K. *Appeal allowed.*

(1) 31 C. 951; 8 C. W. N. 725.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 717 OF 1926.

January 21, 1927.

Present:—Mr. Justice Dalip Singh.

MUHAMMAD HUSSAIN—DEFENDANT—PETITIONER

versus

THE MUNICIPAL COMMITTEE GUJRANWALA, THROUGH ITS SECRETARY—PLAINTIFF—RESPONDENT.

Contract—Offer and acceptance—Acceptance not according to offer, effect of—'Ensuing year.'

The defendant made an application to a Municipality on 17th November, 1925, offering Rs. 150 for the *gab* (silt) for the 'ensuing year.' The Municipality passed a resolution saying that the silt might be given up to 31st March, 1926, to the defendant for Rs. 150 provided he arranged to remove it immediately. This resolution was never sent to the defendant, but a letter was sent by the Secretary on 16th December, 1925, in which it was stated that his offer was accepted with reference to the resolution mentioned above. The defendant immediately began removing the silt. After 31st March, 1926, he was not allowed to remove the silt. In a suit by the Municipality for recovery of Rs. 100, being the balance due from the defendant:

Held, that the words 'ensuing year' referred to a period of one year and not the remaining part of the current year, that, therefore, there was either no contract at all between the Municipality and the defendant or a contract in accordance with the Secretary's letter of acceptance and that in either case the suit could not be maintained. [p. 574, col. 1.]

Petition for revision of the decree of the Sub-Judge, exercising powers as Judge, Small Cause Court, Gujranwala, dated the 13th July, 1926.

Malik *Ram Lal*, for the Petitioner.

Mr. *Gobind Ram Khanna*, for the Respondent.

JUDGMENT.—This is a Small Cause Court Revision in a suit by the Municipal Committee of Gujranwala, for Rs. 100 being the balance of price of silt sold to defendant. The facts are that:

The defendant put in an application on 17th November, 1925, as follows: I beg to offer Rs. 150 for the *gab* (silt) for the *ensuing* year. The Municipality passed a resolution saying that the silt might be given upto 31st March, 1926, to Muhammad Hussain the defendant, for Rs. 150 provided he arranged to remove it immediately. This resolution was never sent to the defendant, but a letter was sent by the Secretary in which it was stated that his offer was accepted with reference to the resolution mentioned above. This letter is dated the 16th December, 1925. The defendant immediately began removing the silt on the 16th December, 1925. After the 31st March, 1916, he was not

allowed to remove the silt, which was sold by auction. The learned Judge of the Small Cause Court has decreed the Municipality's suit holding that as the letter mentioned the resolution, the defendant could have obtained a copy or otherwise cleared up this matter. He held that the word 'ensuing' was not used in its proper significance, nor did the defendant intend to remove the silt from 1st April, 1926, the ensuing financial year. He, therefore, decided the issue against the defendant. I am unable to follow the reasoning of the learned Judge. The words 'ensuing year' must refer to a period of one year. When that year was to begin is a matter that is to be determined with reference to the circumstances. The defendant claimed that it began from the date of the letter of acceptance, and *prima facie* this view seems to be correct. Be that as it may, it is certainly not possible to hold that 'ensuing year' meant from 16th December, 1925, to the 31st March, 1926, because that period is not equal to a year, and there is nothing to show that by the words 'ensuing year' the defendant meant up to the close of the current financial year. This being so, either there was no contract at all between the Municipality and the defendant or the Municipal Committee are bound by the letter of their accredited agent the Secretary. In either case the suit fails and is dismissed with costs throughout.

R. L. *Application accepted.*

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 738 OF 1926.

January 20, 1927.

Present:—Mr. Justice Boys and Mr. Justice Kendall.

Babu JAWALA SAHAI—JUDGMENT-DEBTOR—APPELLANT

versus

Rai Bahadur Babu BHIM SINGH —DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182—Civil Procedure Code (Act V of 1908), O. XXI, r. (2)—Execution of decree—Application for execution made more than three years after date of previous application—Payments made under decree—Extension of time—Procedure.

Where an application for execution is made after the expiry of three years from the date of a previous application and limitation is sought to be saved by the fact that payments have been made by the judgment-debtor under the decree during the interval, the decree-holder must show that an application to certify the alleged payments was made by a prior and separate proceeding to the application for execution. The mere mention of such payments in the application for execution itself is not sufficient to operate as an extension of the period of limitation.

Execution Second Appeal from the decree of the District Judge, Bareilly, dated the 30th March, 1926.

Mr. *S.B. Johari*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—Now that we have been able to arrive at the facts of this case the matter for decision is simple. It is a judgment-debtor's appeal. A decree was obtained on the 31st of July, 1919. The first application for execution was made on April 4th, 1922. On the 22nd of June, 1922, this application was dismissed. On the 15th of August, 1925, a further application was made. It is clear that unless some cause had been shown to prevent this, that application was barred by time, and the Court ought, unless for some good reason, to have proceeded forthwith to dismiss it as barred by time. It is unnecessary, therefore, to detail all the further proceedings that took place until the order of the Court on that application has been considered. For the respondent-decree-holder here reliance is placed on the fact that certain payments are set out in that application for execution as having been made within the period of limitation dating that period from the 22nd of June, 1922, and the judgment-debtor was given credit for the alleged payments. As it appears to us the decision in *Baij Nath* v. *Panna Lal* (1), following several other decisions to the same effect, is sufficient to conclude this matter. It was there held that the application to certify the payments must be made by a prior and separate proceeding to the application for execution. It is clear here that there was no separate proceeding and no prior proceeding to the application for execution of the 15th of August, 1925. The learned Subordinate Judge ought, therefore, to have proceeded forthwith to dismiss the application for execution as barred by limitation. The payments in this case are alleged to have been made on the 19th of January, 1925, and 2nd of July, 1925, but not having been certified prior to the application for

(1) 83 Ind. Cas. 737; 46 A. 635; 22 A. L. J. 581; A. I. R. 1924 All. 70; L. R. 5 A. 348 Civ.

execution, would, in no case, be sufficient to save limitation.

Therefore, allowing the appeal we set aside the order of the lower Appellate Court and holding that the application should have been struck off as barred by limitation set aside so much of the order of the learned Subordinate Judge as declares that the decree-holder will be at liberty to put in a fresh application for execution.

Z. K. *Order set aside.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 47 OF 1925.

July 29, 1926.

Present: --Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

CHANVIRGAVDA SHIVANGAVDA PATIL—APPELLANT

versus

THE DISTRICT MAGISTRATE, DHARWAR—RESPONDENT.

Lunacy Act (IV of 1912), s. 88—Maintenance of lunatic—Manager of joint Hindu family, whether 'Person legally bound to maintain'—Extent of lunatic's share, whether regulates fees leviable for expenses—'Means to maintain'—Hindu Law—Manager's liability to maintain member—Rules under Lunacy Act, r. 18(ii), whether ultra vires.

Although under Hindu Law, a father is not bound to maintain his adult son, yet, where the son is joint with him and there is joint family property, he is bound as manager of the family to maintain the latter. [p. 576, col. 1.]

Savitribai v. *Luximibai* (1), followed.

A father is 'a person legally bound to maintain' his lunatic son within the meaning of s. 88 of the Lunacy Act, if the father as manager of the joint family is liable to maintain his son as an undivided member of the family. It does not matter for the purposes of s 88, that under Hindu Law his liability is limited to the extent of the joint family property in his hands. [p. 576, col. 2.]

If a person is legally bound to maintain a lunatic and if he has the means to maintain him with or without reference to joint family property, under the Lunacy Act the Court can make an order for the costs of his maintenance in the asylum. The fees chargeable for expenses have to be determined under the Act and are not dependent on the lunatic's share in the joint family. The word 'means' has no reference to their source. [*ibid.*]

Ex parte Koster, In re Park (2), relied on.

Rule 18 (*ii*) of the Rules under the Lunacy Act which prescribes the fees for maintenance of a lunatic is not *ultra vires.* It is restricted in its scope and applies to the case of a person legally liable to maintain him, only when the lunatic is a member of the family of that person and is actually dependent on him. [p. 577, col. 1.]

Appeal against the order of the District Magistrate, Dharwar, in Miscellaneous Application No. 58 of 1924.

Messrs. *P. B. Shingne* and *S. B. Jathar*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Respondent.

JUDGMENT.

Shah, J.—This is an appeal under the Indian Lunacy Act (IV of 1912).

The District Magistrate of Dharwar made an application under s. 88 of the Act for an order for the payment of the cost of maintenance of the lunatic Shivangavda to the District Court of Dharwar against the father of the lunatic. It appears that a reception order was made by the District Magistrate with reference to Shivangavda under s. 14 of the Act on April 1, 1924, without any engagement by a relation to maintain him; and in consequence the lunatic was detained in an asylum. The amount of maintenance claimed related to a period of three months (from April 1 to June 30, 1924). In the petition the lunatic was stated to have been discharged on June 30, 1924, though this fact is disputed before us. The amount was claimed at the rate of Rs. 1-2-0 per day according to the scale fixed under r. 18 (*ii*) of the rules made under s. 91 of the Act on the basis that the father had a pension of Rs. 216 per mensem in addition to the joint family property. (See Local Rules and Orders under Enactments applying to Bombay, Vol. II, pages 705 and 706). The opponent (the father of the lunatic) contended that he was not personally liable to maintain his insane son who was about twenty-five years old, that as the manager of the family his liability was limited to the income of the joint property which would represent the share of the son, and that the annual income of such property was about Rs. 100. He contended that the income of the whole joint property was less than Rs. 1,000, and that the lunatic should have been exempt according to law from paying any chargss.

On this application under s. 88 of the Act the learned District Judge made a summary inquiry under s. 89 and passed an order for the payment of the costs of maintenance. He directed the opponent to pay annas eight per day for the period for which maintenance charges were claimed.

The original opponent has appealed. It is urged on his behalf that he is not a person legally bound to maintain his son within the meaning of s. 88, and that an order against him is, therefore, not competent. Further, it is urged that he is not liable to pay any higher rate in consequence of his personal income exceeding Rs. 1,000 a year under r. 18 (*ii*) of the rules made by the Government in the exercise of the powers conferred in that behalf by s. 91 of the Act, and it is lastly contended that the rule is *ultra vires* in so far as it makes the father personally liable, when by law he is not so liable for the maintenance of the lunatic.

I do not think that there is any substance in these contentions of the appellant. On the admitted facts of this case, it is clear that the father is liable to maintain his son, as the manager of the joint family. Admittedly the son is joint with the father; and there is joint family property in which the son has a share. Though the father is not under an absolute obligation to maintain his adult son, he is bound as the manager of the family to maintain him as a member of the undivided family. This position is clear, having regard to the observations in *Savitribai* v. *Luximibai* (1). This obligation is independent of the consideration whether, on account of the lunacy of the son, the father as the manager of the family would be bound to maintain him on the ground that he would be disqualified from enforcing partition of his share from the joint family property during the period of lunacy. It is not necessary, therefore, to consider whether the insanity in this case is of such a nature as to constitute a disqualification under Hindu Law to inherit as an heir or to seek partition of the family property. It is also unnecessary to consider whether the insanity should be congenital or not and whether even if not congenital it should be incurable, in order to disqualify the person suffering from it from inheriting as an heir or from seeking partition of the property. The question, which has been raised in argument, that even temporary insanity is sufficient to create the disqualification and the further question whether such temporary disability to maintain himself, which does not amount to a disqualification, would render the father liable to maintain him during his illness, apart from the consideration of there being any joint family property, do not arise in this appeal. It is sufficient to invite the application of s. 88, if the father, as a manager of the joint family, is liable to maintain his son as a member of the family. In that case he is a person legally bound to maintain the lunatic within the meaning of this section. It does not matter, for the purposes of s. 88, whether under the Hindu Law his liability to maintain is limited to the extent of the joint family property in his hands. Then under s. 89 the Court has to determine whether he has the means to maintain him. The scale of fees chargeable for maintenance has been prescribed by r. 18 (*ii*). It is laid down in *Ex parte Koster*; *In re Park* (2) that the word "means" in the expression "means to pay" has no relation to their source; and a similar view can reasonably be taken of the expression "means to maintain." Thus, if there is a person legally bound to maintain the lunatic and if he has the means to maintain him with or without reference to the joint family property, under the Indian Lunacy Act the Court can make an order for the costs of his maintenance in the asylum.

The r. 18 (*ii*), which prescribes the fees for maintenance, is not shown to be *ultra vires* in any way. It is restricted in its scope, for it applies to the case of a person legally liable to maintain him, only when the lunatic is a member of the family of that person and is actually dependent on him. The lunatic would be dependent upon him when he (*i. e.*, the lunatic) has no estate of his own applicable to his maintenance. In the present case the lunatic has only an undivided share in the joint family property, which according to Hindu Law, cannot be called the estate of the lunatic, such as is contemplated by s. 88.

It must be clearly understood that, in determining whether the appellant is legally bound to maintain the lunatic, we have to be guided by the provisions of Hindu Law. But once that is determined, the further determination of the application is regulated by legislation, as regards the costs of the maintenance of a lunatic with reference to whom there has been a reception order without any engagement being taken from a friend or relative of the luna-

(1) 2 B. 573 at p. 597; 1 Ind. Dec. (N. S.) 805.

(2) (1885) 14 Q. B. D. 597.

tic for the expenses under s. 14 of the Act. The fees chargeable are regulated by the Act and the rules thereunder are in no sense dependent upon any rule of Hindu Law. Rule 18 (*ii*) does not apply to every person who may be legally liable to maintain the lunatic, but is applicable to a person, of whose family the lunatic is a member and upon whom he is actually dependent.

Thus it seems to me that the order under appeal is not open to any legal objection: and neither party has raised any objection to its propriety otherwise.

I would, therefore, dismiss the appeal with costs.

Fawcett, J.—I agree.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 91 OF 1925.

January 8, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Broadway.

QAMAR-UD-DIN—PLAINTIFF—APPELLANT

versus

RAHMAT ALI SHAH—DEFENDANT—RESPONDENT.

Punjab Courts Act (VI of 1918), s. 41—Construction of material document—Question of law.

Where the point for determination in a case is the construction to be placed upon a document on which a suit is to a large extent based the question is one of law, and a second appeal is competent.

Letters Patent Appeal against the judgment of Mr. Justice Harrison, passed in Civil Appeal No. 989 of 1924, dated the 18th December, 1924, reversing that of the District Judge, Amritsar, dated the 26th February, 1924, which affirmed that of the Sub-Judge, Fourth Class, Amritsar, dated the 25th May, 1923.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.

Broadway, J.—This is an appeal under s. 10 of the Letters Patent against an order of Mr. Justice Harrison. The facts briefly are that the plaintiff instituted a suit for the recovery of Rs. 432 with interest claiming that he had advanced that amount to the defendant as a loan. In support of his contention he produced the receipt Ex. P-1. The defendant denied the loan and alleged that he and the plaintiff with certain other persons had entered into a partnership with the object of purchasing certain immoveable property and selling them at profit. The partners contributed certain specified sum of money out of which the purchase was to be made, and were to share the profit in certain specified shares. The trial Court decreed the plaintiff's suit holding that the sum in question had been advanced as a loan.

This decree was maintained in appeal by the learned District Judge. A second appeal was preferred by the defendant and was heard by Mr. Justice Harrison who after careful consideration of the document in question Ex. P-1 and other circumstances came to the conclusion that the transaction was a partnership one and dismissed the plaintiff's suit.

Before us it is urged by Mr. Badri Das that the view taken by the learned Judge in Chambers was erroneous and also that the finding of the learned District Judge was a finding of fact which ought not to be impugned in second appeal.

The point for determination involved is the construction to be placed on a document on which the suit to a large extent was based and the question was one, therefore, of law, and as such a second appeal was competent. The constructions placed on this document by the learned Judge in Chambers is clearly a possible one and I see no reason to take a different view. I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I agree.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1041 OF 1924.

January 4, 1927.

Present:—Mr. Justice Iqbal Ahmad.

Musammat NAZIRUN-NISA—DEFENDANT—APPELLANT

versus

Musammat ASIFA BEGUM—PLAINTIFF—RESPONDENT.

Mortgage—Usufructuary and simple mortgages in favour of same person—Suit for sale on basis of simple mortgage subject to usufructuary mortgage, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4.

A person having a usufructuary mortgage and a subsequent simple mortgage on the same property can maintain a suit for sale of the property on the basis of his simple mortgage subject to his prior usufructuary mortgage.

Second appeal against the decree of the Subordinate Judge, Meerut, dated the 24th of March, 1924.

Mr. *A. Sanyal*, for the Appellant.

Mr. *Ram Nama Prasad*, for the Respondent.

JUDGMENT.—This is a defendant's appeal and arises out of a suit for sale on a mortgage, dated the 7th of October, 1911. It appears that the plaintiff-respondent held a prior usufructuary mortgage over the property which was mortgaged under the mortgage-deed in suit. One of the pleas taken in defence was that as the plaintiff held a prior usufructuary mortgage with respect to the property mortgaged under the deed of simple mortgage now put into suit "the suit for the sale of the equity of redemption was not maintainable."

This plea found favour with the trial Court and it accordingly dismissed the plaintiff's suit.

On appeal by the plaintiff the lower Appellate Court has overruled the defendant's plea noted above and has passed a decree in the plaintiff's favour.

The sole ground taken in appeal before me is that the lower Appellate Court was wrong in granting a decree to the plaintiff-respondent for sale of the mortgaged property subject to the usufructuary mortgage of the plaintiff herself. In my judgment there is no force in the contention advanced on behalf of the defendant-appellant.

A usufructuary mortgagee cannot, in view of the provisions of s. 67 (*a*) of the Transfer of Property Act, institute a suit for sale on the basis of a usufructuary mortgage, and as such obviously the plaintiff could not join a claim on the basis of the usufructuary mortgage with a claim for sale on the basis of a subsequent simple mortgage. By the simple mortgage all that was mortgaged to the plaintiff was the equity of redemption vested in the mortgagor. That equity of redemption is saleable has now been definitely settled by this Court by the decision in *Ram Shanker Lal* v. *Ganesh Prasad* (1). The facts of the present case are in all respects similar to the case of *Udai Chand* v. *Nagina Singh* (2) and in that case it has been held that "a person having a usufructuary mortgage and a subsequent simple mortgage on the same property can maintain a suit for sale of the property on the basis of his simple mortgage subject to his prior usufructuary mortgage." In view of these decisions the plea taken in the memorandum of appeal is untenable and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 4 A. L. J. 273; 29 A. 385; A. W. N. (1907) 97; 2 M. L. T. 248 (F. B.).

(2) 50 Ind. Cas. 40

BOMBAY HIGH COURT.

APPEAL FROM ORDER NO. 63 OF 1925.

July 9, 1926.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

KALU DALPAT PATIL AND OTHERS—DEFENDANTS—APPELLANTS

versus

NARAYAN DAGADU SUTAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract—Sale of land—Time not of the essence—Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 25—Decision not on preliminary point — Remand, legality of.

Time is not of the essence of the contract in contracts relating to sales of immoveable property. [p. 579, cols. 1 & 2.]

Jamshed Khodaram Irani v. *Burjorji Dhunjibhai* (2), followed.

Where the decision of a trial Court is not based on a preliminary point, an order of remand cannot properly be made under O. XLI, r. 23 of the Civil Procedure Code. If an Appellate Court finds, in a case which has not been disposed of by the trial Court on a preliminary point, that any particular issue has not been decided by the trial Court or that further evidence is necessary on the point it should act under O. XLI, r. 25 of the Code. A reversal of the decree and remand of the whole case with liberty to the parties to open up the whole case is illegal. [p. 579, col. 2.]

Appeal from an order of remand passed by the First Class Subordinate Judge, A. P., at Nasik, in Appeal No. 228 of 1923, reversing the decree passed by, and remanding the suit to the Subordinate Judge at Malegaon, in Civil Suit No. 398 of 1922.

Mr. *D. R. Patwardhan*, for the Appellants.

Mr. *W. B. Pradhan*, for the Respondents.

JUDGMENT.

Shah, J.—This is an appeal from an order of remand by the lower Appellate Court. Two points have been urged in support of the appeal. In the first place it is contended that the lower Appellat

Court is not right in its view that time was not of the essence of the contract on the terms of the contract in question. It may be mentioned that the contract in question is dated April 11, 1917, under which the defendants agreed to sell, to the father of the present plaintiffs, certain lands referred to in the contract for Rs. 300. The payment was to be made after four years from the date of the agreement and Rs. 5 were paid as earnest money. It appears that the land in question originally belonged to the plaintiffs' father and was sold by him in 1904 to the defendants' father. The plaintiffs obtained possession of the land in question as tenants of the defendants after this agreement and continued in possession for about four years, when they were dispossessed by a decree of the *mamlatdar* which was obtained by the defendants against them.

Subsequently, a suit was filed in 1921 on the basis that the transaction of 1904 was really a mortgage. But that suit was dismissed and the present suit was filed by the plaintiffs for specific performance of the contract in question.

The trial Court decided that the time fixed under the contract was of the essence of the contract having regard to the *ratio decidendi* in *Samarapuri Chettiar* v. *Suthar-sana Chariar* (1). The trial Court taking that view of the matter proceeded to deal with other issues, and decided the suit without recording any finding on Issue No. 4, which related to the amount which the plaintiffs were to pay to the defendants in case they were held entitled to get the lands and the sale-deed. The plaintiffs' suit was dismissed by the trial Court.

In appeal the First Class Subordinate Judge, with appellate powers made an order of remand, which is now under appeal. The Appellate Court took the view that time was not of the essence of the contract, that the *ratio decidendi* in the Madras case did not apply to this contract, and that the observations of their Lordships of the Privy Council in *Jamshed Khadaram Irani* v. *Burjorji Dhunjibhai* (2) as to time not being of the essence of the contract in contracts relating to sales of immoveable property, would apply to the contract in question. As regards this point, it has been urged by the appellants that the lower Appellate Court's view is not right.

It is quite true that the property in question originally belonged to the plaintiffs' father but it was sold to defendants' father in 1904; and as this contract was entered into in 1917, it is difficult to treat it as connected with the sale of 1904, and as an agreement of re-purchase In fact, it is an independent transaction. It might have been induced by the consideration that originally the property belonged to the plaintiffs' father, but it cannot, on that account, be treated as connected in any way with the transaction of 1904. The contract in terms purports to be a contract for the sale of immoveable property and certain period is stated, after which the payment contemplated under the contract is to be made. Such a contract is not any the less an ordinary contract of sale simply because the intending purchaser was the original owner of the property some years ago. The contract in terms does not refer to the transaction of 1904. Treating it as an ordinary contract of sale, it seems to us that the lower Appellate Court was right in holding that the observations in *Jamshed's case* (2), which have been above referred to, would be applicable to such a contract.

The next point urged is that the order of remand is not proper. It seems to us that the decision of the trial Court was not based on a preliminary point in any sense and the order of remand, therefore, could not be properly made under O. XLI, r. 23. There may be cases in which, even though the case may not be covered by the provisions of r. 23 of O. XLI, the Court may direct a remand. But, under the circumstances of the present case, we see no such ground for departing from the limits of O. XLI, r. 23. The lower Appellate Court should have proceeded to deal with the appeal on the merits. If it found that any particular issue was not decided by the trial Court or that further evidence was necessary on any point, it could have and should have acted under r. 25 of O. XLI of the Code. But, the reversal of the decree and the remand of the whole case with liberty to the parties to open up the whole case under the circumstances do not appear to us to be right.

Though we uphold the view on the main

(1) 52 Ind. Cas. 590; 42 M. 802; 37 M. L. J. 109; (1919) M. W. N. 598; 10 L. W. 376; 26 M. L. T. 269.

(2) 32 Ind. Cas. 246; 18 Bom. L. R. 163; 43 I. A. 26; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 23 C. L. J. 358; 20 C. W. N. 744; 40 B. 289 (P. C.).

question which has been dealt with by the lower Appellate Court, we set aside the order of remand and order the appeal to be remanded to the District Court for disposal according to law in accordance with the observations in this judgment. We direct that each party should bear his own costs in this appeal. Costs in the District Court will be dealt with by the lower Appellate Court while disposing of the appeal.

Fawcett, J.—I would only add that, in my opinion, para. 12 of the lower Appellate Court's judgment, which contemplates Issue No. 1 being re-tried, is one that is not justified under the circumstances of the case. The parties did adduce evidence on this particular issue, and I do not think that there are any grounds for a further opportunity to be given to either side to adduce evidence regarding it. As to the allegation of the defendant that there was an oral stipulation at the time of the written contract that time should be of the essence of the contract, I think the lower Appellate Court should decide the case on such evidence as may have been adduced and is legally admissible. This raises the question of the admissibility of oral evidence to prove a variance of, or addition to, the contents of a written agreement under s. 92 of the Indian Evidence Act.

A. N. A. *Order set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 646 OF 1924.
November 16, 1926.
Present: - Mr. Justice Curgenven.

SONAI KARUPPA PILLAI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

IRULAYEE—DEFENDANT No. 1—RESPONDENT.

Hindu Law—Widow—Gift—Subsequent surrender to reversioner—Reversioner, whether competent to set aside gift.

A gift or gratuitous conveyance executed by a Hindu widow is not liable to be avoided during her lifetime by a reversioner to whom she subsequently surrenders the whole estate. [p. 581, cols. 1 & 2.]

Second appeal against the decree of the Court of the First Additional Subordinate Judge, Madura, in A. S. No. 13 of 1924 A. S. No. 301 of 1923, District Court, Madura) preferred against that of the Court of the District Munsif, Madura Taluk at Madura, in O. S. No. 171 of 1921.

Mr. *K. V. Krishnaswami Iyer*, for the Appellants.

Messrs. *B. Sitarama Rao* and *K. V. Sesha Iyengar*, for the Respondent.

JUDGMENT.—The question of law which this second appeal raises is whether a gift or gratuitous conveyance executed by a widow is voidable by a reversioner to whom she subsequently surrenders the whole estate. One Kandasami Pillai died leaving two widows Kaliammai and Rakkayi. The widows and Mahalingam Pillai, Kandasami's divided brother's son, were parties to a deed of partition under which they divided Kandasami's property in accordance with certain oral instructions which he is said to have given before he died. The document provided that Mahalingam Pillai should enjoy Sch. A property absolutely; that Kaliammai should enjoy Sch. B property, till her death, when it should pass to Mahalingam; and that Rakkayi should similarly enjoy Sch. C property; with remainder to Mahalingam. Mahalingam died in 1907 and Kaliammai in 1918. In 1920, Rakkayi executed a deed of surrender to the reversioner, who has brought this suit to recover Kaliammai's and Mahalingam's shares. The plaint Sch. D property is not now in question. The case has been argued on the assumption that the depositions made by the two widows in favour of Mahalingam were without consideration.

Two propositions of law which have been referred to in discussing the present question are now well-settled. One is that where a widow adopts a son, he may sue, even during her lifetime, to set aside any alienation not supported by necessity, whether it was an alienation for consideration or not. That was decided by a Full Bench in *Vaidyanatha Sastri* v. *Savithri Ammal* (1) overruling *Sreeramulu* v. *Kristamma* (2). The other, for which authority is to be found in *Nelakanti Sundarasiva Row* v. *Ivatuary Viyyamma* (3) is that an alienation made by the widow for consi-

(1) 42 Ind. Cas. 245; 41 M. 75; 33 M. L. J. 387; (1917) M. W. N. 653; 22 M. L. T. 275; 6 L. W. 542 (F. B.).

(2) 26 M. 143; 12 M. L. J. 197.

(3) 91 Ind. Cas. 401; 48 M. 933; 49 M. L. J. 266; (1925) M. W. N. 64; 22 L. W. 398; A. I. R. 1925 Mad. 1267.

deration is good against a surrenderee and the property alienated cannot be recovered until the widow dies. I do not think that the former principle affords any material help in deciding, as I have to decide, whether the fact that consideration is wanting enables a reversionor to whom surrender has been made to avoid an alienation which would otherwise stand good against the surrender. The two acts—adoption and surrender—are not fairly comparable. The distinctions between them, if I may say so with respect, have been very justly and clearly pointed out by Kumaraswami, J., in *Vaidyanatha Sastri* v. *Savithri Ammal* (1). Although a widow cannot be legally compelled to adopt, the duty to honour her husband's wishes is a solemn obligation imposed by Hindu Law and sentiment and a person who, knowing this and knowing or having the means of ascertaining that she has authority to adopt, obtains a transfer of property from her, does so at his peril. In such circumstances, there is no reason to interfere with the logical consequences of an act which is equivalent in its legal effects, to the death of the widow. But no such pious obligation attaches to a voluntary relinquishment by a widow of her estate. Hindu Law-givers hardly contemplated such an act, and "the whole doctrine of surrender and consequent acceleration of the estate of the reversioner has no basis in Hindu Smritis but has been evolved by Courts of Justice on general principles of jurisprudence."

It follows that the Courts, having given the power, may set limits to its exercise. Strict logic requires that, if a widow may renounce her rights upon the theory that she may anticipate her natural death by an act of civil suicide, every consequence that would ensue upon the one death should ensue upon the other. The doctrine that alienations for consideration are to prevail against a surrenderee has been accepted in defiance of this logical principle, upon grounds of justice, equity and good conscience. Equity steps in to temper the rigour of a rule which resembles in its inexorableness some old rule of English Common Law.

The only question then is, how far is equity justified in interfering. There appears to be but one reported case in which a gift was in question, the decision of the Calcutta High Court in *Prafulla Kamini Roy* v. *Bhabani Nath Roy* (4). The learned Judges who decided that case differred. Page, J., took the view that no alienation, whether for consideration or not, was valid against the surrenderee and since that view is contrary to the current of opinion in Madras it would serve no purpose for me to examine the reasons upon which it was based. Walmsley, J., after referring to *Kottapalli Subbamma* v. *Jatavallabhula Subrahmanyam* (5) continues "It is true that in that case the alienation was for value, whereas in the present case the alienation was by gift. but I do not think that the presence of valuable consideration affects the question. The point is that the widow has made an alienation which she was competent to make, and she cannot re-call it by a voluntary act, which only by fiction has the same effect as her actual death would have." In these two judgments we have thus the two extreme positions, the one unreservedly applying the fiction, the other discarding the fiction and considering the real import of the transactions. In the Madras case *Kottapalli Subbamma* v. *Jatavallabhula Subrahmanyam* (5), the head-note speaks of alienations without the qualification 'for value', but it was in fact a case of a mortgage. Sadasive Iyer, J., in part rested his conclusions upon the reasoning of Bhashyam Iyengar, J., in *Sreeramulu* v. *Kristamma* (2) but as that was a case of adoption, and the law has since been differently interpreted, I am precluded from availing myself of its *ratio decidendi*. In Napier, J.'s judgment there is not a word to show that he would have made the presence or absence of consideration the crucial test, his view being expressed thus:—

"The theory that change of status of an assignor or a surrender by such assignor can invalidate legal rights obtained by an assignee is, in my opinion, so contrary to equity and good conscience that it should not be accepted by Courts in this country, whatever the ancient Hindu Law on the subject was."

It may be that there again the effect of the decision in *Sreeramulu* v *Kristamma* (2) is traceable and must be allowed for.

It appears to me that if the point is to be decided upon broad equitable principles

(4) 91 Ind. Cas. 897; 52 C. 1018; A. I. R. 1926 Cal. 121.

(5) 32 Ind. Cas. 813; 39 M. 1035; 30 M. L. J. 260.

the interests of a prior alienee, even without consideration, ought to be preferred to those of a surrenderee. By making the gift, the widow has so acted as to create an expectation that it will enure for the time of her natural life, and although the donee may perhaps have to reckon with a possible adoption, or even, in some cases, a possible re-marriage, he ought not to have to include within his calculations the chance that the widow, by a purely voluntary act, unsupported by any sort of obligation, may divest him of the property gifted in favour of a person who, until the widow dies, has no better claim to it than himself. Looking at the position apart from artificial theory, the widow has parted with her interest in the property and cannot dispose of what she has not got. Page, J., in the judgment I have referred to, commenting upon the hardship which would result to alienees, observes that where the law is clear there is no room for an *argumentum ab inconvenienti*. But that view runs counter to the decision of this High Court, which has recognized the applicability of principles of equity, and if equity be applied, it seems open to the Court, of two gratuitous transferees, to prefer the earlier in time.

My conclusion accordingly is that the plaintiff's claim fails. The second appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 438 OF 1925.
July 20, 1926.

Present:— Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

KRISHNABAI PANDURANG SALAGARE AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAVLARAM GANGARAM KUMTEKAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 50—Decree for injunction—Death of judgment-debtor—Execution against legal representatives—Transfer by legal representatives pending execution—Decree, whether can be enforced against transferee—Lis pendens—*Transfer of Property Act (IV of 1882), s. 52—'Rights', whether include right to injunction.*

A decree granting a permanent injunction with respect to the use of immoveable property can, on the death of the judgment-debtor, be enforced against his legal representatives, as well as against persons to whom the property is transferred by such legal representatives pending execution proceedings. [p. 583, col. 2.]

The word 'rights' in s. 52 of the Transfer of Property Act is wide enough to cover the right to an injunction restraining another from causing acts interfering with rights of ownership and easement. [p. 583, col. 2; p. 584, col. 1.]

Second appeal from the decision of the Assistant Judge at Poona, in Appeal No. 170 of 1924, reversing the decree passed by the Subordinate Judge at Poona, in Darkhast No. 577 of 1913.

Messrs. *G. S. Rao* and *K. H. Kelkar*, for the Appellants.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Shah, J.—The few facts which have given rise to this appeal are these. The plaintiff and the original defendant Pandurang Balaji Salagare were neighbours. The plaintiff sued the defendant claiming various reliefs in connection with certain acts of the defendant which were in the nature of encroachments upon his properties. Out of the seven reliefs claimed, three reliefs D, E and G were granted on February 25, 1918, and injunctions as prayed for in those clauses were issued against the defendant. After the decree the defendant was said to have made certain encroachments in respect of which the present *darkhast* was filed in 1923. Before the *darkhast* was filed the defendant had died; and the *darkhast* proceeded against the two widows of the deceased judgment-debtor in respect of certain encroachments. The Court dealing with the *darkhast* disposed of two out of these matters with which we are not concerned. Those two matters related to the removal of the plaster and the encroachment of the defendant's roof mentioned in the decree. Both those reliefs were granted. But with regard to the other reliefs the learned Joint Subordinate Judge observed as follows:— "The plaintiff besides asked for some other reliefs not awarded by the decree."

Treating those other reliefs as not covered by the decree the learned Judge disposed of the *darkhast*.

The plaintiff appealed to the District Court; and during the pendency of the appeal the legal representatives of the judgment-debtor transferred their property to Kondo Ganesh Deo. The two reliefs, with reference to which the appeal was preferred were, that the first floor gallery of the plaintiff had been blocked up at one end

as a result of the defendant'a wall, and the second complaint was that the defendant's wall projected over plaintiff's property to the extent of two inches. The learned Assistant Judge, who heard the appeal, was of opinion that both these reliefs were sufficiently covered by the prayer G under the decree, and accordingly referred the matter back to the Court of first instance in order that a Commissioner might be appointed and the dispute with reference to those obstructions decided.

From this order in execution, the present second appeal is preferred by the two widows, who are the legal representatives of the deceased judgment-debtor and their transferee Kondo Ganesh Deo. In support of the appeal it is urged that these reliefs are not covered by clause G of the prayer clause, and that as they fall outside the scope of the suit, the plaintiff should file a separate suit to enforce his rights as regards the alleged encroachment and obstruction, Secondly, it is urged that in any case no execution could be allowed, as the relief granted by way of injunction is purely personal, and the original judgment-debtor having died the injunction had ceased to be operative.

As regards the first point, the relief granted is in these terms:—

"A permanent injunction may be issued to the defendant restraining him from causing any such act as would affect the plaintiff's said roof, gable, wall, etc., and the plaintiff's ownership and easement right in connection therewith."

We think that the wording of this clause is wide enough to cover the relief which the plaintiff seeks in this *darkhast* for the removal of the obstruction to his balcony and the other encroachment over his property. Thus, if the *darkhast* is otherwise competent, there is no objection to the plaintiff seeking execution in respect of these two reliefs against representatives of the deceased judgment-debtor. When the suit was filed the defendant was proceeding with the building: and it is not unlikely that the expression '*et cetera*' was used to cover such obstruction and encroachment as the plaintiff complains of even though they are not specifically referred to in the decree.

As regards the second point, it may be mentioned that it was not raised in the lower Appellate Court. But it is a question of law, and Diwan Bahadur Rao has relied upon the decision in *Dahyabhai* v. *Bapalal* (1) in support of his contention. But this case is distinguished in *Sakarlal* v. *Bai Parvatibai* (2). It was held in the latter case that in virtue of s. 234 of the Code of 1882 execution could be taken out against the legal representatives under the statutory right which was given by that section to the decree-holder to proceed against the legal representatives. It is clear, therefore, that, so far as the *darkhast* was originally filed against the legal representatives, it was in order.

But a further complication has arisen in virtue of the transfer to the present respondent No. 3 by the widows of the original defendant. It is urged that though now under s. 50 corresponding to the old s. 234 of the Civil Procedure Code, the *darkhast* may be competent against the legal representatives, it is not so against the transferee. But it is clear that this transfer was during the pendency of the execution proceedings. Under s. 52 of the Transfer of Property Act it is provided that:—

"During the active prosecution, in any Court having authority in British India,.... of a contentious suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

Here the transfer was not under the authority of the Court, and it was made during the pendency of a contentious proceeding in execution of this decree. It seems to me that this transfer cannot be allowed to affect the rights of the present plaintiff. He is entitled to such order as he would have obtained under the *darkhast* if there had been no transfer. If the mere fact of the transfer were accepted as a ground for disallowing his application for execution, it would mean that the transfer is allowed to affect the rights of the plaintiff, which would be contrary to the provisions of s. 52 of the Transfer of Property Act.

It has been urged on behalf of the appellants that the word "rights" in s. 52 has reference to the substantive rights and not

(1) 26 B. 140; 3 Bom. L. R. 561.
(2) 26 B. 283; 4 Bom. L. R. 14.

to a matter of procedure, and that in the present case the right of the plaintiff to be affected is not a substantial right to the property, but to the particular procedure. No authority has been cited in support of this restricted meaning of the word "rights" as used in s. 52; and it seems to me that it is not merely a matter of procedure. It does affect the right of the plaintiff to get the obstruction removed under the decree. He had got a certain right under the decree, which he would be entitled to enforce in execution of the decree. And the argument in substance comes to this that in virtue of that transfer such a right may be lost without contravening the provisions of s. 52. I am not prepared to accept this contention of the plaintiff. It may be mentioned that between these very parties in another suit under similar circumstances this very question was raised; and in *Krishnabai* v. *Savlaram*, Second Appeal No. 420 of 1925, decided by Macleod, C. J. and Crump, J., on March 23, 1926, it was held that execution could proceed against the legal representatives of the deceased judgment-debtor. Though there is no reference to the position of the transferee with reference to s. 52 of the Transfer of Property Act in the judgment, it seems that the conclusion reached there is the same. It supports our conclusion in this case.

I, therefore, dismiss the appeal with costs. The cross-objections are also dismissed with costs.

I desire to add that in execution, if the question arises whether the injunction granted against the original judgment-debtor can be enforced personally against the legal representatives or against the transferee, it will be for the Court to consider whether a personal relief by way of injunction could be enforced against any of them. But it is possible that in execution the alleged encroachment and obstruction may be removed without that question arising at all.

Fawcett, J.—I agree. I think that s. 52 of the Transfer of Property Act is wide enough to cover the present case. As is observed in *Nathaji Anandrav* v. *Nana* (3) the doctrine of *lis pendens* is not based on the equitable doctrine of notice, but on the ground that it is necessary to the administration of justice that the decision of a Court in a suit should be binding not only on the litigant parties but on those who derive title from them *pendente lite*, whether with notice of the suit or not. I think that section has been drawn with intent to cover that principle which had already been adopted in many English cases.

A. N. A. *Appeal dismissed.*

(3) 9 Bom. L. R. 1173.

PATNA HIGH COURT.

CIVIL APPEAL No. 344 OF 1922.

April 15, 1925.

Present:—Mr. Justice Kulwant Sahay.

MADHUSUDAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JEOLAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 182—Homestead land—Occupation by person other than raiyat—*Section 182, whether applicable—Permanent tenancy, proof of.*

Section 182 of the Bengal Tenancy Act is not applicable where the person in possession of homestead land is not a *raiyat* of the village. [p. 585, 1.]

A permanent tenancy cannot be inferred from the mere fact that a person was in possession of a house in the homestead land of a village for about ten or eleven years paying the same rent, and was residing in the village for a long time. [p. 585, col. 2; p. 586, col 1.]

Mohoram Sheikh Chaprasi v. *Telamuddin Khan* (1), distinguished.

Appeal from the appellate decree of the Subordinate Judge, Gaya, dated the 20th December, 1921.

Mr. *S. N. Bose*, for the Appellants.

Mr. *S. Dayal*, for the Respondents.

JUDGMENT.—This appeal was heard on the 19th of March, last; and, as the parties expressed a desire to compromise the dispute between them, judgment was reserved and time was allowed to them to effect a compromise. On the 27th of March, it was represented that the compromise had been effected between the parties and that a petition setting out the terms of the compromise would be filed on the 1st of April, 1925. The case was accordingly again allowed to stand over until the 1st of April. On the 1st of April, it was represented by the learned Vakils on both sides that the matter had been finally settled between the parties and that in order to file a petition of compromise the *khasra* number of one of the plots had to be stated, which was not available;

and time was again asked for to obtain the *khasra* number of one of the plots in dispute. The case was accordingly allowed to stand over till to-day. On the case being taken up to-day it is represented by the learned Vakils on both sides that no compromise has been effected. It is regrettable that if the compromise had fallen through, the matter was not brought to the notice of the Court earlier. I have, however, re-heard the learned Vakils on both sides to-day.

The appeal is by the plaintiffs and it arises out of action in ejectment. The suit was decreed by the Munsif, but, on appeal, it has been dismissed by the learned Subordinate Judge. The plaintiff's case was that the land in dispute was *gair mazrua* land of the proprietors and that the defendants, without any right, had constructed a house thereon in the year 1321 *Fasli*; that a notice was given to the defendants to vacate the land, and they having failed to do so, the present suit was brought for a declaration that the defendant No. 1 had no right to the land in dispute and for recovery of possession thereof.

The defence of the defendants was that the land in dispute was in the occupation of the defendants for a long period and that they had built a dwelling house thereon and that they had acquired a right to remain on the land as a permanent tenant thereof and could not be evicted. It is admitted by the defendants that they are not *raiyats* of the village and, therefore, s. 182 of the Bengal Tenancy Act has no application to this case.

The learned Munsif found that the land was the *gair mazrua* land of the proprietors and that, as the defendants could not acquire any right of occupancy under s. 182 of the Bengal Tenancy Act, the relationship between the parties must be determined by the provisions of the Indian Contract Act; and he found that there was nothing on the record to show that the tenancy was of a permanent or transferable nature. The learned Subordinate Judge has dismissed the suit and the reasons given by him are these: He finds that the allegation of the plaintiffs that the defendants built the house in the year 1321 *Fasli* is false. He also finds that the defendants have been in possession of the house from the time of their ancestors and that, therefore, they have acquired a permanent right in the land and are not liable to be ejected. He further observes that the defendants are weavers and, therefore, members of the village community and, therefore, are not liable to be ejected. Next he finds that the defendants have paid *mutarfa* rents and have got receipts for a period of ten or eleven years from 1316 to 1326 *Faslis*. Lastly he finds that the defendants have been living in the village for the last twenty-five or thirty years. From these facts he has come to the conclusion that the defendants are permanent tenants of the homestead land and could not be ejected.

On second appeal it has been contended by the learned Vakil for the appellants that the reasons given by the learned Subordinate Judge are not sufficient in law to come to a finding that the tenancy of the defendants is of a permanent character. In my opinion, this contention is sound and ought to prevail. It is admitted by the learned Vakil for the respondents that the reasons given by the learned Subordinate Judge by themselves are not sufficient in law to create a permanent tenancy in the defendants. He, however, relies upon the decision in the case of *Mohoram Sheikh Chaprasi* v. *Telamuddin Khan* (1). The facts of that case are distinguishable from those of the present case. In that case there was a finding that the original tenant and his successors had been in occupation of the land for over 60 years; secondly, that the rent was never varied; thirdly, that the tenancy had been treated by the landlord as heritable; and fourthly, that the land was let out for residential purposes. From these facts the Court came to a conclusion that the tenancy was of a permanent nature. In the present case it has not been found that the defendants and their predecessors had been in occupation of the land for a great length of time; all that has been found is that the defendants have been in possession from 1316 to 1326, and further that they have been living in the village (not in the house in dispute) for the last twenty-five or thirty years. Next there is no finding that the rent has never varied: all that is found is that for a period of ten or eleven years the same rent has been paid, and not that rent has continued unvaried from the time of the ancestors of the defendants down to the present time. Thirdly, there is no finding that the landlord has treated the tenancy

(1) 13 Ind. Cas. 606; 16 C. W. N. 567; 15 C. L. J. 220.

of the defendants as heritable; and fourthly, there is no allegation and no finding as to the land upon which the house stands having been let out to the defendants or their ancestors by the proprietor for the purpose of building a dwelling-house thereon. The allegation in the written statement was that the defendants and their ancestors had been in occupation of the house in dispute. It may be that the house was standing on the land at the time the defendants and their ancestors first came to occupy it. No doubt, the allegation of the plaintiffs that the defendants built the house upon the land for the first time in the year 1321 has been found to be false; but upon the findings arrived at by the Courts below it is clear that the defendants cannot acquire a permanent right of tenancy in the land. There was an allegation in the plaint that a notice to quit had been served upon the defendants. This was not denied in the written statement and it appears that the sufficiency of the notice was admitted. In my opinion unless the defendants succeeded in proving upon evidence that there was a permanent lease granted to them or to their ancestors, the position of the defendants must be that of a tenant-at-will or from month to month or from year to year, and the tenancy is liable to be determined on a proper notice to quit. The legality or sufficiency of the notice in the present case has not been disputed and it must be taken that the notice given in the present case was sufficient.

In my opinion the decree made by the Munsif was correct. The decree of the Subordinate Judge must be set aside and that of the Munsif restored. The plaintiffs are entitled to their costs throughout.

A. N. A. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 213 OF 1925.
July 23, 1926.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

SAVITRIBAI GANESH KHADILKAR —PLAINTIFF—APPELLANT

versus

BHAUBHAT SAKHARAMBHAT KHADILKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance—Exclusion from inheritance—Dumbness, whether should be congenital and incurable.

Dumbness should be congenital in order to be sufficient to disqualify an heir from inheriting under Hindu Law. It must also be incurable. [p. 591, cols. 1 & 2.]

(Case-law, discussed).

Per *Shah, J.*—The rule that congenital deafness and dumbness constitutes a disqualification according to Hindu Law to inherit is not obsolete. [*ibid.*]

First appeal from the decision of the First Class Subordinate Judge at Belgaum, in Suit No. 370 of 1921.

Mr. *J. R. Gharpure*, for the Appellant.

Mr. *Nilkant Atmaram*, for the Respondents.

JUDGMENT.

Shah, J.—In this case the plaintiff sued to recover certain properties as the heir of her husband, to whom the properties belonged. Her husband died in 1914; and she alleged that thereafter the first three defendonts, who were the *bhaubands* of her husband, got the tenants over to their side and took possession of the lands. In the course of the suit, as the learned Trial Judge thought that she was mentally infirm, he appointed her brother as her next friend for the suit.

The defence of the first three defendants was that she was congenitally deaf and dumb, and that she was disqualified to inherit the property as an heir according to Hindu Law. That is the only defence with which we are concerned now. The other defendants Nos. 4 to 7 made common cause with the first three defendants, though in their own right they were not entitled to the property.

The first issue raised by the trial Court was: "Is plaintiff born totally deaf and dumb or is she only partially deaf and dumb?" There was no separate issue as to whether she was deaf and dumb by birth; but this issue was understood to cover that question and the parties adduced evidence on the point. The learned Judge on a consideration of the expert evidence as well as the other evidence in the case came to the conclusion that she was not deaf and dumb from birth, but that in fact she was almost totally deaf and dumb. Further, he came to the conclusion that such deafness and dumbness were sufficient to disqualify her from inheriting according to Hindu Law, though the infirmities were not congenital. He recorded findings on other issues; but, having regard to the

view which he took of the disqualification of the plaintiff to inherit as an heir, he dismissed her suit.

The plaintiff has appealed to this Court, and on her behalf it has been urged that the lower Court is wrong on evidence in holding that she is deaf and dumb in the sense required by the rule of Hindu Law. It is urged that she is able to utter a few syllables, and that she is able to hear loud and shrill noise. It is also urged that it is not shown in this case that the infirmities were incurable, and that the lower Court was wrong in presuming her dumbness to be incurable.

On the other hand, the finding that these infirmities were not congenital is not contested. But it is urged that for all practical purposes she is deaf and dumb, and even though these infirmities may not be congenital, they are sufficient in law to disqualify an heir from inheriting according to Hindu Law.

On a consideration of the evidence, it is clear that in this case neither the deafness nor the dumbness, such as it is, is congenital. She became deaf apparently in consequence of some illness which overtook her during her early infancy and became dumb is consequence. It is true that the evidence discloses that she is able to utter a few words, and she is able to hear a little after great effort. But still it must be taken on the evidence that she is for all practical purposes deaf and dumb at present.

As regards the question whether her dumbness is incurable, it must be said that there is no evidence, and all that the learned Judge has said on this point is this:—

"The plaintiff's dumbness is presumably incurable. She has remained in that condition even since her infancy."

It is quite true that she has remained in that condition ever since her infancy. But it seems to me that before an infirmity of this nature can be held to be incurable, it is for the defendants, who rely upon this fact as constituting a disqualification to prove that it is incurable. It is very strange that though medical evidence was recorded in the case, defendants made no attempt to prove this. Further, their evidence was mainly directed to the question whether she was deaf and dumb by birth. Under these circumstances, it seems to me that the burden of proof, which should lie upon the party relying upon this fact, has not been sufficiently discharged.

It may be that this infirmity may be curable. Indeed, we are informed in the course of the arguments by Mr. Gharpure for the appellant that after the judgment of the lower Court was delivered, she has been kept under treatment and training; and as a result she is slowly getting over this infirmity. This may be true or it may represent too hopeful a view of the efficacy of treatment. We have no evidence of the fact. But it is to meet such possibilities that the fact of incurability requires to be strictly proved.

In the present case, however, it is enough to say that it has not been shown to my satisfaction that the dumbness is of an incurable nature, though undoubtedly she has been subject to this infirmity from early infancy up to the present time. That is my view on the evidence.

Now, on these facts the question is, whether the plaintiff is disqualified to inherit as an heir to her husband according to Hindu law; and the most important point to be considered is whether deafness and dumbness must be congenital in order to constitute such disability according to the rule of Hindu Law. If it is required to be congenital according to that rule, the question whether this particular infirmity is incurable or not becomes a subordinate question. But, as a matter of law, it must be considered whether the disease is incurable.

First of all, I shall deal with the question as to whether, according to Hindu Law, she is disqualified to inherit even though her deafness and dumbness are not congenital. The rule on this point is to be found in s. 10 of Ch. II of the Mitakshara; and I shall refer to the text of Yajnavalkya, which is translated in placitum 1 of that section of the Mitakshara at page 455 of Stoke's Hindu Law Books:—

"An impotent person, an outcaste, and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others [similarly disqualified], must be maintained; excluding them, however, from participation."

In his commentary on this text Vijnaneshvara brings in under the expression "*adi*" in the orignal text translated as "others similarly disqualified" persons

suffering from other diseases. In doing so he refers to the text of Manu in Adhyaya IX, verse 201, which is translated as follows in placitum 3 of the same section of the Mitakshara:—

"Manu likewise ordains, 'Impotent persons and outcastes are excluded from a share of the heritage; and so are persons born blind and deaf, as well as madmen, idiots, the dumb, and those who have lost a sense [or a limb].' "

There is nothing further in the commentary of Vijnaneshvara to throw any light on the question as to whether the dumbness, which is referred to, should be congenital. But by referring to the text of Manu, he certainly means to convey that in those cases where according to Manu the infirmity must be congenital, he would accept that view.

In the Vyavahara Mayukha the portion relating to this point is to be found in s. 11 of Ch. IV. The texts of Yajnavalkya and of Manu, which I have just referred to, have been mentioned by the author of the Mayukha. But he does not throw any further light on the question as to whether the particular infirmities should be congenital or not.

I may mention that Mitra Misra, the author of the Viramitrodaya, in dealing with this point, refers to both these texts, and he expresses his opinion, which is rendered as follows by Golapchandra Sarkar Sastri in his translation of the Viramitrodaya at page 252:—

"'An impotent person' and 'a blind man', if so from their birth, are certainly not entitled to shares on partition, but if they become so in the interim, are certainly entitled to shares on a partition agreeably to the mode laid down in the text,—...provided their cure be effected by medication or the like."

Thus by implication he applies the word *jati* to 'impotent' (*kleeba*).

The question depends upon the view which we take of the text of Manu, and of the general rule as to disqualification which is to be found in these texts.

Now, it is clear that, on a grammatical interpretation of the text, the blindness and deafness, which would constitute such a disqualification, should be congenital. The word "*jati*" undoubtedly applies to the words "*andha*" and "*badhira*" the blind and the deaf. But it is urged that that word cannot be grammatically taken to govern the words in the second half of the verse, and cannot be applied to the words meaning 'idiots, the insane, the dumb and those who have lost their sense or limb.' No doubt, looking at it strictly grammatically, that is a reasonable contention. But it must be remembered that in laying down this rule of disqualification, the Smriti-writers had very serious disabilities in view, and it is reasonable to think that they meant really grave cases of such infirmities which would really constitute serious disabilities in their capacity as heirs or as persons entitled to partition. This is not a mere surmise. In the decided cases in which different infirmities have been dealt with, this view is fully reflected. For instance, in dealing with the case of an idiot, the Madras High Court held so far back as 1862-63 in the case of *Tirumamagal Ammal* v. *Ramaswami Ayyangar* (1) that the idiocy, in order to disqualify under Hindu Law, must be congenital. I am only referring to this as an illustration; and I am not concerned to pause to examine the *ratio decidendi* of this case.

As regards the insane, the more recent decisions are to the effect that the insanity need not be congenital. The difficulty with reference to that infirmity also is sufficiently reflected in the judgment of Westropp, C. J., in *Murarji Gokuldas* v. *Parvatibai* (2). By referring to this difficulty I do not wish in any sense to cast any doubt on the view which has been taken in the decisions relating to insanity as a ground for disqualification.

Then, as regards "*nirindriyah*", *i. e.*, one who has lost his sense or limb, as an illustration I may mention that lameness, as a ground of disqualification, does not appear to have been acted upon in any of the reported cases. In the one case that the Madras High Court had to decide, the learned Judges came to the conclusion that the lameness which was not congenital was not sufficient to amount to such disqualification, and the learned Judges reserved their opinion on the question whether congenital lameness would be a ground of disqualification: see *Venkata Subba Rao* v. *Purushottam* (3).

In the present case, however, we have to deal with dumbness. With regard to that, the case-law, though not uniform, is suffi-

(1) 1 M. H. C. R. 214.
(2) 1 B. 177; 1 Ind. Dec. (N. S.) 118.
(3) 26 M. 133; 12 M. L. J. 262.

ciently clear to indicate that that also should be congenital. But, before dealing with the cases, I may point out that the opinions expressed in different modern text-books on Hindu Law, are that dumbness must be congenital. For instance, at page 544 of the Fourth Edition of West and Buhler, the opinion is expressed that the dumbness and insanity must be congenital. That is the opinion recorded by the learned authors of that Digest as given in 1857. Though in the references and in the footnotes there one may not find any clear authority on this point, it means that the opinion then given must have been based upon a broad and not too literal or grammatical interpretation of this text of Manu.

Then we find the same opinion expressed in Golapchandra Sarkar's book on Hindu Law at page 545 (5th Edition).

The same opinion is expressed in Mayne's Hindu Law (page 872, 9th Edition) and in Mulla's Hindu Law (page 106, 4th Edition.)

I refer to these statements merely as showing how the rule has been so far understood. I do not desire, however, to rest my decision merely on those opinions in spite of the fact that they are entitled to great weight. It seems to me that, apart from these opinions, and apart from the cases, to which I shall presently refer, on a proper reading of a text of this nature, which lays down a rule of disability, and where it is unquestionable that deafness must be congenital, it seems to me that it would be proper to hold that dumbness also, which goes ordinarily with deafness, should be of the same description as deafness, that is, it should be congenital. It would be doing no violence to the words of the text to read it in that way, and whatever may be the correct view as to the other infirmities mentioned in the second half of this verse of Manu, it seems to me that there is a special reason for treating the dumbness on the same footing as deafness with reference to which undoubtedly it is laid down that it should be congenital in order that it may constitute a disqualification.

Coming to the decided cases, it may be mentioned that so far there has not been a single decided case in which a person not found to be dumb by birth, has been held to be disqualified to inherit as an heir; and this I say in spite of the judgment of Mr. Justice Kajiji in *Bai Pratapgavri* v. *Mulshankar Premchand* (4) because in that case the learned Judge expressly found that the person alleged to be disqualified was dumb by birth.

This Court had to consider the point in 1867 in *Vallabhram Shivnarayan* v. *Bai Hariganga* (5). It is necessary to examine this case carefully as it has been read by Kajiji, J., as deciding only the question as to whether the rule of disqualification applied to males or extended to female heirs also. In that case the daughter had sued to enforce her rights during the lifetime of her mother who was dumb. When the case came up before the High Court, it was very fully argued, and one of the points raised was whether the rule of disqualification applied to female heirs as well as to male heirs, or was expressly limited to male heirs. That point was, no doubt, considered and decided in the sense that it was applicable to all heirs, males or females. But it is not correct, in my opinion, to say that the question whether the dumbness should be congenital in order to create a disqualification was not before the learned Judges or was not considered by them. The case is stated to have been 'most carefully argued.' At two places they refer in the judgment as follows to this point. At page 137* of the report the arguments of Mr. Nanabhai for the appellant are referred to as including the following point:—

"But there is another point. If dumbness disqualifies, it is in the same category as blindness, lameness, etc., and it must be from *birth*....The District Judge must try whether the dumbness is from birth...."

Then at page 139* Gibbs, J., observes as follows:—

"I must, therefore, decide that if this widow has been dumb from her birth, she is debarred from inheriting...."

It seems to me that, whether the point was argued or whether it was conceded at the Bar, the learned Judges decided the point. From the issues sent down it is quite clear that the learned Judges were of opinion that the dumbness must be congenital. This is what they say with regard to issue No. 1 (page 140*):—

"Has the widow been dumb from birth? If this is found in the negative, she is cap-

(4) 80 Ind. Cas. 173; 26 Bom. L. R. 269; A. I. R. 1924 Bom. 353.

(5) 4 B. H. C. R. A. C. J. 135.

*Pages of 4 B. H. C. R. A. C. J.—[*Ed.*]

able of inheritance, and must recover before her daughter, but if it be found in the affirmative, then" other issues which are stated thereafter in the judgment were to be considered by the lower Court.

Thus, it seems to me that in *Vallabhram Shivnarayan* v. *Bai Hariganga* (5) the learned Judges distinctly held that dumbness must be congenital in order to create a disqualification to inherit.

This decision was read in the same sense by Westropp, C. J., and Sargent, J., in *Murarji Gokuldas* v. *Parvatibai* (2) (see page 190* of the report).

In *Bharmappa* v. *Ujjangauda* (6) the infirmity of dumbness as a ground of disqualification had to be considered. It was a case of congenital dumbness, and the question that arises now did not arise there. In a recent case on the Original Side, Mr. Justice Kajiji, in *Bai Pratapgavri* v. *Mulshankar Premchand* (4) had occasion to deal with this point, in which on an examination of the cases the learned Judge came to the conclusion that dumbness need not be congenital. With reference to the case of *Vallabhram Shivnarayan* v. *Bai Hariganga* (5) the learned Judge observed as follows (page 272†) :—

"I must say that having regard to the question that was at issue in that case, it was assumed that the person there was deaf and dumb by birth and the only question at issue there was whether the text applied to females also."

This observation appears to me to be based upon what may be called an incomplete or narrow reading of the judgment. I have already referred to *Vallabhram's case* (5) to show that the question before the learned Judges was not only whether the text applied to females also, but there was the further question whether the dumbness should be congenital. It may be that in the judgment they did not consider it necessary to say as much as they said with reference to the application of this rule to females. But the issue, which I have quoted above, makes it abundantly clear that they considered it necessary to decide it because they were of opinion that, if it was not congenital, it would not be sufficient to disqualify her as heir. In this case of *Bai Pratapgavri* v. *Mulshankar Premchand* (4) reference is made to the decision in *Charu Chunder Pal* v. *Nobo Sundari Dasi* (7) and the learned Judge was much influenced in his conclusion by the observations of Mr. Justice Banerjee in that case. Referring to that case, and the observations of Mr. Justice Banerjee, it is clear that the point there was quite different. It was a point which might possibly arise under the Bengal School of the Hindu Law, but it could not arise in Bombay, and which did not turn upon the interpretation of the particular verses of Manu and Yajnavalkya. I may refer to the following passage in the judgment at pages 332-33* to make this position clear:—

"A good deal of argument was addressed to us on behalf of the appellant to show that dumbness in order to disqualify a person from inheriting need not be congenital; and if it were necessary to decide that question in this case, I should have felt inclined to answer it in favour of the appellant's contention. But I do not think it necessary to go into that question here, because the real question that we have to decide is not whether this dumb son, Shoshi Bhusan, is himself entitled to inherit, but whether his dumbness disqualifies his mother from inheriting. Upon that question most of the authorities referred to in argument do not throw any light. All that is necessary to entitle the plaintiff, Nobo Sunderi, to succeed in this case is that she should have a son by means of whom she may present oblations at solemn obsequies. That is the only qualification required of her by the Dayabhaga (see Ch. IV, s. II, para. 9). That provision of the Hindu Law, as I understand it, does not require any present capacity in the daughter's son to confer spiritual benefit by means of oblations at solemn obsequies. It only requires the existence of the possibility to confer such benefit; and the question is whether such possibility exists in the present case."

All the Judges, who dealt with the point that arose there, came to the conclusion that this possibility existed in that case, and, therefore, the mother was entitled to inherit, and was not disqualified in consequence of the dumbness of her son. It is quite true, however, that there is that expression of opinion of Mr. Justice Banerjee which is entitled to weight. But in

(6) 65 Ind. Cas. 216; 46 B. 455; 23 Bom. L. R. 1320; A. I. R. 1922 Bom. 173.

*Page of 1 B.—[*Ed.*]

†Page of 26 Bom. L. R.—[*Ed.*]

(7) 18 C. 327; 9 Ind. Dec. (N. S.) 219.

*Page of 18 C.—[*Ed.*

this Court from the time of the decision in *Vallabhram's case* (5) there has not been a single reported case in which dumbness not congenital has been held to be a sufficient ground to disqualify an heir from inheritance. In *Bai Pratapgavri's case* (4) Kajiji, J., held on the evidence that the plaintiff was dumb congenitally.

It may be mentioned that in the Privy Council case of *Lala Muddun Gopal Lal* v. *Klikhinda Koer* (8) one who had been born deaf and dumb was held to be disqualified to inherit. But there was no question in the case as to whether deafness and dumbness not congenital would be sufficient to disqualify a person from inheriting. I only refer to this case as an instance in which what was accepted as constituting a disqualification was congenital dumbness.

I am, therefore, of opinion that, on a fair interpretation of this text, it is reasonable to hold, as was held by this Court in *Vallabhram's case* (5) that dumbness should be congenital in order to be sufficient to disqualify an heir from inheriting under Hindu Law.

I desire to add a word with reference to the argument which has been urged on behalf of the appellant, that all these rules of disqualification based upon physical infirmities are obsolete, and reliance was placed upon the observations of Mr. Justice Sadasiva Ayyar in *Yellavajhulu Surayya* v. *Yellavajhulu Subbamma* (9). It may be mentioned, however, that in *Pudiava Nadan* v. *Pavanasa Nadan* (10) these observations of the learned Judge were considered by a Full Bench of that Court, and they could not see their way to hold that the rules relating to all infirmities must be treated as obsolete. Apart from that, this very point was urged in the case of *Bharmappa* v. *Ujjangauda* (6). There it was held that there might be certain physical infirmities as to which the rule might be treated as obsolete in these days, but it could not be treated as obsolete in its entirety with regard to all infirmities. With regard to dumbness and deafness, it was held that the rule was not obsolete. Under these circumstances, it is not possible to accept the appellant's contention that the rule that congenital deafness and dumbness constitutes a disqualification according to Hindu Law to inherit is obsolete.

It is also clear to my mind that in order to constitute a disqualification this particular infirmity must be shown to be incurable. This is clear from the text of Yajnavalkya where the word "*achikitsya*" is used. It is translated as meaning a person afflicted with incurable disease. The deal and the dumb are brought in under the word "*adi*" (and others) used in Yajnavalkya's text and the same characteristic must apply to deafness and dumbness, that is, they should be incurable. It would be in accordance with the rule that where there are texts of two Smriti-writers on points, as to which one is silent, they must be read as supplementing each other as far as possible (see Vijnaneshvara's Commentary on Verses Nos. 4 and 5 in the Acharadhyaya of the Mitakshara—as translated by Srisachandra Vidyamana—page 107]. It is in that way that the text of Manu has been read as regards the question whether the particular infirmity should be congenital, though there is no word like *jati*, (congenital) used in Yajanavalkya's text, and even though deaf and dumb persons are not mentioned by Yajnavalkya. Having regard to the texts of Yajnavalkya and of Manu on this point, it seems to me that dumbness must be incurable also. As I have said, it is not shown in this case by the defendants that it is incurable. But even if it were incurable in fact, as it is not congenital, it is not sufficient to create any disqualification in the plaintiff.

The result, therefore, is that this appeal is allowed, the decree of the lower Court is reversed, and there will be a decree for the plaintiff for possession of the property against all the defendants. She should also be allowed mesne profits from defendants Nos. 1 to 3 for three years prior to the date of the suit, and from the date of the suit until delivery of possession at the rate of Rs. 114 a year, which is found by the lower Court to be the amount of mesne profits per year.

The plaintiff should have her costs throughout from defendants Nos. 1 to 3.

Fawcett, J.—I agree that there is no sufficient evidence that the deafness and dumbness are incurable. The two medical officers who were examined have not given definite evidence on this point, and, having

(8) 18 I. A. 9; 18 C. 341; 15 Ind. Jur. 93; 5 Sar. P. C. J. 676; 9 Ind. Dec. (N. S.) 228 (P. C.).

(9) 53 Ind. Cas. 498; 43 M. 4; 26 M. L. T. 154; (1919) M. W. N. 580; 37 M. L. J. 405.

(10) 69 Ind. Cas. 313; 45 M. 949; 16 L. W. 563; (1922) M. W. N. 693; 43 M. L. J. 596; A. I. R. 1923 Mad. 215; 31 M. L. T. 320 (F. B.).

regard to the great advance that medical science has made in the treatment of deaf and dumb people, I think it cannot properly be presumed that the plaintiff cannot be cured, at any rate, to the extent of being able to understand what people say to her and being able to utter sounds to convey what she means. In fact it is common knowledge that now-a-days children, who are dumb and deaf, can be taught by lip reading to understand what people say, and to give verbal answers which can be understood by persons to whom the answers are addressed. I understand that in India considerable advance has been made in this teaching, especially in institutions at Bombay and Ahmedabad; and it seems quite possible that plaintiff's dumbness, if she was properly treated, might be overcome.

On the question whether dumbness to disqualify a person for inheritance should be congenital, I cannot speak, with the same authority as my learned brother, but I entirely agree with his conclusion. It is clear that Kajiji, J., in *Bai Pratapgavri* v. *Mulshankar Premchand* (4) was inaccurate, when he said in his judgment with regard to the case of *Vallabhram Shivnarayan* v. *Bai Hariganga* (5) that "having regard to the question that was at issue in that case, it was assumed that the person there was deaf and dumb by birth and the only question at issue there was whether the text applied to females also." As the learned Judges expressly sent down an issue whether the person in that case was deaf and dumb from birth or not, it clearly was not assumed that she was deaf and dumb by birth. No doubt, it can be said that it was assumed in that case that she would only be disqualified, if she was dumb from her birth. The reference to this point at page 137* of the report, which my learned brother has quoted, may possibly be a statement of the contentions of Mr. Nanabhai for the appellant. But it would appear that the opposing Pleader, Mr. Shantaram, in his reply, the substance of which is given, did not controvert that particular point. Whether he did so or not, it is clear from page 139* that the Court decided that "if this widow has been dumb from her birth, she is debarred from inheriting." And even supposing that there was no contention on the point, the facts that the two learned Pleaders who appeared in that case, one of whom (Mr. Nanabhai Haridas) became a Judge of this Court, had a good knowledge of Hindu Law, and that there was no contention on this point, would itself point strongly to, at any rate, a sentiment or even usage, which has considerable weight on a question of this kind, as has been pointed out by the Privy Council in the well-known case of *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (11).

Then Sir Michael Westropp in the later case, which has already been referred to, *Murarji Gokuldas* v. *Parvatibai* (2) distinctly considered that *Vallabhram's case* (5) proved that dumbness to disqualify for inheritance must be congenital, so that the case has already been treated by this Court as an authority on the point. It seems to me that we should follow that view rather than that of Kajiji, J., in *Bai Pratapgavri* v. *Mulshankar Premchand* (4) adopting a mere inclination of opinion on the part of Banerjee, J., which (as my learned brother has pointed out) was on a different point under the Bengal School of Hindu Law. Having regard to the close connection of dumbness, in a case of this kind, with deafness, which has to be congenital, there is obviously logical ground for holding that dumbness, which is really a consequence of the deafness, should also be subject to the same rule that it must be congenital to disqualify for inheritance. Possibly a different rule might apply to dumbness which is not the result of deafness, but of some defect of the vocal organs which would prevent a person speaking. But that is not the case before us.

No doubt, it has been held that madness need not be congenital to disqualify, but there clearly is a different basis for that decision. The text of Manu covers the case of idiots, who by the very meaning of the word must have been born idiots; and, accordingly, when he includes madness, it can logically be said that it was not intended that in such cases the disease must be congenital.

I, therefore, agree with the conclusion of my learned brother and the decree, he proposes, should be passed.

A. N. A. *Appeal allowed.*

(11) 12 M. I. A. 397 at pp. 435, 436; 10 W. R. P. C. 17; 1 B. L. R. P. C. 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 3 Mad. Jur. 298; 20 E. R. 389; 1 Ind. Dec. (N. S.) 1.

*Pages of 4 B.H. C. A. C. J.- [*Ed.*]

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1207 OF 1924.

January 19, 1927.

Present:—Mr. Justice Boys and Mr. Justice Kendall.

Sahu PRAHLAD PRASAD AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

BHAGWAN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), Sch. I, Arts. 1, 5 (c)—Acknowledgment in writing containing promise to pay future interest—Stamp duty—Effect of such acknowledgment on barred items—Promise in writing to pay barred debt—Contract Act (IX of 1872), s. 25.

On a statement of account sent by the plaintiff to the defendant, the latter made an endorsement acknowledging that the amount stated was due from him to the plaintiff and added the words "interest at annas 12 per cent. per mensem:"

Held, (1) that the addition of the promise to pay future interest was sufficient to take the endorsement out of Art. 1 of Sch. I of the Stamp Act and to render it liable to be stamped as an 'agreement not otherwise provided for' under Art. 5 (c) of the Schedule; [p. 594, col. 1.]

(2) that, although the endorsement could not save from limitation those items of account which were barred on the date of the endorsement, yet, it operated as a valid promise in writing to pay them under s. 25 of the Contract Act. [p. 594, cols. 1 & 2.]

Laxumibai v. *Ganesh Raghunath* (3), *Mahadeo Kori* v. *Sheoraj Ram Teli* (4) and *Mulchand Lala* v. *Kashibullav Biswas* (5), followed.

Ganga Prasad v. *Ram Dayal* (1) and *Gobind Das* v. *Sarju Das* (2), distinguished.

Second appeal from a decree of the District Judge, Pilibhit, dated the 12th May, 1924.

Mr. *U. S. Bajpai*, for the Appellants.

Dr. *K. N. Katju* and Mr. *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—The plaintiff-appellant here had advanced certain monies to the defendant. In accordance with the common practice he sent to the defendant on the 29th of September, 1922, a statement of account, which is Ex. 2 in the case, in which he showed that Rs. 2,366-2-6 were due to him from the defendant. This is the last account which was sent in to the defendant. On that account the defendant endorsed an acknowledgment that Rs. 2,366-2 6 remained due from him to the plaintiff and added the words "interest at annas 12 per cent. per mensem." A reference to this memorandum signed by the defendant is made in para. 3 of the plaint, and in para. 5 of the plaint the plaintiff further states that the correctness of the statement of account is supported by his account books. The trial Court decreed the plaintiff's suit. The lower Appellate Court held that this document (Ex. 2) was merely an acknowledgment of the amount due from the defendant and that it came within Art. 1 of the Stamp Act, and that as such it required a one anna stamp, and not having been stamped was inadmissible in evidence.

Neither party has been able to put before us very clearly the circumstances in which the trial Court apparently admitted the document into evidence, but it bears an endorsement by the trial Court "Admitted in evidence against the defendant" and it was undoubtedly considered by the trial Court. In view, however, of the opinion at which we have arrived on the point, which we shall next discuss, it is unnecessary for us to consider the effect of section 36 of the Stamp Act, and whether the lower Court was right in excluding it from the record, if it had been once accepted in evidence.

The first question argued before us for the appellant is that this document was more than a mere acknowledgment such as is described in the first paragraph of Art. 1 of Sch. I of the Stamp Act, and that it came in fact within the proviso to that Article. It was contended that the memorandum signed by the defendant did contain a promise to pay the debt and, at any rate, a stipulation to pay interest. We think that there can be no doubt on the terms of the document that the contention that the document contained a stipulation to pay interest must be accepted. That the document contained a stipulation as to the rate of interest is beyond question on the face of it. That stipulation must have had reference either to the rate of the past interest or to the rate of future interest to be paid or to both. It is difficult to see what could have been the meaning of particularly mentioning the rate of interest if it only referred to past interest. That interest had already been calculated and formed part of the total which both parties agreed was due from the defendant. There can be no possible reason then for referring to it unless it related to the interest which the defendant was agreeing to pay in the future on the balance which he was acknowledging to be due. We have already stated that we are unable to see any reason for mentioning the rate of interest if it referred to the past. But it did not even refer both to the past rate of interest and the future, for it is stated to us on behalf of the appellant that the interest payable prior to the 29th of September,

1922, was 11 annas and the new interest to be payable according to the memorandum was to be 12 annas. It is, therefore, apparent that the rate of interest quoted referred to the future and cannot be held to be anything but a stipulation to pay interest in the future. This is sufficient to take it out of Art. 1 of Sch. I of the Stamp Act, and it would come within the terms of Art. 5 (c), Sch. I, that is to say, it was an agreement not otherwise provided for and the stamp duty payable on it was 8 annas. That being so, the lower Court should not have held the document inadmissible in evidence but should have acted under s. 61 of the Stamp Act.

We have next to consider the effect of s. 19 of the Limitation Act. To make an acknowledgment valid for the purpose of saving limitation, the acknowledgment must have been made before the expiration of the period prescribed for the suit. It is urged on behalf of the respondent that certain of the items which went to make up the total acknowledgment by the defendant to be due were already barred by limitation. If then this was a mere acknowledgment, we should have to consider the effect of s. 19 in the light of this fact. But we have already held in connection with Art. 1 of Sch. I of the Stamp Act that this memorandum was something more than an acknowledgment of past liability, and we think that the contention of the appellant must be upheld that he is entitled to rely on s. 25 of the Contract Act. It is there laid down that "an agreement made without consideration is void unless (sub-s. 3) it is a promise, made in writing and signed by the person to be charged therewith. . . . . to pay. . . . . a debt of which the creditor might have enforced payment but for the law for the limitation of suits." We are asked on behalf of the respondent to hold that in order to give the defendant the benefit of this section there must be an express promise in writing. This would apparently mean that we must be able to find the words "I promise to pay" or some equivalent words. We think that this is going beyond the section. We have to find whether there was or was not expressly or by implication in the memorandum a promise to pay. In our view it is impossible to hold that the stipulation as to interest can be interpreted otherwise than as a promise to pay interest in the future at the named rate, whether the promise was in express words such as "I promise to pay" or a matter of necessary implication is immaterial. On behalf of the respondent we are referred to the case of *Ganga Prasad* v. *Ram Dayal* (1). It is not necessary for us to say whether we would agree with the decision in that case that a mere acknowledgment of the amount due would or would not imply a promise to pay that amount. This case and the other case, *Gobind Das* v. *Sarju Das* (2), are clearly distinguishable from the present case in that in those cases the memorandum or acknowledgment contained no promise to pay interest. In the present case there was not only a mere acknowledgment by the defendant that he had incurred certain liability in the past, but there was a definite promise as to what he intended to do in the future. On the other hand for the appellant reliance is placed on the cases of *Laxumibai* v. *Ganesh Raghunath* (3), *Mahadeo Koeri* v. *Sheoraj Ram Teli* (4) and *Mulchand Lala* v. *Kashibullav Biswas* (5). In all three of these cases there was a condition as to the interest to be paid in the future in almost exactly similar terms to those used in the memorandum in this case. In the Bombay and Allahabad cases it is true that there had been no previous running account, but the document did provide for interest which was to be paid on the loan then being taken, and it was held that that provision as to interest was sufficient to alter the character of the memorandum from that of mere acknowledgment to an agreement. The Calcutta case was still further on all fours with this case, in that it was also a case where the balance was due on a running account. The three cases which we have last quoted support the view which we have ourselves expressed that the proper Article of Sch. I of the Stamp Act was Art. 5 (c) and that the plaintiff was entitled to rely upon s. 25 of the Contract Act.

The result is that allowing the appeal we set aside the decree of the lower Appellate Court and restore that of the trial Court, subject to the appellant affixing stamps to the value of Rs. 5-8 to the document, Ex. 2, numbered 37B, in accordance with the provisions of s. 35 of the Stamp

(1) 23 A. 502; A. W. N. (1901) 150.
(2) 30 A. 268; 5 A. L. J. 274; A. W. N. (1908) 129.
(3) 25 B. 373; 2 Bom. L. R. 1132.
(4) 52 Ind. Cas. 974; 41 A. 169; 17 A. L. J. 19; 1 U. P. L. R. A.) 29.
(5) 35 C. 111; 11 C. W. N. 1120.

Act. The appellant will have his costs in this Court and the Court below.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 134 OF 1926.

January 7, 1927.

Present:—Mr. Justice Addison.

FIRM GURANDITTA RAM RAM KISHAN THROUGH GURANDITTA RAM—PLAINTIFFS—PETITIONERS

versus

SUKHU RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (VI of 1918), s. 44—Revision—Interference, when another remedy open.

Though as a general rule a High Court does not interfere on the revision side when the petitioner has another remedy open to him, it will do so in exceptional circumstances.

Petition for revision of an order of the Subordinate Judge, Second Class, Multan, dated the 17th November, 1925.

Mr. *Jiwan Lal Kapur*, for Dr. *Nand Lal*, for the Petitioners.

Mr. *Arjan Das*, for the Respondents.

JUDGMENT.—The plaintiffs obtained an *ex parte* decree against all five defendants on the 21st May, 1924. Four out of the five defendants applied to have this decree set aside on the 2nd March, 1925. By order dated the 8th April, 1925, the *ex parte* decree was set aside. No special mention being made as to whether it was set aside only as regards the four defendants who had applied or as regards all the five defendants. The hearing of the suit was then fixed for the 29th June, 1925, On that day it was discovered that the defendant, who had not applied was not present and the plaintiffs were ordered to put in the process-fee in order to serve him by registered post. The next hearing of the suit was fixed for the 4th November. In the meantime, the Subordinate Judge hearing the suit, left the District and it came before another Subordinate Judge. On the 4th November this second Subordinate Judge dismissed the whole suit under O. IX, r. 2, Code of Civil Procedure. An application was made to him to set aside that order and to restore the suit to the pending file, but he dismissed this application on the 17th November, 1925, although he accepted the contention that the suit should not have been dismissed as against all the defendants if the defendants before the Court were individually responsible. Against this order the plaintiffs have come here in revision.

It was part of the plaintiffs' case that they had put in the process fee, which, they alleged, must have been mislaid in the Court. This was not impossible, seeing that the case in the meantime came before a different Subordinate Judge. I think the explanation, which was given on oath, should have been accepted and the Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in not restoring the suit. It is true that it is a general rule that this Court will not interfere on the revision side when the petitioner has another remedy, but it will do so in exceptional circumstances. See *Shahabdin* v. *Anjaman-i-Naumania* (1).

I accordingly accept this petition and make an order setting aside the dismissal of the suit and direct the Subordinate Judge to proceed to hear it. There will be no costs here.

R. L. *Petition accepted.*

(1) 65 P. W. R. 1908.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1270 OF 1924.

January 20, 1927.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

NASIR KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

TARA CHAND *alias* TANSUKH RAI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 27 (b)—Contract to sell immoveable property—Subsequent mortgage with notice of contract—Specific performance—Registration, whether notice—Mortgagee, duty of, to search registers.

A contract to sell immoveable property can be specifically enforced against a subsequent mortgagee with notice of the contract. [p. 596, col. 1.]

The question whether registration amounts to notice depends on the circumstances of each case [p. 596, cols. 1 & 2.]

Tilakdhari Lal v. *Khedan Lal* (1), explained.

A mortgagee is liable to pay all prior incumbrances and so it is his duty to search the registers of the Registration Department and discover the prior charges. [p. 596, col. 2.]

Second appeal from a decree of the Subordinate Judge, Bulandshahr, dated the 26th May, 1924.

Mr. *U. S. Bajpai*, for the Appellants.

Dr. *N. C. Vaish*, for the Respondent.

JUDGMENT.—The plaintiff mortgagee sued for sale and the defence of certain defendants was that the mortgage could not have operation against Yusufpur property, 864 *sihams* out of 1728 of which had been purchased by them. The mortgage was executed on 13th April, 1920, but prior to that the mortgagor had entered into an agreement with the defendants-appellants to sell the Yusufpur property. This agreement was registered on 8th April, 1920. Subsequently the defendants-appellants brought a suit for specific performance on 19th April, 1920, and obtained a decree in accordance with which a sale deed was executed in their favour.

The trial Court exempted the property of the defendants appellants on the ground that the plaintiff had notice of the previous contract for sale. In appeal the learned Subordinate Judge did not consider the question of notice but held that a prospective vendor, even after an agreement to sell the property could transfer it. This opinion on a point of law is obviously wrong, having regard to the provisions of s. 27 (*b*) of the Specific Relief Act. It is there laid down that specific performance of a contract may be enforced against any other person claiming under either party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The question of notice is, therefore, of importance. If the plaintiff had notice of the previous contract he cannot enforce his mortgage as against the property so contracted to be sold previously. Having regard to the circumstances of the case we are satisfied that the plaintiff had notice. The agreement to sell was registered. When the plaintiff took the mortgage it was his duty to search the book of registration and discover the prior charge on the property. We have been referred to the Privy Council ruling reported in *Tilakdhari Lal* v. *Khedan Lal* (1) in support of the contention that registration was not a notice. What their Lordships held was that the question would depend upon the circumstances of every case. A mortgagee is liable to pay all the prior incumbrances, so it would be his duty to search the registers of the Registration Department and discover what the prior charges were. If the plaintiff had performed the duty of a prudent man he would have discovered the existence of the agreement of 8th of April, 1920. The agreement was made on 8th of April. The mortgage was executed on the 13th and the suit for specific performance was brought on the 19th of April. The proximity of all these dates indicates that the plaintiff had knowledge of the previous contract.

We are, therefore, of opinion that the property purchased by the defendants-appellants should be exempted from the burden of the mortgage. We direct accordingly and order the decree of the lower Court to be amended so as to exempt 864 *sihams* out of 1728 *sihams* of the Yusufpur property from the burden of the mortgage. The appellant shall receive costs of all the Courts including fees in this Court on the higher scale.

The trial Court shall be informed of the deficiency of Court-fee paid by the plaintiff in the Court and the Presiding Officer there shall take proper steps for the recovery of the amount.

A. N. A. *Appeal allowed.*

(1) 57 Ind. Cas. 465; 48 C. 1; 39 M. L. J 243; (1920) M. W. N. 591; 2 U. P. L. R. (P. C.) 139 ;22 Bom. L. R. 1319; 18 A. L. J. 1074; 25 C. W. N 49; 28 M. L. T. 229; 47 I. A. 239; 32 C. L. J. 479; 13 L. W. 161; 4 P. L. T. 101 (P. C.).

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 251 OF 1925.

January 27, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Broadway.

NIDHAN SINGH—PLAINTIFF—APPELLANT

versus

MESSRS. E. D. SASOON & Co.—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 91—'Instrument'—Award, whether an instrument—Suit to set aside decree based on award—Limitation.

An award is an instrument within the meaning of Art. 91 of Sch. I to the Limitation Act and a person cannot impeach a decree incorporating an award unless he can show that a suit to set aside the award was brought within the period prescribed by the Article. [p. 597, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Zafar Ali in Civil Appeal No. 932 of 1925, dated the 24th July, 1925, affirming that of the District Judge, Amritsar, dated the 15th January, 1925.

Mr. *Dev Raj Sawhney*, for the Appellant.
Mr. *J. M. Mackay*, for the Respondents.

JUDGMENT.

Shadi Lal, C. J.—This was a suit to set aside an award and the decree based thereon on the ground of fraud. The award was made on the 26th March, 1918, and the decree which followed upon it was passed on the 5th June, 1918. The suit was, however, not instituted until the 1st of June, 1921.

The learned Judge from whose judgment this appeal under cl. 10 of the Letters Patent has been preferred, holds that the suit was barred by time, and after hearing arguments on behalf of the appellant I concur in the conclusion reached by him.

It is to be observed that an award is an instrument within the meaning of Art. 91 of Sch. I to the Indian Limitation Act, and the plaintiff cannot impeach the decree incorporating the award unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91. It is undeniable that the suit to set aside the award is barred by time, but Mr. Sawhney for the appellant contends that the case is governed by Art. 95, which provides a period of three years for an action to set aside a decree obtained by fraud, and the *terminus a quo* is the date on which the fraud becomes known to the plaintiff. It is, however, clear that the plaintiff became aware of the fraud on or before the 28th May, 1918. There can, therefore, be no doubt that the suit is barred by limitation even if Art. 95 be held to be applicable to it.

For the aforesaid reasons I confirm the judgment of the Single Judge and dismiss the appeal with costs.

Broadway, J.—I concur.

R. L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 481 OF 1924.
January 21, 1927.
Present:—Mr. Justice Iqbal Ahmad.
Thakur RAM PRATAP SINGH AND OTHERS —PLAINTIFFS—APPELLANTS
versus
LAL BAHADUR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Abadi—*Tenant, right of, to use* sahan *of house.*

A *ryot* in a village is entitled to put the *sahan* of his house to such use as suits his convenience, provided that by doing so he does not, in any way, adversely affect the proprietary rights of the *zemindar.* [p. 598, col. 1.]

So long as a person remains a tenant in a village and so long as his house exists, the *zemindar* has no right to possession of the site of the house or to possession of the *sahan* of the house [p. 597, col. 2; p. 598, col. 1.]

Second appeal from a decree of the Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, Allahabad, dated the 22nd of December, 1923.

Dr. *S. N. Sen*, for the Appellants.

Messrs. *P. L. Banerji* and *U. S. Bajpai*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit for possession of a plot of land by demolition of certain constructions made thereon by the defendants respondents. The plot in dispute is admittedly situate in the *patti* of which the plaintiffs-appellants are the *zemindars*, and on a portion of the said plot, the house of the defendants exists. The plaintiffs' case was that the constructions complained of (a stable, a pigeon house and a cattle trough) were recently made by the defendants without the plaintiffs' permission and as such the plaintiffs were entitled to a decree for possession of the site of those constructions by their demolition.

The defence to the suit was that the constructions in dispute were old and the suit was time-barred, and that the suit was barred by the principle of acquiescence. These pleas taken in defence have been overruled by both the Courts below and I am not concerned with them in the present appeal.

The defendants also alleged that the disputed constructions were made by them on a portion of the *sahan* of their house and as such the plaintiffs are not entitled to the reliefs prayed for by them. This contention of the defendants was overruled by the trial Court but has been accepted by the lower Appellate Court.

In my judgment the decision of the lower Appellate Court is perfectly correct and ought to be affirmed. On the findings of the lower Appellate Court it must be taken that the disputed constructions have been made by the defendants on a portion of the land that constitutes the *sahan* of their house. So long as the defendants remain tenants in the village and so long

as their house exists, the plaintiffs *zemindars* have no right to possession of the site of their house or to possession of the *sahan* of their house. This being so, obviously a decree for possession as prayed for by the plaintiffs cannot be granted to them. There remains the question as to whether or not the plaintiffs are entitled to a decree directing the demolition of the new constructions and the restoration of the site to its original condition. In my judgment, the plaintiffs are not entitled, as a matter of right, even to such a decree. The defendants as *ryots* in the village are entitled to put to such use their *sahan* as suits their convenience, provided by doing so they do not in any way adversely affect the proprietary rights of the *zemindars*. By making the new constructions on the *sahan* the defendants have only altered the mode of enjoyment of a portion of the area of the land appertaining to their house and by this alteration in the mode of enjoyment, the plaintiffs have not been damnified in any way. The view that I take is in consonance with the view taken in the cases of *Bhagwan Das* v. *Muhammad Yahia* (1), *Mahabal Kurmi* v. *Sarju* (2) and *Mahadeo Rai* v. *Jan Muhammad* (3). The cases of *Jagannath* v. *Gurdiyal Singh* (4) and *Chatterpal* v. *Gajadhar Upadhya* (5) relied on by the trial Court are distinguishable from the present case. In neither of those cases the plots of land on which the new constructions were built by the *ryots* without the permission of the *zemindar* were a portion of the house of those *ryots*. They were open plots of land in the *abadi* of the village and, therefore, the *ryots* obviously had no right without the permission of the *zemindar* to make new constructions on the same. The case of *Rehmat Ullah* v. *Badam Singh* (6) relied on by Dr. Sen is also distinguishable. In that case a *chabutra* was built by certain Muhammadan residents of a village, without the permission of the *zemindar* on an open piece of land, that admittedly belonged to the *zemindar*, but it was alleged by those Muhammadans that they had used the land from time immemorial for the performance of their religious observances and as such were entitled to build a *chabutra* on the same. In that case as well, the site of the *chabutra* did not constitute a portion of the area of the house of the defendants to that suit. It goes without saying that in all the three last mentioned cases a decree for possession of the site of the constructions sought to be demolished could be passed in the plaintiffs' favour which, as shown above, cannot be done in the present case, and as such the decision in those cases cannot govern the decision of the present case.

For the reasons given above I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 18 Ind. Cas. 928; 35 A. 292; 11 A. L. J. 301.
(2) 42 Ind. Cas. 51; 4 O. L. J. 454.
(3) 85 Ind. Cas. 1; 23 A. L. J. 231; A. I. R. 1925 All. 341; 47 A. 541; L. R. 6 A. 211 Rev.
(4) 10 Ind. Cas. 284.
(5) 25 Ind. Cas. 59.
(6) A. W. N. (1885) 325.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1680 OF 1925.
February 9, 1926.
Present:—Mr. Justice Addison.
NARAIN DAS AND ANOTHER—DEFENDANTS—APPELLANTS
versus
KHUSHI RAM—PLAINTIFF AND KIRPA RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 35, 100—Costs, award of—Appeal, second, whether lies.

The general principle to be followed is that costs should follow the event. [p. 599, col. 1.]

A second appeal as to costs will lie from an appellate decree when the lower Court has exercised its discretion as to costs arbitrarily and not according to general principles. [*ibid.*]

Second appeal from the decree of the District Judge, Gujranwala, dated the 25th March 1925.

Mr. *Bodh Raj Sawhney*, for the Appellants.

Lala *Ram Chand Manchanda*, for the Respondent.

JUDGMENT.—The plaintiff, who was then a minor though he attained his majority during the litigation, instituted a suit on the 27th of June, 1921, to recover Rs. 2,300 from certain defendants, who pleaded that they had paid off the debt. After a lengthy trial involving the examination of numerous witnesses and the proving of numerous documents the defendants were successful and the suit was dismissed with costs.

The plaintiff appealed in the Court of the District Judge and there the plaintiff offered that the appeal should abide the

result of an oath to be taken by one of the defendants in a particular manner. The oath was so taken. Thereupon the District Judge dismissed the appeal but directed the parties to bear their own costs not only in his Court but in the Court of first instance also. Against the District Judge's decision as regards costs this appeal has been filed.

Now, the District Judge gave no reasons as required by s. 35 of the Civil Procedure Code why the costs should not follow the event. It is clear that a second appeal does lie on a matter of costs if there is a question of law or principle involved. This was held in *Daulat Ram* v. *Durga Prasad* (1) which is to the effect that an appeal as to costs will lie from an appellate decree when the Court has exercised its discretion as to costs arbitrarily and not according to general principles. In the present case the discretion was obviously arbitrarily exercised and in fact no reasons were given for the exercise of that discretion. Similarly it was held in *Bunwari Lall* v. *Chowdhry Drup Nath Singh* (2) that if the question was one of principle a second appeal lay as to costs. *Moshingan* v. *Mozari Sajad* (3) is also a case where the question of costs was gone into in second appeal. In 1925 the decree of the lower Appellate Court was modified as to costs. *Nibaran Chandra Roy* v. *Nabin Chandra Roy* (4). It was also admitted before me that the general principle to be followed was that costs should follow the event.

An attempt was made to argue that the District Judge had exercised his discretion properly, though he did not give any reasons for doing so, in that he must have considered that the plaintiff should not be burdened with costs seeing that he was a minor when the litigation started. That was no excuse why he should have continued the litigation when he became a major. There was also no reason why the District Judge should have deprived the defendants of costs in both Courts when the plaintiff offered to be bound by the oath of one of the defendants as to the decision of the appeal.

(1) 15 A. 333; A. W. N. (1893) 110; 7 Ind. Dec. (N. S.) 930.
(2) 12 C. 179; 6 Ind. Dec. (N. S.) 122.
(3) 12 C. 271; 6 Ind. Dec. (N. S.) 184.
(4) 85 Ind. Cas. 127; A. I. R. 1925 Cal. 297; 40 C. L. J. 504.

I accordingly hold that this appeal is competent and that the District Judge erred in not awarding costs in both the Courts below to the defendants who were successful. He was bound to do so except for good reasons to be stated by him. He neither stated them nor do there appear to be any such reasons. This appeal is accordingly accepted with costs and defendants are awarded their costs in both the lower Courts.

Z. K. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1262 OF 1924.
February 1, 1927.
Present:—Mr. Justice Ashworth.
Sheikh ABDUL SATTAR—PLAINTIFF—APPELLANT
versus
Musammat AQIDA BIBI—DEFENDANT—RESPONDENT.

Muhammadan Law—Dower—Death of husband—Widow retaining possession of properties—Presumption—Possession in lieu of dower.

Where a Muhammadan dies and his widow remains in possession of his properties after his death it will be presumed that her possession is in lieu of dower. [p. 600, cols. 1 & 2.]

Second appeal from the decree of the Subordinate Judge, Azamgarh, dated the 19th of May, 1924.

Mr. *Mukhtar Ahmad*, for the Appellant.
Mr. *M. A. Aziz*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by Sheikh Abdul Sattar plaintiff as heir of one Muhammad Ishaq against *Musammat* Aqida Bibi, the widow for a declaration that he was entitled to a $\frac{3}{4}$ths share of the property and that the widow had no right to resist his claim. An alternative prayer was that if he should be found to be out of possession, he should be given a decree for possession. The first Court found that Muhammad Ishaq died five years ago and that the widow had been in possession of his property in lieu of her dower-debt of Rs. 5,000 ever since his death. The lower Appellate Court upheld this finding.

In this second appeal the only point taken is that the finding of the Courts below that the widow had been in possession of Sheikh Abdul Sattar's property in lieu of her dower was a finding not of fact but of

law and was a wrong finding. If that finding be set aside, then under Art. 104 of the Limition Act the widow's claim to dower would be time-barred.

The first question that arises in respect to this question is whether the finding of the lower Courts as to the widow's possession in lieu of dower was a finding of law or finding of fact. It appears to have been regarded by the lower Courts as a finding of fact but, in my opinion, it cannot be regarded in this light. There was no doubt that the widow was in actual possession for the last five years and long before her husband had not been heard of for 14 years and all that time she must have been in actual possession. The finding to this effect was a finding of fact but the question arises whether she was in possession in lieu of her dower or whether she was in possession merely because her husband was absent. It appears that some five years ago the widow applied to the Mutation Court for entry of her name. Her application is not on the file but it must be presumed that she wished her name to be entered in place of her husband as she considered his long absence was sufficient proof of his death. The Mutation Officer, owing probably to what may be regarded as an excess of caution, directed that her name should be entered "along with her husband Muhammad Ishaq who had not been heard of for a long time". The form of this entry, however, is of no evidential value. Nor indeed does the entry prove anything one way or the other as to possession. What is significant is that an application for alteration of the entry was made and allowed. This shows that from the date of the entry the intention of *Musammat* Aqida Bibi was to hold the property of her husband in lieu of her dower. It was not, however, necessary for the Courts below nor for this Court to base a finding as to her intention on the evidence, provided that it is possible to hold that her husband was dead and that she continued to be in possession of his property after his death. As to the first fact this Court is bound by the concurrent finding of the lower Courts that the husband died five years before suit. This finding apparently was based on a single witness. That is no reason for its not being binding on this Court. Now, if the husband was dead and the widow remained in possession after his death, it will be presumed that her possession was in lieu of dower. This presumption is mentioned as a presumption on Muhammadan Law on page 120 of Tyabjee's Principles of Muhammadan Law, First Edition. In Mulla's Muhammadan Law, 8th Edition, page 184 the legal position is stated slightly differently. It is stated that the widow has a right of retention "when she is in possession of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid." In this view of the law it is not necessary to prove with what intention she may have retained possession of her husband's property. It is only necessary to prove that she got possession rightfully during his life and that at the time of his death her dower was unpaid.

The argument which has been raised by the appellant appears to me largely based on the misconception that in this case the widow could not have got possession of her husband's property until his death was presumed. She was in actual possession from the date when the husband went abroad on his travels. Her lien on the property came into existence as from the date when the Courts below have held that he died.

For the above reasons I dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 656 OF 1925.
October 7, 1926.

Present:—Mr. Justice Odgers.

TIRUVENGADATHA IYENGAR—PETITIONER

versus

L. V. THIRUVENGADAM IYENGAR—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 34, 35, 36, 41 (3)—Discharge of guardian—Procedure for scrutiny of accounts—Regular suit.

Where a guardian appointed by Court under the Guardians and Wards Act has been finally discharged, the Court can, acting under s. 41 (3), direct the accounts in his possession to be delivered, but when the measure of the guardian's liabilities is sought to be put in issue, the proper course is to apply to the Court under s. 35 or s. 36 and then file a regular suit against the guardian. [p. 601, cols. 1 & 2.]

Bathina Subbarami Reddi v. *Gonesam Pattabhirami* (3) and *Harikrishna Chettiar* v. *Govindarajulu Naicker* (5), followed.

Sita Ram v. *Gobindi* (4), dissented from.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Madura, in I. A. No. 653 of 1924, in O. P. No. 180 of 1912.

JUDGMENT.—This is an application to revise the order of the learned District Judge of Madura dismissing a petition by a minor who attained majority. Under s. 34 (c) and (*d*) of the Guardians and Wards Act, the petitioner asks for a proper scrutiny of the accounts submitted by the guardian or *ex*-guardian. I use this expression because the order made by the previous District Judge was that the guardian would be discharged subject to his furnishing proper accounts. The guardian has since submitted his accounts and the District Judge does not say they are improper. The learned District Judge regards the case in *Nabu Bepari* v. *Sheikh Muhammad* (1) as direct authority in support of the objections taken on behalf of the guardian that no such order can be made under s. 34 when once the ward has attained majority. The learned Vakil for the petitioner points to *Syed Abdul Rahiman Sahib* v. *Abdulla Sahib* (2) as an authority of this Court, as directly contrary to *Nabu Bepari* v. *Shikh Muhammad* (1). But all that the former decides is that they cannot follow the decision of the Calcutta High Court as to the effect of the termination of the guardianship on the powers of the Court under sections quoted, that is to say, the provisions of s. 41 (3) and s. 45 (1) (*c*). These sections relate to failure to deliver property or accounts. The law has been exhaustively considered quite recently in the case reported in *Battina Subbarami Reddi* v. *Ganesam Puttabhirami Reddi* (3) by a Bench of this Court. The learned Judges recognised in their judgment that where a guardian has been finally discharged the Court can act under s. 41 (3) and they held that it is contrary to the intention of the Act that a detailed scrutiny of accounts should be held in order to ascertain what amount is really due by the guardian. The learned Judges held that the Act leaves all these questions for decision by a suit outside guardianship proceedings. True the decision in *Sita Ram* v. *Gobindi* (4) is to the contrary effect, namely, that under the Act the Court can hold an enquiry as to the correctness of the accounts, that is to say, that the Court should not accept any accounts that may be put before it by the guardian. But that authority has been expressly dissented from in the judgment I have just referred to and that judgment is, of course, binding on me. In a somewhat similar case in *Harikrishna Chettiar* v. *Govindarajulu Naicker* (5) where the Court ordered a guardian to deposit in Court a sum found due from him, it was held that the order was one passed under s. 43 (1) and not under s. 34 (*d*) and the Court was of opinion that when the measure of the guardian's liability is sought to be put in issue the proper course is to apply to the Court under s. 35 or s. 36 and then file a regular suit against the guardian.

I am then asked to reduce the ambit of this petition to one for simply ordering the guardian to pay into Court the amount shown to be due in his account. This petition does not ask for that relief. There is no limitation in these matters. It, is of course, open to the petitioner to put in a petition for this purpose hereafter. I do not think any good reason has been shown why I should reduce the ambit of this petition in the present case. The order, therefore, of the learned District Judge was right and the revision petition must be dismissed with costs.

V. N. V. *Petition dismissed.*

(1) 5 C. W. N. 207.
(2) 16 M. L. J. 286.
(3) 97 Ind. Cas. 578; 51 M. L. J. 249; (1926) M. W. N. 695; 24 L. W. 525; A. I. R. 1926 Mad. 977; 50 M. 80.
(4) 80 Ind. Cas. 592; 46 A. 458; 22 A. L. J. 585; A. I. R. 1924 All. 593.
(5) 98 Ind. Cas. 332; 50 M. L. J. 273; 23 L. W. 420; (1926) M. W. N. 359; A. I. R. 1926 Mad. 478.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 65 OF 1925.
January 21, 1927.
Present :—Mr. Justice Boys and Mr. Justice Kendall.

HUB LAL—PLAINTIFF—APPELLANT
versus
GILZARI LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata, *doctrine of, applicability of, to question of law—Court trying prior suit, whether must be competent to try subsequent suit,*

There is nothing in the language of s. 11 of the Civil Procedure Code to limit the operation of the section to an issue of fact. A decision on a question of law may, therefore, operate as *res judicata*. [p. 602, col. 2.]

In order that a decision on an issue in a prior suit may operate as *res judicata* in a subsequent suit, the Court which tried the prior suit must have been competent to try the subsequent suit and not merely the issue in the subsequent suit with regard to which the plea of *res judicata* is advanced. [p. 602, col. 2; p. 603, col. 1.]

Second appeal from an order of the Subordinate Judge, Mainpuri, dated the 14th of November, 1924.

Mr. *K. N. Laghate*, for the Appellant.

JUDGMENT.—This is a plaintiff's appeal in a suit for damages on the allegations that the defendant had wrongfully cultivated the plaintiff's share, a joint holding, and that the defendant had further cut certain trees and taken certain fruit from groves belonging to the plaintiff. We will deal first with the question of joint tenancy. The trial Court held that the plaintiffs' joint ownership of the tenancy was *res judicata*, and decreed the plaintiff's claim, allotting him Rs. 531-10-0 as damages. It is admitted on behalf of both parties that there were two previous suits in 1916 and 1920, in which the question of ownership had been decided in favour of the plaintiff. The lower Appellate Court, however, held that the matter was not *res judicata*, because the plaintiff's title was based on his acquisition by sale and foreclosure of a certain share in an occupancy holding, and that such a title was void under the provisions of the Tenancy Act. It further held that a wrong decision of a point of law could not be the basis of a plea of *res judicata*, and in support of this proposition it relied on the decision of the Madras High Court in *Mangalathamal* v. *Narayanaswami Aiyar* (1), in which it was held that "It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal of a question of law directly and substantially in issue between the parties to a suit does not prevent a Court from deciding the same question arising between the same parties in a subsequent suit according to law."

We are, however, unable to concur in this expression of opinion. In our view, the words of s. 11 of the Code of Civil Procedure are clear that "No Court shall try any suit in which the matter directly and substantially in issue has....." There is, in our view, nothing in these words to limit the matter in issue to an issue of fact. On behalf, however, of the respondent a further reason has been urged in support of the plea that the matter was not *res judicata*. This reason is that while the first suits were within the competency of the Court which tried them, that Court could not have tried the present suit by reason of the fact that the valuation of the suit was in excess of the pecuniary jurisdiction of the Court which tried the earlier suits. The facts as regards the pecuniary jurisdiction of the two Courts are not denied by the appellant. We think, therefore, that the respondent's contention must be accepted that the first Court was not competent to try the present suit. It is not sufficient that the first Court should have been competent to try one or other of the issues. Section 11, when split into its two parts, is clear, firstly, that "*No Court shall try any suit* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court *competent to try such subsequent suit*, and has been heard and finally decided by such Court," and secondly that "*No Court shall try any issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a Court *competent to try the suit in which such issue has been subsequently raised*, heard and finally decided by such Court." It is clear, when the section is thus split up, that in both cases the trial Court must have been competent to try the later suit and not merely an issue in the later suit. On behalf of the appellant reliance has been placed on *Shahzade Singh* v. *Mohammad Mehdi Ali Khan* (2), as supporting the proposition that the pecuniary jurisdiction of the trial Court has no bearing on the application of the principle of *res judicata*. We think, however, that this contention is unfounded. In that case it was urged that the fact that the trial Court, a Revenue Court, had only jurisdiction up to Rs. 100 and the suit in the later Civil Court was valued at Rs. 250 did not

(1) 30 M. 461; 17 M. L. J. 250.

(2) 3 Ind. Cas. 954; 32 A. 8; 6 A. L. J. 917.

prevent the application of the principle of *res judicata*; but the *ratio decidendi* was not that the question of the valuation of the suit was immaterial, but that the Revenue Court deciding the question of title must be deemed to be the Civil Court of lowest jurisdiction which would have been competent to try the suit, if the parties had been referred to a Civil Court. If it were to be deemed such Civil Court, that Civil Court would have had power to try the later suit. The case, therefore, does not support the contention of the appellant. On the other hand we have been referred by the respondent to *Sheikh Hassu* v. *Ram Kumar Singh* (3). We think, therefore, that though the rejection of the plea of *res judicata* cannot be supported for the reason given by the lower Appellate Court, yet for the other reason which we have stated the question of the plaintiff's title was not *res judicata*. If the matter then is open to decision in the present suit, there can be no question but that the plaintiff did not, in virtue of the terms of the Tenancy Act, acquire a title in the occupancy holding by his sale and foreclosure. That being so, his claim for a declaration of his share and damages must fail.

We now turn to consider the plaintiff's claim so far as it concerns the groves and damages for cutting the trees and taking the produce of those groves. The trial Court held that in certain suits between the parties the land in question had been held to be groves. In this case it did not hold that the matter was *res judicata*, but went on to say that there was no reliable evidence to the contrary. It further held that the prior suits showed that the plaintiff owned all of the groves except two of them, and finally on the evidence held that the defendant was in possession and had taken the produce ; and it gave the plaintiff damages in two amounts of Rs. 141-2-9 and Rs. 93-5-4. The lower Appellate Court did not refer in regard to these matters to the prior suits or to the question of *res judicata* ; but in view of our decision above as to the application of the principle of *res judicata* to the joint tenancy it is clear that the lower Court was right so far in its dealing with these issues. It did, in fact, reject the plaintiff's claim on the ground that there had been a partition in 1917. No attack on the finding in this respect has been made before us in appeal, and it is, therefore, unnecessary for us to further consider this question. The lower Appellate Court after considering the partition and matters bearing thereon, arrived at the conclusion that "the plaintiff-respondent has totally failed to substantiate his claim.". The result is that the appeal fails in its entirety, and is dismissed with costs.

(3) 16 A. 183; A. W. N. (1894) 18; 8 Ind Dec. (N. S.) 118.

Z. K. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 629 OF 1924.

November 26, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Graham.

ABDUL BARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Srimati AMIRJAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Fraud—Suit to set aside decree on ground of fraud, when maintainable.

A decree cannot be challenged in a subsequent suit upon the ground that it is wrong or incorrect or was obtained by means of perjured evidence, false documents or the like. Where, however, the allegation is that the decree was obtained by practising a gross fraud upon the Court, a separate suit to set aside the decree is maintainable. [p. 604, col. 1.]

Appeal against a decree of the District Judge, Chittagong, dated the 24th of November, 1923, affirming that of the Munsif, Second Court at Satkania, dated the 18th of April, 1922.

Babu *Norendra Kumar Das*, for the Appellants.

Babu *Chandra Sekhar Sen*, for the Respondents.

Babu *Biraj Mohan Majumdar*, for the Deputy Registrar.

JUDGMENT.

Mukerji, J.—The plaintiffs instituted the suit out of which this appeal arises for setting aside a decree passed in a mortgage suit on the ground that it was fraudulently obtained, and for other reliefs.

In 1886, two persons Uzir Ali and Khadim Ali executed a mortgage in respect of lands of Sch. I to the plaint. In 1892, Uzir Ali alone executed a document, in respect of the lands of Schs. I and II to the plaint, the exact character of which is disputed in the presedt suit. The interest of the mortgagee under the document of

1886 ultimately passed on to one Asgar Ali who in 1890 instituted a suit, being Suit No. 25 of that year, on the basis of the said mortgage, obtained a decree and in execution thereof purchased the lands of Sch. I and then sold them to the predecessors of the present defendants.

The plaintiffs who are the heirs of Uzir Ali at first instituted Suit No. 636 of 1920, practically ignoring the mortgage of 1886 and praying to redeem the lands of Schs. I and II, treating the document of that year as a mortgage. The claim was opposed on the ground that the defendants were in possession under purchase from Asgar Ali who had obtained the decree under the mortgage of 1886 as aforesaid. The plaintiffs then withdrew that suit with liberty to bring a fresh one. Then the present suit was filed.

Shortly stated, the plaintiffs' case is that the mortgage of 1886 had been paid off, Suit No. 25 of 1898 was a fraudulent one and all proceedings taken therein were tainted with fraud and the plaintiffs had no knowledge of them and consequently the decree and proceedings subsequently held were void and inoperative.

The main defence of the defendants on the merits was that Uzir Ali himself had appeared in Suit No. 25 of 1898 and had filed a written statement pleading that he had tendered the money due on the mortgage of 1886 but it had not been received and that Uzir Ali had thereafter withdrawn from the contest, and that there was no fraud. The other defences of the defendants were that the suit was barred by limitation and the document of 1892 was a *kabala* and not a mortgage and consequently the plaintiffs had no rights left in them under which they could get any relief in the suit.

The Courts below have concurrently decreed the suit. Some of the defendants have then preferred this appeal.

The appellants' first ground is that the suit is not maintainable and that at any rate the findings of the lower Appellate Court are not sufficient to sustain the decree. The suit, it must be remembered, is not founded upon a mere allegation that the decree was wrong or incorrect or obtained by perjured evidence but upon allegations which, if true, would amount to a gross fraud practised in relation to the proceedings in Court. It is well settled that upon such allegations a decree may always be challenged. As regards the question of sufficiency of the findings the one that is enough to vitiate the decree is that Uzir Ali never appeared in the suit, but a written statement purporting to have been his, had been fraudulently filed in the suit. This finding has been recorded in so many words in the judgment of the learned Munsif. That the Judge has affirmed this finding is clear from his observation that "it is difficult to believe that Uzir Ali having fabricated a false receipt would allow the suit to be decreed in this fashion and it is more clearly apparent from his finding on the question of plaintiffs' knowledge of the proceedings which he says dates from 1920, namely, from the time when the written statement in Suit No. 636 of 1920 came to the plaintiffs' knowledge. This ground, therefore, has no substance.

The question of limitation, which has been next argued on behalf of the appellants, cannot arise if the finding on the question of plaintiffs' knowledge which is a finding of fact is right.

Lastly, the appellants contended that the document of 1892 was a *kabala* and not a mortgage. The learned Judge in view of the paucity of the materials on the record has left the question open, and the learned Vakil for the appellants was eventually convinced about the propriety of this course adopted by the learned Judge.

The appeal fails and is accordingly dismissed with costs.

Graham, J.—I agree. If it were the case that the former decree, which it is sought to set aside, had been obtained by fraud in the ordinary sense of the word, *e.g.*, by means of perjured evidence, false documents, or the like, so as to mislead the Court and obtain an erroneous decision, I should not in that case be prepared to hold that the matter could be re-opened, and the decree set aside. There is, however, something more than that. There are, as my learned brother has pointed out, concurrent findings in both the Courts below that the decree in the former suit (No. 25 of 1898) was obtained by practising a gross fraud upon the Court, and, that being so, it is well established by authority that the decree is liable to be set aside.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1075 OF 1924.

January 27, 1927.

Present :—Mr. Justice Lindsay.

Musammat AISHA BEGAM—PLAINTIFF —APPELLANT

versus

DAULAT SINGH—DEFENDANT —RESPONDENT.

Custom—Existence of custom—Question of law—Second appeal—Civil Procedure Code (Act V of 1908), s. 100—Abadi—*Tenant's rights—Alienation of house site, validity of.*

The question whether a custom exists or not, is a question of law for purpose of second appeal where the lower Appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish the alleged custom. [p. 605. col. 2 .

Ram Bilas v. *Lal Bahadur* (1), followed.

Where an agriculturist is allowed to build a house for his occupation in the *abadi* he obtains, in the absence of a special contract to the contrary, merely a right to use that house for himself and his family so long as he maintains the house and so long as he does not abandon the house by leaving the village, and in the absence of a special grant by the *zemindar*, the tenant has no interest which he can sell by private sale or by sale in execution except such interest as he has in the timber, roofing and woodwork of the house. [p. 606, col. 2.]

Sri Girdhariji Maharaj v. *Chote Lal* (3), followed.

A tenant in the village of Pali Muqimpur is not entitled by custom to transfer the right of occupancy of the site in the *abadi* on which he has built a house. [*ibid.*]

Second appeal from the decree of the District Judge, Aligarh, dated the 17th of April, 1924.

Messrs. *A. M. Khwaja* and *Mukhtar Ahmad*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondent.

JUDGMENT.—The suit in this case was a suit for ejectment. The plaintiff claimed, as the *zemindar* of a village called Pali Muqimpur, to eject the second defendant who claimed to be rightly in possession of the site of a house situated in the village. The plot on which the house stands is described as No. 84. The case of the plaintiff was that this defendant, Daulat Singh, had no right whatever to occupy this plot against her will. Admittedly this plot was once in the occupation of an agricultural tenant named Chhidda Khatik. The story of the plaintiff was that Chhidda abandoned the village without paying his rent. She stated that for this reason the site of the house had escheated to her as *zemindar*. It was alleged that on the 28th of January, 1921, Chhidda had sold the materials of his house under a registered sale-deed for Rs. 100 to the first defendant Nand Ram Khatik who was his relation. After this Nand Ram is said to have sold this house to the second defendant Daulat Singh. The suit was contested by Daulat Singh on various grounds and amongst other pleas taken was a plea of custom which is described as follows in para. 7 of the written statement:

"It is a custom in the village that every inhabitant of it has been mortgaging and selling his house and they have been sold by auction. The plaintiff or his predecessor-in-title never took any objection to it."

The Court of first instance decreed the claim. The lower Appellate Court has reversed the decree of the first Court being of opinion that there was a custom enabling a tenant to transfer his right to the occupation of the site of his house.

One of the grounds which is taken in appeal is that the finding of the Court below regarding the existence of the custom is not supported by any legally sufficient evidence. It may be observed here that this is recognized as a good ground in second appeal, and in this connection I need only refer to the Full Bench decision of this Court reported as *Ram Bilas* v. *Lal Bahadur* (1). At page 313* of the report Stanley, C. J., stated that he agreed in the view expressed in the case of *Hashim Ali* v. *Abdul Rahman* (2) that where a question arises as to the existence or non-existence of a particular custom where the lower Appellate Court has acted upon illegal evidence or on evidence which was legally insufficient to establish an alleged custom the question is one of law.

I have decided, therefore, to examine the evidence which was before the Court below in support of this alleged custom. The burden of proof was on the defendant. A copy of the *wajib-ul-arz*, art. 25. was produced by the plaintiff. In this it is stated that in this village the tenants' houses have all been built by the tenants themselves with their own materials and their own labour and so the tenants are the owners of the materials. It is further stated that tenants are entitled to occupy the houses so built so long as they remain settled in the village and after their death their children have the right to occupy. It is also stated that if a tenant abandons the

(1) 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169.

(2) 28 A. 698; A. W. N. (1906) 187; 3 A. L. J. 467.

*Page of 30 A.—[*Ed.*

village or dies without heirs the house becomes the property of the *zemindar*. There is nothing here by which any right to transfer the site of a house or to transfer the right to occupy it is recognized. The defendant produced three documents of sale for the purpose of showing that sales had taken place purporting to be sales of houses with their sites, or with the right to occupy the sites. One of these is of the year 1898, another of the year 1919 and the third of the year 1922. Two other documents apparently were put in but were not proved. The oral evidence on behalf of the defendants was as follows:—There was the statement of a man, Dal Chand, who said he had bought a portion of a house in the month of June, 1919, from one Gobinda Dhobi. Dal Chand said he subsequently sold this house. He stated in his examination-in-chief that purchasers of houses have a right to occupy. In cross-examination Dal Chand said that he could not state whether he bought the materials only of this house or the land as well. Daulat Singh, the defendant, deposed to a custom of selling houses without the leave of the *zemindar*. He said that he had heard of lots of sales. He admitted that it was not stated in the sale-deed which was executed in his favour, whether there was a sale only of the materials or of the land also. Several witnesses who were produced on behalf of the plaintiff were cross-examined, and some attempt has been made to extract from their cross-examination support for the case of the custom set up by the defendant. For example, the *Patwari* was examined and made an admission in cross-examination that houses were auctioned and that sales and mortgages were made without any *nazrana* being given to the *zemindar*. He mentioned one specific instance in which a house had been sold by auction without any *nazrana* being paid. Then one Umrao, the agent or attorney of the plaintiff was examined. He stated that cultivators mortgage and sell their houses and have always done so. He said also that houses were sold by auction but he was unable to say whether, when such sales took place, the sites were also sold or only the materials of the houses.

I am satisfied that there is no sufficient evidence on the record to prove the custom set up by the defendant.

The general law on this question of the rights of tenants with respect to their houses was laid down in the case reported as *Sri Girdhariji Maharaj* v. *Chhote Lal* (3). There it was held that where an agriculturist is allowed to build a house for his occupation in the *abadi* he obtains, in the absence of a special contract to the contrary, merely a right to use that house for himself and his family so long as he maintains the house and so long as he does not abandon the house by leaving the village. It was further held that in the absence of a special grant by the *zemindar* the tenant has no interest which he can sell by private sale or by sale in execution except such interest as he has in the timber, roofing and wood-work of the house.

In that case it was also stated that if the defendant had set up a local custom by which an occupier could sell his right to occupy, the Judges would have been prepared to hold that such special custom was bad. This, however, in the circumstances was an *obiter dictum*, and there is at least one case in which a right to transfer the right of occupancy has been recognized [see the ruling in *Tajammul Husain* v. *Banwari Lal* (4).] But there, it will be observed, there were no less than 126 instances cited ranging over a period of sixty years.

In the present case the evidence is of the flimsiest possible description, and, in my opinion, the lower Appellate Court was wrong in holding that a tenant in this village of Pali is entitled to transfer the right of occupancy of the site on which a house has been built. It is quite true that there is evidence to show that Pali is a very large village. The *Patwari* stated that at the last census it contained 1,800 inhabitants, and there is also evidence to show that there are a number of shops in the village. Nevertheless it does not appear to me that Pali has ceased to be an agricultural village; and in the present case the man, Chhidda, who transferred the house in the first instance was, undoubtedly, an agricultural tenant.

The appeal is allowed, the decree of the Court below is reversed and the decree of the Court of first instance is restored. The plaintiff-appellant is entitled to her costs both in the lower Appellate Court and in

(3) 20 A. 248; A. W. N. (1898) 27; 9 Ind. Dec. (N. S.) 520.

(4) 88 Ind. Cas. 752; 23 A. L. J. 932; L. R. 6 A. 179 Rev.; A. I. R. 1926 All. 47; 48 A. 77.

this Court. The costs in this Court will include fees on the higher scale.

A. N. A. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2316 OF 1924.

November 18, 1926.

Present:—Mr. Justice Cammiade.

HACHANUDDI—DEFENDANT No. 1—APPELLANT

versus

ASIMADDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908) Sch. I, Art. 144—Landlord and tenant—Suit for rent—Denial of relationship of landlord and tenant—Adverse possession—Ejectment suit—Limitation, commencement of.

Plaintiff instituted a suit for rent against the defendant and the defendant in his written statement denied the relationship of landlord and tenant. The defence was given effect to by the trial Court and the suit was dismissed and an appeal against the dismissal was unsuccessful. More than twelve years after the date of the written statement filed by the defendant in the suit but within twelve years after the dismissal of the appeal the plaintiff instituted a suit to eject the defendant from the holding of which he had continued in possession throughout:

Held, that the defendant's possession became adverse to the plaintiff from the date of the filing of the written statement in the previous suit and that, therefore, the plaintiff's suit was barred by time.

Appeal against the decree of the Subordinate Judge, First Court, Bakarganj, dated the 26th May, 1924, reversing that of the Munsif, Seventh Court at Barisal, dated the 8th September, 1923.

Babus *Suresh Chandra Talukdar* and *Mohendra Kumar Ghose*, for the Appellant.

Babu *Probodh Chandra Kar*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant against a decree declaring the title of the plaintiffs to certain lands and ordering recovery of possession. The suit was instituted on the 26th February, 1923. The defendant's case is that the land had never belonged to the plaintiffs and he has pleaded further that if the lands had ever belonged to the plaintiffs, the plaintiffs' title was extinguished by lapse of time. It would appear that two of the plaintiffs, as representing the entire body of the landlords, instituted a suit for rent in the year 1910 against this defendant. The written statement filed by the defendant is not on the record; but from the judgment of the Court of first instance, which is dated the 29th of September, 1910, it would appear that the defendant denied the relationship of landlord and tenant, and that that defence was given effect to by the Court. More than twelve years elapsed between the 29th of September, 1910, and the 26th of September, 1923, when the suit was filed. It is not disputed that the defendant has been in possession throughout this period. The learned Subordinate Judge who decided the appeal held that limitation had run against the plaintiffs not from the date on which the defendant filed the written statement but from the date of the order in appeal in the rent suit, which order is dated the 4th of March, 1911. This finding is incorrect. The real date from which limitation ran is the date on which open assertion of hostile title was made by the defendant in his written statement. That date is not known but it necessarily was earlier than the 29th of September, 1910, when the judgment of the Munsif was delivered. As more than twelve years have elapsed since the defendant asserted a hostile title to the land and began possessing the land adversely to the plaintiffs, the defendant, if he had no title before, has acquired one by prescription.

The appeal is accordingly allowed, the decree of the Subordinate Judge is set aside and the decree of the Munsif is restored with costs in all Courts.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL SUIT No. 128 OF 1926.

November 9, 1926.

Present:—Mr. Justice Odgers and Mr. Justice Jackson.

KOZHIKKOT PUTHIA KOVILAGATH MANAVEDAN *alias* ANUJAN RAJA AVL. AND OTHERS—PLAINTIFFS Nos. 1 TO 3 AND DEFENDANT No. 13—APPELLANTS

versus

KOZHIKKOT PUTHIA KOVILAGATH KIAYATHIN SREEDEVI *alias* VALIA THAMBURATHI AVL. AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Karnavan, *powers and obligations of*

—Suit for removal of karnavan *and for accounts—Relief for removal becoming impossible—Accounts, whether can be ordered.*

The *karnavan* of a Malabar *tarwad* is the manager of the family estate. He may administer that estate for the benefit of the family according to his own discretion, and is not bound to render any account or pay to the *tarwad* any surplus he may have in his hands provided he does not devote it to other than *tarwad* purposes. But if it be proved against the *karnavan* of a Malabar *tarwad* that he has abused his discretion and fraudulently misappropriated the family estate, he must account for that transaction. On proof of fraudulent alienation or misappropriation by the *karnavan* the junior members suing on behalf of the *tarwad* will be entitled to recover from the *karnavan* personally the amount of which the *tarwad* has been defrauded. [p. 609, col 2; p 610, col. 1.]

If it be proved generally that he is a bad manager, he will be liable to removal, unless he gives a good account of his management. But he cannot be compelled actually to render accounts by a threat of removal or for any other reason. [p. 610, col. 1]

Although a *karnavan* may be made liable to account for each proved defalcation in a separate suit framed for the purpose, yet the prayer for a general rendering of the accounts in a suit for his removal and accounts cannot be granted where the prayer for his removal becomes impossible. [p. 610, cols. 1 & 2.]

Appeal against the decree of the Court of the Additional Subordinate Judge, Calicut, in O. S. No. 16 of 1925 (O S. No. 50 of 1924, Sub Court, Calicut).

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—The parties to this suit are members of the family of the Zamorin of Calicut, but for the purposes of this appeal it is unnecessary to detail the complicated rules of succession prevailing in that family. In essence the suit is simple, and the learned Vakils on either side have proceeded (and, in our opinion, rightly proceeded) on the assumption that it is a suit for the removal of the *karnavan* of an ordinary Malabar *tarwad*, coupled with the prayer that he be ordered to furnish general accounts for the period of his office. In this family, the *karnavan* happens to be a woman, the 1st defendant. The 2nd defendant is her son, alleged to have acted as her manager and to have imposed his will upon her to the detriment of the *tarwad* in general. Defendants Nos. 3 and 4 are the remaining members of the particular branch descended by way of the motherhood of the 1st defendant (the *tavazhi* in Malayalee phraseology). It is alleged in the plaint that by the various acts of malfeasance set forth at great length therein para. 12-A to D) 1st and 2nd defendants in collusion have misappropriated funds belonging to the family in general and have devoted them to the 1st defendant's particular branch. The plaintiffs are three junior members of the family, and they have brought all the other members into the suit by impleading them as defendants.

In the course of the suit, the 1st defendant ceased to be *karnavan* because by the family rule of succession she moved to a higher sphere. Therefore, there was no longer any question of removing her (prayer A in the plaint), and it only remained to consider how far prayers B and C were sustainable; directing defendants Nos. 1 and 2 to render all accounts of receipts and expenses of the family from 22nd September, 1915, and to pay whatever sums might be found due to the family in general from the personal property of defendants Nos. 1 and 2 and out of *tazavhi* property of defendants Nos. 1 to 4.

The learned Subordinate Judge has held on the authority of *Kenath Puthen Vittil Tavazhi* v. *Narayanan* (1) that the *karnavan* is not liable to pay to the *tarwad* any surplus income, and on the authority of *Karunakara Menon* v. *Kutti Krishna Menon* (2) that an *anandravan* cannot ordinarily sue a *karnavan* to render accounts of his management. The right of such junior members is confined to suing for maintenance, to suing for cancellation of any transaction entered into by the *karnavan* to the detriment of the family, and to suing for his removal. "As incidental to the relief of removal from management and only in that way, it is competent to *anandravans* to call upon the *karnavan* to render accounts. But that is allowed not with a view that the *anandravans* may recover from the *karnavan* the amount found due, such a remedy being directly opposed to the inherent status of the *karnavan*, and is unheard of, but simply in order that the extent of the loss suffered by the *tarwad* at the hands of the *karnavan* may be ascertained with a view to his removal. But when there is no question of his removal there is clearly no liability on him to render accounts. To hold otherwise would

(1) 28 M. 182; 14 M. L. J. 415.
(2) 38 Ind. Cas. 666; 5 L. W. 511; (1917) M. W. N. 342.

be to reduce the *karnavan* to the position of a trustee which he certainly is not." The Sub-Judge has further found that according to the plaint the 2nd defendant stood only in the position of an agent of 1st defendant, and was accountable to 1st defendant alone. Accordingly he dismissed the suit.

It has been contended on behalf of appellants that the *karnavan* of a Malabar *tarwad* cannot use its funds for purposes other than *tarwad* purposes, and assuming that the other members of the *tarwad* can prove misappropriation, the *karnavan* is bound to render an account. If general misappropriation is proved the *karnavan* must render a general account. In any case those who have benefited by such misappropriation such as defendants Nos. 2, 3 and 4 would be bound to account, and any special acts of mismanagement by 2nd defendant would give a cause of action in this suit.

The first ground in appellants' argument is clearly sustainable. The learned Subordinate Judge may be correctly stating the traditional law of his community, but at this date judicial rulings negative the extreme position that a *karnavan* cannot be held accountable for alienations made by him in fraud of his *tarwad*.

Large as the powers of the *karnavan* appear to be, those powers are essentially powers of management: *Raman Menon* v. *Raman Menon* (3). The *karnavan* has not any larger right of ownership than any junior member: *Govindan Nair* v. *Narayanan Nair* (4). The members other than the *karnavan* have the right to prevent the *karnavan* from wasting or improperly alienating the family property: *Vasudevan* v. *Sankaran* (5). The *karnavan* has no higher claim in the enjoyment of the income than any other member of the family. He has the right to expend as he pleases for the common benefit of all: *Narayani* v. *Gobinda* (6). His office is fiduciary: *Ponambilath Paraprovan Kunhamod Hajee* v. *Ponambilath Paraprovan Kuttiath Hajee* (7).

In these circumstances it would seem proper that the *karnavan* should make good from his personal estate any of his defalcations from the family property; but there happens to be no case directly in point. However, the observations of Wallis, C. J., in *Venkanna* v. *Narasimham* (8) seem to apply although there the defalcation was by a widow with a limited life-estate. "As to the widow's own accountability for wasting the moveable corpus of the estate, the authorities are meagre because the remedy against her would rarely be effective, but on principle I see no sufficient reason for refusing to hold her accountable for waste in the sense of making her re-place the moveable corpus which she has made away with."

In *Raya* v. *Gopal Mallan* (9) a Bench of this Court ruled that if the manager of a joint Hindu family were proved guilty of negligence or misconduct he would be held personally liable for any loss caused to the family thereby and in *Govindan Nair* v. *Narayanan Nair* (4) the substantive right of the *karnavan* in the *tarwad* property is held to be of exactly the same character as that of the managing member of a Mitakshara family. Therefore, on proof of fraudulent alienation or misappropriation by the *karnavan* the junior members of a *tarwad*, suing on its behalf will be entitled to recover from the *karnavan* personally the amount of which their *tarwad* has been defrauded.

It is obvious that in a suit of this character if the junior members have succeeded in establishing a case that calls for rebutter, the *karnavan* thus put upon his defence must render some account of the impugned transaction, else he will fail in the suit. Such a case is contemplated in *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi* (10) where it is observed: "He is not accountable to any member of the *tarwad* in respect of the income of it, nor can a suit be maintained for an account of the *tarwad* property in the absence of fraud on his part." And again in *Karunakara Menon* v. *Kutti Krishna Menon* (2): "If the plaintiff could show that the *karnavan* and senior *anandravan* were colluding to defraud the *tarwad*, it might be open to him to file a suit for the removal of the *karnavan* and to ask for appropriate

(3) 24 M. 73 at p. 80; 4 C. W. N. 810; 10 M. L. J. 245; 7 Sar. P. C. J. 755; 27 I. A. 231 (P. C.).
(4) 17 Ind. Cas. 473; 23 M. L. J. 706 at p. 709; 12 M. L. T. 585; (1913) M. W. N. 79.
(5) 20 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90.
(6) 7 M. 352; 2 Ind. Dec. (N. S.) 829.
(7) 3 M. 169 at p. 176; 1 Ind. Dec. (N. S.) 675.
(8) 66 Ind. Cas. 10; 44 M. 984 at p. 988; 14 L. W. 193; (1921) M. W. N. 590; 41 M. L. J. 279.
(9) 11 Ind. Cas. 666.
(10) 2 M. 328; 5 Ind. Jur. 243; 1 Ind. Dec. (N. S.) 498.

relief on behalf of the *tarwad*, including the rendering of an account." This presumably means that if any specific fraud is proved against the *karnavan* in regard to some specific item of property he must account for his dealing with that item, and if a general case of mismanagement is made out against the *karnavan*, he may be liable to removal, unless he can render a satisfactory general account of his management. It does not mean, as now contended on behalf of appellants, that whenever junior members sue to remove their *karnavan*, they can, by virtue of asking for that relief, always demand, as of right that the *karnavan* shall render general accounts. If this were so, the well-known principle recognised in this very ruling *Karunakara Menon* v. *Kutti Krishna Menon* (2) that an *anandravan* cannot sue a *karnavan* for an account of his management would become a dead letter. For then any *anandravan* could sue his *karnavan* for rendering of accounts by merely tacking on a subsidiary prayer for the *karnavan's* removal from office.

The matter may be summed as follows:—The *karnavan* is the manager of the family estate. He may administer that estate for the benefit of the family according to his own discretion. He is not bound to render any account or to pay to the *tarwad* any surplus he may have in his hands, *Kenath Puthen Vittil Tavazhi* v. *Narayanan* (1) which, of course, does not mean that he may devote the surplus to other than *tarwad* purposes, but only that he need not distribute it among the individual members, if in his discretion he preferred to accumulate or invest it for the benefit of the family as a whole. If it be proved against him that he has abused this discretion and fraudulently misappropriated the family estate, he must account for that transaction. If it be proved generally that he is a bad manager, he will be liable to removal, unless he gives a good account of his management. But he cannot be compelled actually to render accounts by a threat of removal or for any other reason.

Therefore, when they pray for a decree directing defendant No. 1 to render all accounts of receipts and expenses from 22nd September, 1915, plaintiffs have no cause of action. They are entitled to sue for a decree removing 1st defendant from management, and to contend, if 1st defendant gives no account by way of rebutter of their proved allegations, that such a decree should be granted and 1st defendant should be removed. But, if, as in this case, the removal is already an accomplished fact such a contention would be idle. And plaintiffs might have brought their suit in different form praying that each proved defalcation might be set aside and 1st defendant held liable in damages. In its present form, and in the present circumstances, the suit discloses no cause of action as against 1st defendant, and was rightly dismissed.

In so far as 2nd defendant acted as the agent of 1st defendant, a suit which would not lie against his principal would not lie against him. And in so far as 2nd defendant acted as a mere trespasser there could be no question of calling upon him for general accounts. In a properly framed suit it would be open to the *karnavan* as representing the *tarwad* to sue the 2nd defendant as liable for any proved act of malfeasance or misappropriation. In the same way defendants Nos. 3 and 4 or their *tavazhi* might be held liable in a suit for setting aside specific transactions, but not in a suit for general accounts, a matter in which they have no responsibility.

For the above reasons, we consider that the suit was rightly dismissed, and the appeal also must be dismissed with costs (one set).

V. N. V.
A. N. A.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1197 AND 1198 OF 1925.

January 18, 1927.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

KALYAN—DEFENDANT—APPELLANT

versus

Musammat DESRANI—PLAINTIFF—RESPONDENT.

Pre-emption—Hindu widow—Alienation—Transfer by reversioner for costs of litigation, whether pre-emptible—'Sale', meaning of—Transfer of Property Act (IV of 1882), s. 54.

A transfer by a reversioner of properties in the possession of alienees of a Hindu widow, in consideration of the vendee undertaking to find funds for conducting a litigation against the alienees and recovering possession of the properties, is not pre-emptible. [p. 613, cols. 1 & 2.]

Per *Lindsay*, J.—Such a transfer is not a sale but a transfer of a share of the chance of success in a suit to be subsequently brought. [p. 612, col. 2.]

Per *Sulaiman*, J.—A transfer of property which has become vested in a reversioner on the

death of a Hindu widow passes the proprietary title in it even though a suit may have to be instituted to recover actual possession. The vesting of such title is not postponed till the passing of a decree on which delivery of possession would be dependent. On the other hand, there may be cases where the cash price paid or promised is not the sole consideration for the transfer but in addition thereto there is an undertaking by the vendee to fight out a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is other than the cash price is not capable of exact valuation. A pre-emptor cannot be given a decree for pre-emption of the property sold in such a way. [p. 613, cols. 1 & 2.]

Second appeals from the decrees of the District Judge, Jhansi, dated the 7th April 1925.

Mr. *Mukhtar Ahmad*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondent.

JUDGMENT.

Lindsay, J.—These appeals arise out of two suits for pre-emption, the plaintiff in each case being *Musammat* Desrani, and the defendants being Kalyan and Paras Ram.

In order to understand the situation of the parties at the time these suits were brought, it is necessary to set out the following facts:

The second defendant to these suits, Paras Ram, had two cousins named respectively Parmanand and Pahalwan. When Parmanad and Pahalwan died they were succeeded by their respective widows and it is made to appear that these widows during their lifetime alienated the property of their husbands by sale in favour of certain third parties.

When Parmanand and Pahalwan died, Paras Ram, the second defendant here, was the nearest reversioner.

He was anxious to recover possession of the properties which had been alienated as above stated by the widows of Parmanand but he had not the funds necessary to institute the suits which had to be brought in order to enable him to recover possession.

In these circumstances on the 13th of September, 1923, he executed two sale-deeds in favour of the defendant, Kalyan. By one of these deeds he purported to transfer by sale a portion of the *zemindari* share which had belonged to his cousin Pahalwan. By the other document in a similar way he purported to transfer a portion of the *zemindari* property which had belonged to Parmanand.

The documents were of a similar description and we need only refer to the document which dealt with a portion of the share which had belonged to Pahalwan. In this sale-deed Paras Ram sets out the facts and refers to the transfer which had been made by Pahalwan's widow *Musammat* Rani Bahu. He recited that it was necessary for him to bring a suit to recover Pahalwan's property from the alienees of the widow and he declared that he had no funds for that purpose. He goes on to say that Kalyan had agreed to find him the money for this litigation and in consideration of Kalyan's undertaking to supply him with funds he purported to transfer to Kalyan a portion of the property which had once belonged to Pahalwan. In this document Paras Ram states that he has sold absolutely the property specified in the deed for the costs of the suit which were estimated to amount to about Rs. 1,000. It was stated in the deed that Kalyan undertook to join Paras Ram in the suit which was to be brought to recover Pahalwan's property; and then the deed goes on to say that "when a decree for possession has been passed Kalyan will get possession of the shares sold to him through the Court". A further provision of the deed in question was that Kalyan was to pay the consideration in the following manner, namely, he was to supply all costs which might be incurred up to the High Court in appeal. If these costs were to exceed the sum of Rs. 1,000 Kalyan was not to be in a position to recover any excess from the vendor Paras Ram. Then the document sets out that in case a decree for possession is passed Kalyan will take possession of the property being sold to him and will get mutation made in his favour and will remain in possession as owner. The document wound up with the usual declaration to the effect that Paras Ram had executed this document as a deed of absolute sale.

Following on this deed a suit was filed on the 17th of September, 1923, in which Paras Ram and Kalyan were arrayed as plaintiffs. The defendants were the persons to whom Pahalwan's widow, *Musammat* Rani Bahu, had alienated the property of Pahalwan. On the 17th of April, 1924, the suit was compromised. Under the compromise the defendants retained a portion of the property in dispute and consented to a decree for the balance in

favour of the two plaintiffs. The decree provided that out of the property allotted to the plaintiffs Kalyan was to get a 9-16ths share, while Paras Ram was to get a 7-16ths share.

Following on this we have the present suit for pre-emption which was filed on the 6th of September, 1924. The plaintiff, *Musammat* Desrani, having set out the facts as I have stated them above, claimed that she was entitled to pre-emption of this property on payment of a sum of Rs. 200. In the plaint it was represented that the costs which Kalyan had disbursed in connection with the suit for possession could not have amounted to more than that sum.

The facts in the second suit, namely, the suit out of which Second Appeal No. 1198 arises, were similar, and the Court below tried both cases together. The result in the Court of first instance was that the plaintiff got a decree for pre-emption in each case. The Munsif was of opinion that Kalyan had spent Rs. 963 in conducting the litigation which was necessary for the recovery of the property from the alienees of the widows. He split this sum into two and gave the plaintiff a decree in each case for pre-emption on payment of Rs. 481-8. Both these decrees have been affirmed in appeal by the District Judge of Jhansi and now we have these second appeals in which the point raised is that the plaintiff had no right of pre-emption in either case inasmuch as the sales which were effected by the documents of the 13th September, 1923, were merely transfers of a right which had to be established by litigation.

We have heard a great deal of argument in the case and a number of cases have been cited before us, all of them cases from Oudh. One decision of the Privy Council has also been cited before us, namely, the case of *Abdul Wahid Khan* v. *Shalukha Bibi* (1).

After due consideration we have both come to the conclusion that the plaintiff was not entitled to pre-emption in these cases. We have not come to this conclusion on precisely identical grounds and, therefore, separate judgments are being delivered.

These cases are governed by the Agra Pre-emption Act, and according to that Act, a right of pre-emption means the right of a person on a transfer of immoveable property to be substituted in the place of the transferee by reason of that right.

The only transfers which give occasion for the exercise of the right of pre-emption are transfers by sale and foreclosure. Sale for purposes of the Pre-emption Act means a sale as defined in the Transfer of Property Act, 1882.

In these cases the plaintiff claims her right to pre-empt by reason of the execution and registration of the two documents of the 13th September, 1923, and in order to ascertain whether these are sales which are pre-emptible under the Act we have to look at what was the substance of these transactions.

At the time these deeds were executed the property was in the possession of third parties to whom it had been conveyed by a Hindu widow. The transferee, that is to say Kalyan, was to provide the funds required for the prosecution of the suit necessary to recover the property. As we have pointed out, he joined as a plaintiff in the suit and was to get possession, through the Court, of the property mentioned in the deed if and when a decree for possession was made in favour of himself and his transferor Paras Ram. But this decree for possession might never have been passed, in which case the transferee, that is, Kalyan, would have lost his money and got nothing for it. To quote the words of the Privy Council in *Abdul Wahid Khan* v. *Saluka Bibi* (1):

"If the defendant succeeded and the suit was dismissed there would have been no property to be sold." To me, therefore, the correct view seems to be that the transfers made by the deeds of the 13th of September, 1923, were merely transfers of a share of the chance of success in a suit which was subsequently to be brought. The purchaser, that is, Kalyan, knew that the title of his vendor was uncertain, dependent upon the result of a suit which itself was uncertain. He knew that Paras Ram was not in a position to pass a proprietary interest in the property unless and until he had successfully vindicated his title as reversioner after the widows by avoiding the sale which had been made by them. The proprietary interest in these properties was at that time in the alienees from the widows. It is true that the sales by the widows were voidable and that these

(1) 21 C. 496; 21 I. A. 26; 6 Sar. P. C. J. 399; Rafique and Jackson's B. C. No. 134; 10 Ind. Dec. (N. S.) 961 (P. C.).

alienees had not an indefeasible title, but all the same, unless and until their title was set aside in favour of a superior title in Paras Ram, the ownership of these properties was vested in the alienees.

Kalyan knew all these facts and he took the risk of the suit not being decreed and consequently the sum which he undertook to pay was not the price of immovable property sold to him but the price he was prepared to give for the chance of the success of Paras Ram and himself in the subsequent suit.

In a sale under s. 54 of the Transfer of Property Act the proprietary interest is transferred on execution and registration of the sale-deed where the property is of the value of Rs. 100 and upwards. Here the proprietary interest in these lands could not have passed on execution and registration of the deeds of the 13th September, 1923, and in fact no proprietary interest in these properties passed to Kalyan until the Court gave a decree in favour of himself and Paras Ram on the 17th April, 1924.

For these reasons I am of opinion that under the deeds of the 13th September, 1923, there was no transfer of proprietary interest and, therefore, no case for the exercise of a right of pre-emption under the Agra Pre-emption Act. I hold, therefore, that these appeals ought to be allowed and that the decrees of the Courts below should be set aside and it should be ordered that both suits brought by *Musammat* Desrani be dismissed with costs in all Courts including in this Court-fees on the higher scale.

Sulaiman, J.—I concur in the order proposed. It cannot be said that in all cases where the vendor is not in possession of the property he purports to sell, the sale is not capable of pre-emption. If a registered document is executed and the transfer is for a *price* paid or promised, or part paid and part promised, and comes within the meaning of s. 54 of the Transfer of Property Act, a sale is duly effected and the proprietary interest in the property passes, no matter whether the vendor is or is not in actual possession. A transfer of the property which has become vested in a reversioner on the death of a Hindu widow passes the proprietary title in it even though a suit may have to be instituted to recover actual possession. The vesting of such title is not postponed till the passing of a decree on which delivery of possession would be dependent. On the other hand, there may be cases where the cash price paid or promised is not the sole consideration for the transfer but in addition thereto there is an undertaking by the vendee to fight out a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is other than the cash price is not capable of exact valuation. It is, therefore, difficult to see how a pre-emptor can be given a decree for pre-emption of the property sold in such a way. In the present case the sale was effected in lieu of the costs of the litigation. If, taking the surrounding circumstances into consideration, one were to infer that part of the consideration was an undertaking by the vendee that he would fight out the case against third parties then it is obvious that it was not a sale strictly for a cash price. Even though there was no such undertaking the transfer was in lieu of the costs of litigation which were unknown and unascertainable in advance, and there was a risk involved. Under such circumstances it would be too much to suppose that the amount of the costs contemplated by the parties would be anything like the market value of the property if freed from all risk. It would be grossly unjust to give the plaintiff a decree for pre-emption after the suit has successfully terminated and the property has been recovered and all risks have disappeared. In my opinion a sale which is not in lieu exclusively of a cash price, or such price as can be definitely ascertained, is not payable of pre-emption.

By the Court.—Second Appeals Nos. 1197 and 1198 of 1925 are allowed, the decrees of the Courts below are discharged and it is ordered that the plaintiff's claim in each suit be dismissed with costs in all Courts including in this Court fees on the higher scale.

A. N. A. *Appeals allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1794 AND 1997 OF 1924.

December 2, 1926.

Present:—Mr. Justice Duval and Mr. Justice Mitter.

Munshi SAFAR ALI—PLAINTIFF—APPELLANT

versus

KHOSH BANU (KOSHBAN IN PETITION) ON HIS DEATH HER SON ABDUL MAJID AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 116—Landlord and tenant—Lease of homestead land, nature of—Tenant allowed to continue in possession for several years after expiry of lease—Ejectment—Notice to quit, whether necessary.

The word "*raiyati*" used in a lease does not necessarily indicate a *jote* within the meaning of the Bengal Tenancy Act. [p. 614, col. 2; p. 615, col. 1.]

A lease of homestead land situate within the limits of a Municipality to persons who are not agriculturists, is governed by the provisions of the Transfer of Property Act and not by the Bengal Tenancy Act. It is immaterial that the land is described as *bagan* in the Record of Rights. [p. 614, col. 2, p. 615, col. 1.]

Where for a long number of years a tenant is allowed to continue in possession of the demised premises after the expiry of his lease, an inference may legitimately be drawn that his possession is not that of a trespasser but of a person who must be treated as holding over and whose rights can be determined only on a notice to quit. [p. 615, col. 1.]

Appeals against the decrees of the Additional Subordinate Judge, Noakhali, dated the 2nd of May, 1924, modifying those of the Munsif, First Class, at Sudharam, dated the 16th of May, 1922.

Babu *Jitendra Kumar Sen Gupta*, for the Appellant, in No. 1794, and for the Respondents in No. 1997.

Dr. *Bijan Kumar Mukherjee* and Babu *Raj Kumar Mukherjee*, for the Appellant in No. 1997 and for the Respondents in No. 1794.

JUDGMENT.

Mitter, J.—These two appeals arise out of one suit commenced by the plaintiff for *khas* possession of plots Nos. 1158 and 1159 of the Cadastral Survey from the defendants on the allegation that he took settlement of the lands from Waliulla in *osat raiyati* right of plot No. 1158 which was in his *khas* possession and of plot No. 1159 which was let out to one Arif Meah in *meadi osat raiyati* right and that after his death it came into the *khas* possession of the landlord as it was an under-*raiyati* right and was neither heritable nor transferable. The defence is that she acquired an interest in the land in suit with reference to both the plots by virtue of her *kobala* from her husband Arif Meah in consideration of her dower. The first Court held that plot No. 1158 was outside the *kobala* and that in plot No. 1159 Arif had only a *meadi* right and was holding the land from year to year and that the defendant was never recognized by the superior landlord. The first Court decreed the suit with regard to both the plots. On appeal by the defendants the lower Appellate Court dismissed the suit with reference to plot No. 1159 and confirmed the decree with reference to plot No. 1158. The plaintiff has appealed to this Court with reference to plot No. 1159 his second appeal being numbered 1794 of 1924 while the defendants have appealed with reference to plot No. 1158 and their second appeal is numbered 1997.

It has been contended before us that the decision of the lower Appellate Court is wrong seeing that the Court finds the *kobala* in favour of the defendant who was mistress of Arif was without consideration and that after Arif's death although the defendant continued to be in possession for 11 years there was no holding over and that Arif's lease expired after 5 years which was the time fixed in the lease, and the Court was wrong in holding that from the mere possession one can infer implied consent of the landlord to the tenants holding over within the meaning of s. 116 of the Transfer of Property Act. In this connection reference was made on behalf of the appellant to the case reported in *Ratan Lal Gir Sanyasi* v. *Farshi Bibi* (1). It has been argued for the respondents, on the other hand, that the case is governed not by the Transfer of Property Act, but by the Bengal Tenancy Act and that the lease being a lease in favour of the plaintiff and being an under *raiyati* lease for a period exceeding 9 years the plaintiff acquired no interest as such lease is void and that consequently the plaintiff has no title to this plot. We are of opinion, however, that the case is governed by the Transfer of Property Act and that the word '*raiyati*' does not necessarily indicate a *jote* within the meaning of the Bengal Tenancy Act. The Record of Rights shows that both the plots are *bagan* lands and we find that in 596, the subject-matter of this appeal, there is a house and that the

(1) 34 C. 396; 11 C. W. N. 826.

defendants and Arif enjoyed it for a long time. This land being homestead land within the Municipality the case cannot be governed by the Bengal Tenancy Act. We, therefore, overrule the contention of the respondents in this behalf.

Now, let us proceed to consider the contention of the appellant that the case being governed by the Transfer of Property Act and the lease having expired after 5 years, there has been no holding over simply because the tenant has established his possession for a period of 11 years after the date of the expiry of the lease. Section 116 of the Transfer of Property Act says "If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor of his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased." It has been argued on the authority of the case reported in *Ratan Lal Gir Sanyasi* v. *Farshi Bibi* (1) that mere possession is not sufficient to justify the inference that there was holding over. I may point out that in the case in *Ratan Lal Gir Sanyasi* v. *Farshi Bibi* (1) the suit was instituted within one year and 7 months of the expiry of the lease, whereas in the present case the tenant continued in possession for sometime after the expiry of the lease and after his death his mistress, the present defendant, continued in possession under the *kobala*—the aggregate period being 11 years. In the circumstances the Court was justified in drawing the inference that the tenancy did not determine and that the possession of the defendants was not that of a trespasser but of a person whose rights were to be determined on notice to quit. In this view we are supported by an unreported decision* of this Court in the case of *Chaturbhuja Nanda* v. *Gopal Dolai* decided by Mr. Justice Chitty and Justice Teunon, in S. A. No. 335J of 1910. It is true that there the case was under the Bengal Tenancy Act but the principle as to what would amount to a holding over is the same whether we are considering the provisions of the Bengal Tenancy Act or those of the Transfer of Property Act. I will quote a passage from that decision to show that this decision supports the view which we take. The learned Judges say "It is true that a mere omission by a landlord to sue in ejectment immediately after the tenancy had expired would not be a ground for saying that the tenant was holding over and was not a trespasser." This was decided in the case reported in *Ratan Lal Gir Sanyasi* v. *Farshi Bibi* (1). There the suit was brought a year and 7 months after the period of the lease had expired. Here the case is quite different. The tenant Chandra executed a *kobala* and held over for five years. He then died and his sons continued to hold the lands. Altogether there was an interval of 8 years between the expiry of the lease and the present suit. We think that it may be reasonably inferred that the tenancy was in the possession of the tenants holding over after the expiry of the lease as the Subordinate Judge has found.

In this view we think that the decision of the Subordinate Judge in Appeal No. 1794 was right. The appeal consequently fails and is dismissed with costs.

With regard to the other appeal numbered 1997 having regard to the view which we have taken that the case is governed by the Transfer of property Act, the plaintiff's title under the lease is good and as the said plot was outside the *kobala* of the defendants the lower Appellate Court was right in confirming the decree of the first Court.

Duval, J.—In the case No. 1794, which relates only to plot No. 1159 on which admittedly there was a homestead, the first question appears to me to be as to whether the case is governed by the Transfer of Property Act. The learned Subordinate Judge appears to have thought that the mere fact that the land lay within the Municipality of Noakhali was sufficient to bring the case under that Act. I am not prepared myself to say that that is necessarily so. But in this particular case there is the evidence that the land is homestead land. Neither the original tenant nor the heirs of Khosh Bibi who now appear before us are shown to be cultivators or agriculturists at all; and in this view I agree that the Transfer of Property Act applies. The mere fact that in the Record of Rights the land, which is only a few *cottas* in area, was shown as a *bagan* is not

*Reported as 18 Ind. Cas. 448.—[*Ed.*]

sufficient to show that it was used for horticultural purposes.

Coming to the question of whether the lessee held over within the meaning of s. 116 of the Transfer of Property Act and so cannot be ejected without notice, it appears that Arif held the land under a lease which expired in 1911. Out of affection apparently, for the lady with whom he lived, he executed a deed of transfer in 1917. It does not seem to me necessary for this purpose to discuss whether it was a *heba-bil-ewaz* or a gift. He died in 1919 and after that the lady continued to be in possession of the homestead. It was not till 1921 that the plaintiff got his lease and after his lease he at once instituted this suit. Now, it may be noted that the landlord is no party to this litigation. It is also found that there was no collection of rent from Arif or his successor in occupation after 1911. Section 116 says that if a lessee remains in possession after the determination of his lease and the lessor accepts rent from him or *otherwise assents* to his continuing possession there is a holding over. The question, therefore, is (as there was no acceptance of rent), has there been consent. It will be noted, that for ten years the landlord did nothing and as a presumption of fact from the evidence the learned Subordinate Judge has come to the finding that, therefore, the lessee was holding over. Reference was made in the course of argument to the case of *Paramananda Singh* v. *Syjou Singh* (2) where Mr. Justice Ashutosh Mukherji has discussed at length a large number of reported cases and the conclusion come to is that a notice is not necesssry unless the landlord assents to the continuing of possession. In the present case the finding of fact which I do not think increditable in second appeal is that the landlord tacitly did consent to continuance of possession and on that finding of fact the defendants must have been held to have been holding over. I do not think that there is anything in the contention in view of s. 108J of the Transfer of Property Act that Arif had not the power so long as he was in possession to make any transfer of whatever interest he had, how small it might have been.

Appeal No. 1997 is concerned with another plot of only six *cottas* which is described also as a *bagan*. The defendant Khosh Banu was impleaded in respect of that plot of land on the ground that there had been a *bundabusti* taken of it from the landlord. But at the hearing it subsequently transpired that the present defendants and Khosh Banu before them had no interest at the time of the suit in that land. This is a finding of fact and so the appellants were not really interested either to defend the suit in respect of the plot or to appeal in the matter.

In this view I consider that this appeal also must stand dismissed with costs.

Z. K. *Appeals dismissed.*

37 Ind. Cas. 201; 24 C. L. J. 30.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 528 OF 1924.
November 23, 1926.
Present:—Mr. Justice Ramesam.
Syed ABDUL HAWK AND OTHERS—PLAINTIFFS—APPELLANTS
versus
TUMULARI VYKUNTAM—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 253—Partnership—Death of partner—Dissolution of partnership—'Contract to the contrary'—Agreement for accounting after sale of stock—Partnership being for single adventure—Co-heirs—Suit by some alone, maintainability of—Civil Procedure Code (Act V of 1908), O. XXX, r. 1.

In the absence of a contract to the contrary the death of a partner dissolves the partnership and the fact that it is entered into for a single adventure does not necessarily lead to the inference of a contract to the contrary within the meaning of s. 253 of the Contract Act. [p. 618, col. 1.]

Haramohan Poddar v. *Sudarsan Poddar* (1) and *Gokul Krishna Das* v. *Sashi Mukhi Dasi* (2), distinguished.

Lancaster v. *Allsup* (3), relied on.

The mere fact that a deed of partnership provides that the accounts are to be taken after all the stock is sold cannot be held to mean that there is an agreement that if a partner dies before all the stock is sold there is to be no dissolution. [p. 618, col. 2.]

A suit by some only of the heirs of a deceased partner for accounts against the surviving partner without impleading the other heirs as parties is not sustainable. Such a defect cannot be cured by applying to add them as parties after a suit by them would be barred by limitation. [p. 619, col. 1.]

Second appeal against the decree of the District Court, Godavari at Rajahmundry, in A. S. No. 79 of 1922, preferred against that of the Court of the Additional Subordinate Judge, Cocanada, in O. S. No. 29 of 1920.

Messrs. *A. Krishnaswami Iyer* and *C. Rama Rao*, for the Appellant.

Messrs. *S. Varadachariar* and *K. N. Rajagopala Sastri*, for the Respondent.

JUDGMENT.—This second appeal arises out of a partnership transaction. The facts may be thus stated. The first defendant T. Vaikuntam a resident of Tuni in the Godavari District, the first plaintiff, Syed Abdul Hawk, a merchant of Anakapalli, Vizagapatam District, and a third person named Meru Khan who belongs to a place called Kohibara, somewhere in Northern India entered into partnership in 1904 for the purpose of dealing in assafetida. Rs. 6,000 was contributed as capital by the defendant and Rs. 3,000 by Meru Khan and the first plaintiff and the defendant were the working partners. The whole stock of assafetida was purchased and it had to be sold gradually and money realised by the sales. In 1906 Meru Khan died. Immediately after the death of Meru Khan, his father Hajee Mulla Ramyan came down and obtained Ex. A from the defendant. It is dated 15th August, 1906. The date of this document as given in the chronological list of the Subordinate Judge's judgment and as printed in the printed papers is wrong. It is neither 18th August nor 13th August but the 15th August. This document was executed by the defendant. In this the facts were first narrated. It then winds up by saying "Azumulla Ramyan Sahib, resident of Kohibara, examined this day the receipts and expenses as per my *chitta* and arrived at the (grim) as mentioned above, it is written in this manner. 'Henceforth, you have nothing to do in the case, I give to others except yourself, the sum relating to the credits and debts'." Ramyan died in 1913 or 1914 and the present suit was filed on the 26th April, 1920, by three plaintiffs. The first plaintiff was Harok as already mentioned, the second plaintiff a son of Meru Khan and the third plaintiff a son of Ramyan. It is admitted that the third plaintiff's mother was living at the time of the suit but she is not a party to the suit. The Subordinate Judge decreed the suit The District Judge reversed it and dismissed it without costs. In the plaint the plaintiffs alleged in para 3:—"He also wrote in the same entry the terms of the joint business agreed upon before that and agreed to treat as partner in the place of Meru Khan the said father Hajee Mulla Ramyan and wrote all the above terms in the said entry in the handwriting of the defendant himself." The plaintiff's case, therefore, is that, by Ex. A a fresh partnership was constituted. On this plea the defendant raised the contention that not only there is no new partnership or continuance of original partnership but also the plea that the suit is bad for non-joinder on account of want of all the heirs of Ramyan. The Subordinate Judge found on the 2nd issue that there was a new partnership constituted by Ex. A; on the 5th issue, that the suit was not bad for non-joinder; on the 4th issue, that the suit was not barred. His ground for so finding is that the whole stock was not yet sold and until the whole stock was sold, it must be taken that the original partnership is continuing. He says "thus there is the express agreement that no settlement could be asked for until the stock is exhausted. "In a transaction like this an agreement may also be presumed that the partnership was not to be dissolved until after the whole business was concluded by selling out the entire stock."

On appeal by the defendant for some reason the plaintiffs shifted their ground and they contended not that there was a new partnership at the date of Ex. A, but that there is in this case an agreement to the contrary within the meaning of s. 253 of the Contract Act and that the original partnership itself was not dissolved by the death of Meru Khan. The District Judge finds against this contention. The plaintiffs appeal and repeat the contention before me that at the very beginning of the partnership of 1904 there was an agreement to the contrary. In support of this contention Mr. Krishnaswami Iyer refers me to page 153 of Lindley on Partnership, in which it is stated that "if a partnership be entered into for a single adventure or undertaking an agreement that the partnership shall last until the termination of the adventure or undertaking will be inferred." Here, the District Judge and the Subordinate Judge both seem to have thought that this must be regarded as a partnership for a single adventure, namely, the sale of Rs. 9,000 worth of assafetida. Assuming that this is a partnership for a single adventure, it seems to me that the statement at page 153 of Lindley's

Partnership does not advance the case of the appellants very much.

The passage quoted has since been enacted as s. 32 of the Partnership Act and its object is to lay down a rule of law by which in the case of an adventure a term or *terminus ad quem* may be attributed to the partnership even though it was not expressly made for any term. A partnership may be dissolved by the expiry of a term and in the case of an adventure it is dissolved at the end of the adventure. This is one mode of dissolution of a partnership, that is, by death. This is provided for in s. 33 of the Partnership Act, and in s. 253 of the Indian Contract Act. Even where there is a term the death of one partner dissolves the partnership. The case of an adventure is no better than the case where there is an express term. Section 33 overrides s. 32 and if the death is earlier, the partnership is dissolved. It is not possible to hold that wherever there is an adventure that itself amounts to a contract to the contrary. I do not say that a 'contract to the contrary' should be always express. It may be that it can be inferred from certain facts but it seems to me that the mere existence of an adventure is not such a fact as leads to the inference of an agreement to the contrary. The appellants relied upon two cases: *Haramohan Poddar* v. *Sudarsan Poddar* (1) and *Gokul Krishna Das* v. *Shashi Mukhi Dasi* (2). In one of these cases there had been several deaths and the partnership business went on and the Court inferred that there was an agreement to the contrary from the very beginning. That was a first appeal. In the other case, the case came up in second appeal to the High Court, the Courts below found that there was an agreement from the very beginning. It appears from the statement of facts that there was some difficulty in attributing the continuance of the partnership business to a new contract of partnership after the death, though what it is, does not expressly appear. I do not think that these cases can help the appellants. On the other hand, the case in *Lancaster* v. *Allsup* (3) referred to by the respondent seems to support him. In that case the original agreement was on behalf of partners and their executors. After the death of the one of the partners the executors refused to continue the partnership. The Court held that the partnership was dissolved. That case seems to show that though the original agreement was that the partnership should not be dissolved on death, if the executors do not agree to continue, it is dissolved. It may be if the heirs agree and continue it is dissolved. It may be if the heirs agree and continue the business the Court will infer not a new partnership but the operation of the original agreement. Here, there is really nothing to prove the original agreement. Anyhow I am sitting in second appeal and I am bound by the finding of the District Judge that no agreement that the partnership should not be dissolved by death is made out.

It seems to me that the alternative contention found in plaintiff's favour by the Subordinate Judge is equally useless for them, for, even assuming that Ex. A amounted to a new partnership it is difficult to see why the suit is not barred. The mere fact that the accounts were intended to be taken after all the stock is sold cannot be held to mean that there is an agreement that if there is a death before all the stock is sold there is to be no dissolution. It seems to me this stands on the same footing as the point already dealt with. I think the suit would then be barred. The other question argued by the respondent, namely, the suit is bad for non-joinder would also seem to be fatal. All Ramyan's heirs are not parties. It is true the objection here is not that one of the partners is not represented in the suit for dissolution as in the cases in *Baboo Janokey Doss* v. *Bindabun Doss* (4), *Ramdoyal* v. *Junmenjoy Coondoo* (5) and *Sri Nath Pal* v. *Hari Charn Pal* (6) which, therefore, do not apply, but that all the heirs of the deceased partner ought to be made parties. It is true some of the heirs of Ramyan are parties, but not all. The cause of action of all the heirs seems to be one and indivisible and it cannot be split up and suits cannot be filed by the heirs in severalty even if the heirs do not constitute joint co-parceners as in Hindu Law. Even

(1) 66 Ind. Cas. 811; 25 C. W. N. 847.
(2) 13 Ind. Cas. 23; 16 C. W. N. 299; 15 C. L. J. 204.
(3) (1888) 57 L. T. 53.
(4) 3 M. I. A. 175; 1 Sar. P. C. J. 263; 18 E. R 464
(5) 14 C. 491; 7 Ind. Dec. (N. S.) 524.
(6) 7 C. L. J. 266.

if they are several as between themselves as in the case of Muhammadans their right is all one as against the rest of the parties to the suit: see *Ahinsa Bibi* v. *Abdul Kader Saheb* (7) and *Bhagela Koer* v. *Abdul Rahman* (8). The case in *Naminini Chengama Naidu* v. *Gangulu Naidu* (9) relied on by the appellants, I do not think helps them. In that case the suit was rightly constituted. In the course of the litigation one party died and all his legal representatives were added. Some only appealed. The rule of law as to non-joinder in a suit does not apply to appeals. If an appeal can go on in the presence of the parties to the appeal and if it is not necessary to take any accounts between the parties to the appeal and the persons not parties, the appeal can well proceed. That case is, therefore, distinguishable. I am, therefore, inclined to hold that the suit is bad for non-joinder of parties also and cannot be cured at this stage by the addition of deficient parties, for it will be long out of time. I have said nothing as to whether Ex. A constitutes a new partnership. Even this is very doubtful. The suit seems to be a hopeless suit from every point of view except that of moral justice. The second appeal fails and is dismissed with costs.

The memorandum of objections relates to costs. The respondent relies on *Ritter* v. *Godfrey* (10) and *Jackson* v. *Anglo-American Oil Co* (11). I am not clear the cases help the respondent, and I do not see any reason to interfere with the Judge's discretion in directing the parties to bear their costs in the lower Courts. The memorandum of objections is dismissed but without costs.

V. N. V. *Appeal and memo. of objections dismissed.*

(7) 25 M. 26.
(8) 36 Ind. Cas. 77.
(9) 82 Ind. Cas. 420; 20 L. W. 402; (1924) M. W. N. 789; A. I. R. 1925 Mad. 235.
(10) (1920) 2 K. B. 47; 89 L. J. K. B. 467; 122 L. T. 396; 36 T. L. R. 144.
(11) (1923) 2 K. B. 601; 92 L. J. K. B. 1000; 129 L. T. 792; 67 S. J. 640.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 47 OF 1925.
July 28, 1926.

Present:—Justice Sir Lallubhai Shah, Kt., and Mr. Justice Fawcett.

MADHAV PRABHAKAR OKA AND OTHERS—JUDGMENT CREDITORS—APPELLANTS

versus

BALAJI GOVIND JOSHI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 146, O. XXI, r. 15, Sch. III, para. 11 (3)—Death of decree-holder—Application for execution by one of surviving co-parceners, validity of—Proceedings before Collector—Subsequent application—Limitation—Exclusion of time.

An application for execution presented by one only of the surviving co-parceners of a deceased judgment-debtor is not invalid in law so as to prevent the deduction of time mentioned in sub-para (3) of para. 11 of the Third Schedule of the Code, in computing the period of limitation of a subsequent application for execution for the benefit of all the co-parceners. [p. 620, cols. 1 & 2.]

First appeal from the decision of the Joint First Class Subordinate Judge, A. P., at Thana, in Darkhast No. 364 of 1923.

Mr. *P. B. Shingne*, for the Appellants.

Mr. *A. G. Sathaye*, for the Respondents.

JUDGMENT.—These are three appeals in execution. When a few facts are clearly realised, the point that arises is short and simple. It appears that in 1910 a decree was passed on a mortgage in favour of one Vishnu Vishvanath Oka against Govind Vishvanath Joshi and Balaji Govind Joshi and this was an instalment decree. There were certain attempts made by Vishnu to execute the decree with which we are not now concerned. Vishnu died on April 8, 1919. *Darkhast* No. 54 of 1920 was filed by his natural brother Balvant Kashinath Oka. The table of the family relationship is given in the judgment of the lower Court. That *darkhast* was sent to the Collector for execution on August 20, 1920. The learned Subordinate Judge, however, held, on April 27, 1922, that it was not competent to the applicant Balvant to proceed with the execution as other persons interested with him in the decree as co-parceners after the death of Vishnu were not joined. According to the view taken by the Court at the date of the presentation of the *darkhast* he alone was not entitled to apply for execution. While dismissing this *darkhast*, the Court observed as follows:—

"This will not stand in the way of the applicant and his brothers or nephews presenting a fresh *darkhast* after showing that they are entitled to present the same. At

the date of the presentation of this *darkhast* the applicant was not a co-parcener and was not the sole surviving co-parcener and was not entitled to present the *darkhast*."

The proceedings were called back from the Collector on May 5, 1922. The present *darkhast* was filed on October 23, 1923, by Mahadev, the son of Prabhakar, as shown in the pedigree in the judgment of the lower Court, for the benefit of all the other co-parceners. The other members of the Oka family, as shown in the genealogical table, were brought on the record in the *darkhast* on March 15, 1924. Thus unquestionably the *darkhast* was properly constituted on March 15, 1924. The learned Judge allowed execution in respect of two instalments which fell due within three years prior to this date, but disallowed the prayer for execution in respect of the earlier instalments claimed in this *darkhast*. The lower Court was of opinion that the time occupied before the Collector, after the *Darkhast* No. 54 of 1920 was sent up to him for execution, could not be excluded under para. 11, sub-para (3), of Sch. III of the Code of Civil Procedure.

Two appeals have been preferred by different members of the Oka family in the same interest, and the third appeal is preferred by one of the judgment-debtors contending that the family was not joint, and that the previous *Darkhast* (No. 54 of 1920) was not properly filed by Balvant.

The lower Court has found on the evidence that Vishnu died in union with the surviving members of the family. It may be mentioned at once as regards the contention of the judgment-debtor that the family was not joint, that it must be disallowed. There is evidence of union, and there would be a presumption also in favour of union. As against that there is nothing on the side of the judgment-debtor to show that, at the time of Vishnu's death, the family was divided. Accepting that finding, therefore, the main question in the appeal is whether the lower Court was right in not excluding the time during which the *Darkhast* No. 54 of 1920 was pending before the Collector in consequence of the order of the Civil Court under para. 11, sub-para. (3), of Sch. III, Civil Procedure Code. It is admitted before us that, if that time is excluded, all the instalments asked for in this *darkhast* could be claimed as being within time. The learned Pleader for the respondent has not been able to suggest any answer why that provision should not apply, and why the time could not be excluded. It is quite clear that there was an order sending the *darkhast* for execution to the Collector. That *darkhast* was pending before the Collector during the period already mentioned. The learned Judge appears to us to have taken an erroneous view in holding that because the *darkhast* was ultimately found not to have been properly presented, the order referring the matter to the Collector for execution and all the proceedings that were then pending before the Collector were wholly invalid. This view has not been sought to be supported before us, and we feel clear that that time should be deducted.

We also think that the *darkhast* was properly presented although it was presented by one of the co-parceners only. Such a presentation could not be said to be invalid in view of the provisions of s. 146, Civil Procedure Code, and the provisions of O. XXI, r. 15. It may be defective and the Executing Court may not proceed with execution on the application of one of them under the circumstances. But the presentation by one of the surviving co-parceners of the deceased decree-holder, could not be said to be invalid so as to render the proceedings before the Collector invalid and so as to prevent the deduction of the time mentioned in sub-para. (3) of para. 11 of the Third Schedule of the Code. So long as there is nothing to show that Balvant in that application was acting entirely for his own benefit and not for the benefit of the family, it could not be said to be an improper application in the sense that the whole thing was invalid.

We, therefore, allow First Appeals Nos. 47 and 86 of 1925, and modify the order under appeal by directing that the execution should proceed in respect of all the instalments claimed in this *darkhast*. First Appeal No. 208 of 1925 is dismissed with costs. The first two respondents (the original defendants) to pay the costs of the appellants in First Appeal No. 47 of 1925: other respondents to bear their own costs. There will be no order as to costs in First Appeal No. 86 of 1925.

We are informed that all the members of the Oka family, who were joined formally as opponents in this *darkhast*, are willing to join with the applicant in prosecuting

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

the *darkhast* for execution. For the purpose of execution hereafter formally the record may be amended in the lower Court so as to make all these persons applicants. It has been agreed both by the original applicant and all the other members of the Oka family appearing on the record that they all should be treated as applicants.

A. N. A. *Appeal allowed: Decree modified.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 2 OF 1926.
January 10, 1927.
Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Hasan.
Musammat RAJAU—PLAINTIFF—APPELLANT
versus
DHARAMRAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Mother's share on division between sons—Arrangement for maintenance of mother—Suit by mother for partition, maintainability of—Actual division by metes and bounds between sons whether necessary.

A mother cannot maintain a suit for partition and recovery of a share against her sons, where in a partition between the sons after the father's death provision has been made for her maintenance for life, and the arrangement has been accepted by her. [p. 622, col. 1.]

It may be that the word 'dividing' in the text of Hindu Law giving the mother a share when the sons divide after the death of the father does not include a mere expression of an intention to separate but it certainly covers a separation in fact and does not restrict it to a division by metes and bounds where immoveable property is concerned. [p. 622, col. 2.]

The share which the mother receives on partition of the family estate amongst her sons she receives for her lifetime only and the true nature of the estate so received is a provision for maintenance. [*ibid.*]

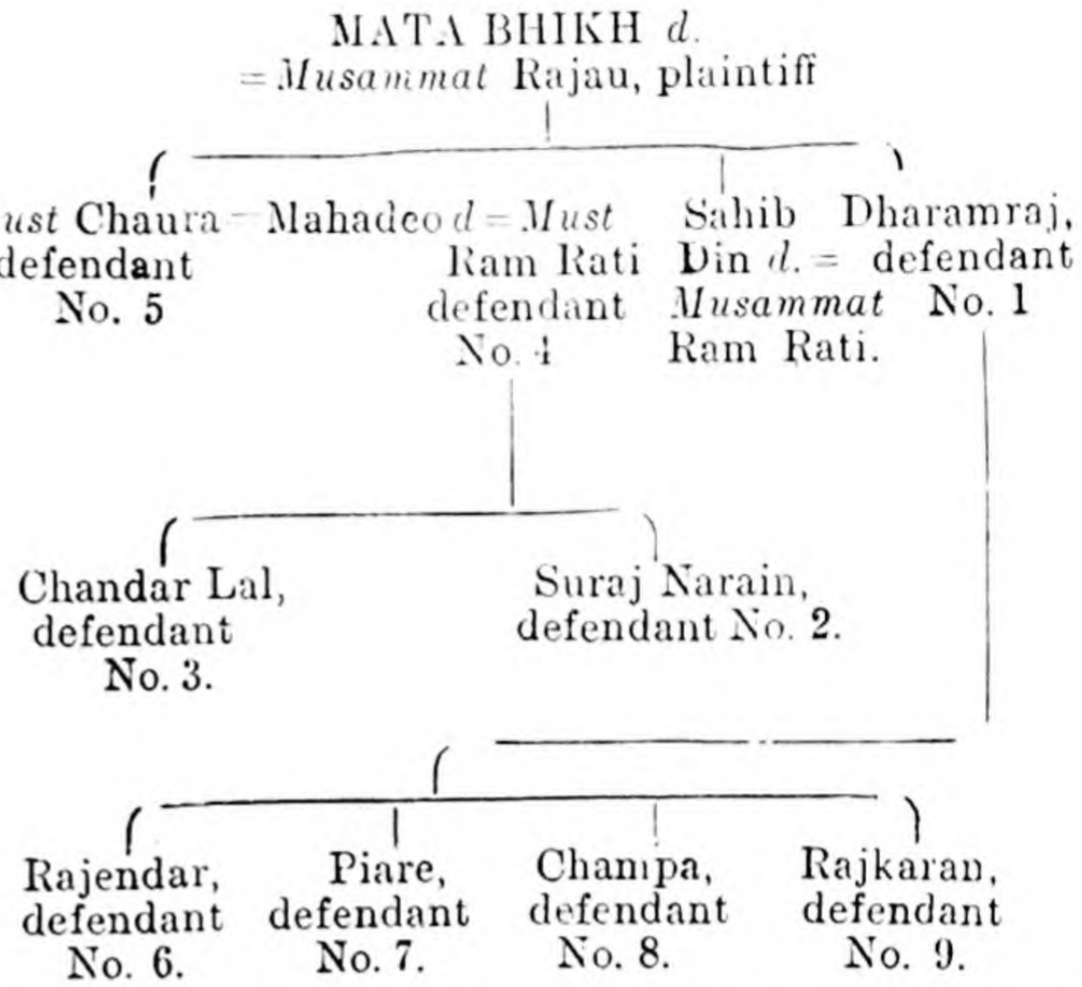
Debi Mangal Prasad Singh v. *Mahadeo Prasad Singh* (6), followed.

First appeal against the judgment and decree passed by the Subordinate Judge, Fyzabad, dated the 30th September, 1925.

Mr. *Naim Ullah*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghose*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Fyzabad, dated the 30th of September, 1925. It is necessary to state a short pedigree at the outset of this judgment:



Suraj Narain defendant No. 2 was impleaded as a minor. He has now attained majority and consequently his mother, *Musammat* Ram Rati, defendant No. 4, has been discharged from guardianship.

The plaintiff, *Musammat* Rajau, claims a one-third share in the family estate of the defendants, who are the descendants of Mata Bhikh, the deceased husband of the plaintiff, on the ground that the members of the family separated and divided the estate in the year 1924.

The necessary facts of the case are as follows:—In the year 1907, when Mahadeo, one of the sons of the plaintiff, was living, a disruption of the joint family did take place as between Mahadeo on one side and Dharamraj, defendant No. 1, on the other. This is evidenced by two deeds of agreement of even date, that is the 5th of February, 1907, (Exs. B-15 and B-16). By means of these documents provision was made for the maintenance of the plaintiff and *Musammat* Ram Rati. After the death of Mahadeo and in the year 1924 one of the family villages, that is, Barepur, was subjected to partition through the Court of Revenue. Livestock was also divided in the same year.

The defence to the suit is that the provision made by the agreement (Ex. B-15) in favour of the plaintiff for her maintenance and accepted by the plaintiff as such bars the claim for a share in the estate and that the partition of 1924 gave no right to the plaintiff for the reason that one set of the parties to the said partition were the grandsons of the plaintiff.

On the question of the partition of 1907 the learned Subordinate Judge, on the authority of the decisions in *Beti Kuar* v. *Janki Kuar* (1) and *Raoji Bhikaji Kondkar* v. *Anant Laxman Kondkar* (2) is of opinion that no right to a share arose to the plaintiff because there was no actual division of the property. As to the partition of 1924, he held that it was an actual division of the family property but the plaintiff could not obtain a share at that partition for the reason that her claim was satisfied by the earlier agreement of the 5th of February, 1907, and for the further reason that it was a partition at which the plaintiff occupied the position of a grandmother and, therefore, on the authority of the decision in *Sheo Narain* v. *Janki Pershad* (3) she was not entitled to a share at such a partition.

We propose to dispose of the appeal on the ground that the plaintiff's right to a share in the family estate arose at the partition of 1907 but she compromised the claim by accepting maintenance under the agreement of the 5th of February, 1907.

The partition of 1907 was clearly between the sons of the plaintiff, Mahadeo and Dharamraj, and according to the admitted view of the law, if it was a division of the family estate, the plaintiff as the mother of her two sons would be entitled to a share. The text of Yajnavalkya is this: "Of heirs dividing after the death of the father, let the mother also take an equal share (Mitakshara, Ch. I, s. 7, para. 1)." This text was quoted in the case of *Beti Kuar* v. *Janki Kuar* (1) and the learned Judges with reference to it said: "This, in our opinion, implies an actual division of the family property, that is, a completed partition under which there is a division of interest as well as separate possession. We do not think that a mere severance of interest where no actual division of the property takes place confers on the mother a right to a share equal to that of each of her sons." The same view was taken in *Raoji Bhikaji Kondkar* v. *Anant Laxman Kondkar* (2). For the purpose of this appeal we assume that that is the right interpretation of the text of the Mitakshara and it seems to us that the distinction lies between a mere expression of intention to separate and separation in fact. According to a series of decisions of their Lordships of the Judicial Committee a severance of the joint status takes place by "a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty:" see *Suraj Narain* v. *Iqbal Narain* (4) and *Girja Bai* v. *Sadashiv Dhundiraj* (5). It may be that the word "dividing" in the text does not include a mere expression of an intention to separate but we are of opinion that it certainly covers a separation in fact and does not restrict it to a division by metes and bounds where immoveable property is concerned.

In the present case the evidence and particularly the terms of the agreement of the 5th of February, 1907, establish beyond all reasonable doubt that there was a separation between the two brothers in fact. Each appropriated to himself a specified share of the profits of the immoveable property and by the same transaction granted maintenance to the plaintiff, their mother. The provision made for the maintenance of the plaintiff was that she was to receive interest for her life accruing on a certain fund in the hands of a debtor, the amount of interest being Rs. 960 per year. The plaintiff's plea that the agreement relating to the maintenance was not acted upon is futile. It was negatived by the learned Subordinate Judge on consideration of the evidence in the case and it was not repeated before us. The share which the mother receives on partition of the family estate amongst her sons she receives for her lifetime only and the true nature of the estate so received is a provision for maintenance —*Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (6). The provision which was made for the plaintiff under the agreement of the 5th of February, 1907, being both for life and for maintenance was a provision in lieu of her share in the estate and as the agreement has been acted upon all along and is valid in law the present suit is not maintainable.

(1) 7 Ind. Cas. 908; 33 A. 118; 7 A. L. J. 980.
(2) 46 Ind. Cas. 750; 42 B. 535; 20 Bom. L. R. 671.
(3) 16 Ind. Cas. 88; 34 A. 505; 9 A. L. J. 749.
(4) 18 Ind. Cas. 30; 40 I. A. 40; 13 M. L. T. 194; 17 C. W. N 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 35 A. 80; 15 Bom. L. R. 456; 16 O. C. 129 (P. C.).
(5) 37 Ind. Cas. 321; 43 I. A. 151; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 207; 31 M. L. J. 455; 43 C. 1031 (P. C.).
(6) 14 Ind. Cas. 1000; 39 I. A. 121; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 34 A. 234 (P. C.).

We, therefore, dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1057 OF 1924.

January 25, 1927.

Present:—Mr. Justice Lindsay.

KHUDA BAX AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAGHUNANDAN LAL AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (ii)—Suit for damages for wrongfully cutting trees—Assertion of acts amounting to mischief—Suit, whether of Small Cause nature—Burial ground—Dedication—Presumption against reservation in favour of grantor.

A suit for recovery of damages for wrongfully cutting and misappropriating a tree falls within the purview of Art. 35 (*ii*) of Sch. II of the Provincial Small Cause Courts Act and is consequently exempted from the cognizance of a Small Cause Court where the allegations in the plaint amount to an assertion that the defendants have committed acts which, if proved against them in a Criminal Court, would render them liable to conviction on a charge of mischief. [p. 623, col. 2; p. 624, col. 1..]

Raghubar Dayal v. *Mulwa* (1), distinguished.

It is reasonable to presume that where land is given for a cemetery there is no reservation by the grantor. [p. 624, col. 2; p. 625, col. 1.]

Second appeal from the decree of the Additional District Judge, Aligarh, dated the 19th of May, 1924.

Mr. *M. A. Aziz*, for the Appellants.

Mr. *S. K. Dar*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by one Raghunandan Khattri to recover a sum of Rs. 100 from the defendants as damages on account of the price of wood of a *pipul* tree which, it was alleged, these defendants had wrongly cut and appropriated from a plot No. 493, said to be situated in the plaintiff's *zemindari*. There were three sets of defendants in the case. In the plaint it was said that the first and third set of defendants had colluded and cut the *pipul* tree without any right and had sold the timber to the second set of defendants.

The main defence to the suit was that plot No. 493 on which this *pipul* tree was situated was *wakf* property, being a piece of land dedicated as a graveyard and which was used by the *bhatiyara* residents of the town of Atrauli for burying their dead.

The Court of first instance dismissed the plaintiff's suit. The Munsif was of opinion that there was evidence that the property had been dedicated for the purposes of a cemetery and that the plaintiff had lost all right to this land and was, therefore, not in a position to assert that he had any title to the *pipul* tree. In appeal this judgment has been reversed and the plaintiff's claim has been decreed for a portion of the sum claimed. The defendants have now come here in second appeal, and it is argued that the decision of the Court below is wrong because a certain document of agreement of the year 1867 has been wrongly construed by the learned Additional Judge of Aligarh.

When arguments were opened here a preliminary objection was raised on behalf of the plaintiff-respondent to the effect that no second appeal lay by reason of the provisions of s. 102 of the Code of Civil Procedure. The plea was that the suit as framed was a suit of a Small Cause Court nature. I am of opinion that this preliminary objection was not well taken for it seems to me that on the case disclosed in the plaint, the plaintiff was asserting that these defendants had done acts which would amount to an offence punishable under Ch. XVII of the Indian Penal Code.

In this connection Art. 35 (*ii*) of Sch. II to the Provincial Small Cause Courts Act has to be referred to. There was a good deal of argument as to the applicability of this Article, but I am satisfied that the Article does apply and that, therefore, it is not possible to maintain that the suit was a suit of a Small Cause Court nature. It seems to me that, having regard to what is set out in the Article just referred to, the suit was one which could not have been tried by a Small Cause Court. I may mention here that the judgment of a Bench of this Court in *Raghubar Dayal* v. *Mulwa* (1) was cited on behalf of the respondents. I find there the principle laid down in the following terms:—

"We have already decided to-day, agreeing with Mr. Justice Daniels and dismissing an appeal from him, that where the plaint discloses no allegation of a crime, this Article, *i. e.*, 35 (*ii*), did not apply."

Having regard to the allegations in the plaint here I am satisfied that they amounted to an assertion that the defendants had

(1) 100 Ind. Cas. 38.

committed acts which, if proved against them in a Criminal Court, would have rendered them liable to conviction on a charge of mischief.

Passing on to the merits of the case I have, after some consideration, come to the conclusion that the judgment of the first Court is to be preferred and that the judgment of the lower Appellate Court should be set aside

It is not to be denied that this plot in suit has been used as a graveyard for a very long time. In the *khasra* prepared in the year 1871 A. D. this field is described as No. 447. It is stated there that the name of the field is "*kabristan wali*," that is to say, the field used as a burying ground. It is described as being situated in the *Patti* of Kishan Lal who was the owner, and the occupiers and *khashtkars* are described as "being all the *bhatiyaras* residing in town of Atrauli who are *muafidars*." In the remarks column it is said that this plot contains a *pakka* well, two trees and a *makan idgah*, that is to say, a place used for purposes of prayer.

In the *intikhab jamabandi* of the same year we find the plot described in similar terms. It is there repeated that all the *bhatiyaras* in the town of Atrauli are *muafidars* holding from the *zemindars*; and in the remarks column it is stated that this plot "*waste kabristan muaf hai*." The plaintiff, however, laid great stress upon a document executed in the year 1867. It appears that this plot is situated in a *patti* known as *Patti* Sher Singh, *Kasba* Atrauli. In some way or other, which is not clear, this *patti* came to be auctioned after the mutiny and was purchased by the predecessor-in-title of the present plaintiff who is a *khattri* by caste. In the year 1867, a document was executed as between the plaintiff's prodecessor and a number of the *bhatiyaras* in the town of Atruali. This document began by stating that in the town of Atrauli in *Patti* Sher Singh there was situated a poor man's cemetery (*gor gariban*) close to the Shah Wilayet. The Shah Wilayet obviously means the tomb of some saint. The document went on to recite that before this *Patti* Sher Singh had come to be purchased by auction the former *zemindars*, and after them the succeeding *zemindars*, had appointed, or set apart, this land for the purpose of a poor man's cemetery (*muqarrar kar rakhi hai*). The document went on to state that the ancestors of the *bhatiyaras* also had their cemetery in the land in question. The document then went on to provide for an agreement between the *zemindars* and the *bhatiyaras*. The latter were anxious to plant trees for the purpose of giving shade over the graves, and it was agreed that they should be allowed to plant trees but they should not be allowed to sell them. Provision was made for cases in which the trees fell down, in which event, the timber was to be shared between the *zemindar* and the *bhatiyaras*. The Court of first instance took this document to be evidence that this land had for a very long time been dedicated as graveyard, and it was held, therefore, that having been so dedicated the plaintiff had no right to claim any proprietary interest in it. The view taken by the lower Appellate Court was that the document was not evidence of a complete dedication. The learned Judge seems to have been of opinion that the persons who handed over this plot for the purposes of graveyard reserved some rights in themselves and he treated the document, therefore, as showing only that the *bhatiyaras* in the town of Atrauli had a right to bury their dead in the land in question by permission of the *zemindars* but had no higher rights.

I do not think that this is a reasonable construction of the evidence in the case. The document of 1867 does not show that the burials in this plot were made by permission of the *zemindars*. What was stated was that the old *zemindars*, that is to say, the *zemindars* before the time of the auction-sale and those who had acquired title afterwards, had recognised this plot as a place set apart for a poor man's burying ground. The words, as I have said, are *muqarrar kar rakhi hai*. These words to my mind indicate complete dedication of the property not only for the benefit of the *bhatiyaras* but also for the benefit of the poor of Atrauli. It is distinctly stated in the deed that any poor man who is to be buried in Atrauli is buried in this burying ground. Again I do not agree with the learned Judge of the Court below who seems to think that the words *zemindaran sabiq* must necessarily mean the immediate predecessors-in-title of the persons who purchased *Patti* Sher Singh after the mutiny. The words are perfectly general and may refer to the *zemindars* of seven generations back.

I think it reasonable to presume that

where land is given for a cemetery there would be no reservation by the grantor. There is just another point which may be mentioned, and that is this. It is proved from a reference to the *Gazetteer* of the Aligarh District that Atrauli has had a large Muhammadan population for a very long time. The history of the town goes back for a great many years, and it is stated, in the *Gazette*, that this town contains a number of, what are called, Rajput Muhammadan inhabitants. It is well known that in Aligarh there are a great many Rajput converts to Muhammadanism. It seems likely, therefore, from the history of the town that there must have been a cemetery for the Muhammadan poor for a very long time. Moreover, it need not necessarily be assumed that because this property is situate in *Patti* Sher Singh that Sher Singh was necessarily a Hindu. He may, for all we know, have been one of these Rajput Muhammadans. I have come to the conclusion, therefore, that the rights of this case are with the defendants and that the Court of first instance was right in holding that there had been a complete dedication of this plot for the purposes of a cemetery.

It only remains to mention that there was a previous suit between this plaintiff and some of these defendants, in which the plaintiff recovered damages for the cutting and removal of one of the branches of the *pipul* tree now in dispute. An attempt was made in the Court below to hold this previous judgment as *res judicata*, but as the decree in the earlier suit was only given against three of the defendants in the present suit, obviously the question of the title is not *res judicata* under the earlier judgment. I, therefore, allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance. The defendants will be entitled to their costs both in the lower Appellate Court and in this Court, in this Court the costs will include fees on the higher scale.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 128 OF 1925.

January 25, 1927.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Broadway.

RAHMAT ALI—PLAINTIFF—APPELLANT

versus

SHADI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption—Right to redeem and to foreclose, co-extensive—Agreement postponing right to redeem—Clog on redemption.

The right of redemption is co-extensive with the right of foreclosure and where a mortgagee has power to foreclose at any time the Court would refuse to give effect to a unilateral agreement postponing the mortgagor's right of redemption. [p. 626, col. 1.]

Letters Patent appeal against the judgment of Mr. Justice LeRossignol, in Civil Appeal No. 2221 of 1922, dated the 24th March, 1925, affirming that of the District Judge, Gurdaspur, at Dalhousie, dated the 21st June, 1922, reversing that of the Munsif, First Class, Batala, District Gurdaspur, dated the 14th June, 1921.

Mr. *Fakir Chand*, for the Appellant.

Mr. *Jagan Nath Aggarwal*, for the Respondents.

JUDGMENT.

Broadway, J.—On the 31st July, 1916, one Allah Ditta executed a mortgage of certain property for Rs. 500 in favour of Gangu. Out of the consideration a sum of Rs. 200 was to be paid to prior mortgagees. On the 10th November, 1919, Gangu having died, his sons sued to recover the money due under the mortgage and obtained a decree. In execution of the decree they had the property attached and sold, the decree-holders purchasing it at the auction. One Rahmat Ali objected to the sale on the strength of a mortgage in his favour dated the 17th April, 1916, for a sum of Rs. 250. Under this mortgage Rahmat Ali claimed to be entitled to retain possession of the property for five years. His claim to the money due under the mortgage was allowed but it was held that the purchasers were not bound to leave him in possession for five years.

On the 6th March, 1921, Rahmat Ali instituted a suit asking that he should be declared to be the mortgagee of the property and entitled to hold possession thereof for a period of five years from the date when certain prior mortgages should be redeemed. The suit having been

dismissed on the ground that the condition in his mortgage that after redemption from prior mortgagees he should be allowed to retain possession of the property for a term of five years was a clog to redemption and, therefore, void, he preferred a second appeal to this Court which was dismissed by Mr. Justice LeRossignol who agreed with the view taken by the Court below.

Rahmat Ali has preferred this appeal under the Letters Patent through Mr. Fakir Chand who contended that the mortgage in the appellant's favour was not open to any objection and did not contain any condition which in any way postponed or barred redemption and which could be regarded as a clog. Mr Jagan Nath on behalf of the respondents urged that the view taken by the learned Judge in Chambers was correct and that in order to decide whether the condition under consideration in the mortgage-deed in favour of the appellant was a clog to redemption it was necessary and allowable to examine the prior mortgages referred to in the mortgage deed and that a reference to the said prior mortgages made it perfectly clear that the condition in question was a clog to redemption. He also urged that a condition existed which created a compelling equity in the respondents' favour, and, finally, that inasmuch as the appellant under his mortgage is entitled to the recovery of his money at any time, the mortgagor's right to redeem was co-extensive and entitled him to pay off the mortgage without being compelled to carry out the provision as to giving the appellant possession for a period of five years.

Under the appellant's mortgage the mortgagor undertook to redeem the previous mortgages which had been executed in favour of the appellant's brothers and, after redemption to place the appellant in possession for a period of five years during which the mortgagor would not be entitled to redeem. On the other hand, the appellant was given the right to call in the mortgage money at any time. Now the right of redemption is generally co-extensive with the right of foreclosure and it has been held that where the mortgagee has power to foreclose at any time the Court would refuse to give effect to a unilateral agreement postponing the mortgagor's right of redemption. In *Sayad Abdul Hak* v. *Ghulam Jilani* (1), it was held that the right of redemption and the right of foreclosure are always co-extensive and that a Court of Equity will not enforce any agreement in restraint of the right of redemption which is oppressive and unreasonable as giving the mortgagee an advantage not belonging to the contract of mortgage. To the same effect was the decision in *Sari* v. *Motiram Mahadu* (2), where it was held that "a stipulation postponing the mortgagor's right to redeem beyond the time when the mortgagee can call in his money is inoperative." As has been said above, under the terms of the appellant's mortgage he was entitled to call in his money at any time, and after examination of the mortgage-deed in question I am unable to see that there was any condition restraining the mortgagor from redeeming his mortgage without first redeeming the mortgages prior to it. As the appellant was expressly allowed to call in his money at any time, the right of the mortgagor to redeem at any time must be held to be co-extensive and I would, therefore, dismiss this appeal with costs.

Shadi Lal, C. J.—I concur.

K. L. *Appeal dismissed.*

(1) 20 B. 677; 10 Ind. Dec. (N. S.) 1021.
(2) 22 B. 375; 11 Ind. Dec. (N. S.) 834.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1141 OF 1924.
January 7, 1927.

Present:—Mr. Justice Iqbal Ahmad.

IRSHAD HUSAIN—PLAINTIFF—APPELLANT

versus

MAKUT MANOHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

*U. P. Land Revenue Act (III of 1901), s. 44—Entry in Record of Rights—Presumption of correctness, nature of—Muhammadan Law—*Waqf*—User—Question of fact—Appeal, second—Interference by High Court.*

An entry in an annual Record of Rights must be presumed to be true under s. 44 of the U. P. Land Revenue Act but the presumption is rebuttable. [p. 627, col. 2.]

A *waqf* may be presumed by user, but the question whether such user has been established is a question of fact to be decided upon the evidence adduced in the case on either side. Where it is found that such user is not established and the finding is based upon legal evidence, it cannot be interfered with in second appeal. [*ibid.*]

Second appeal against the decree of the District Judge, Budaun, dated the 5th of April, 1924.

Mr. *M. A. Aziz*, for the Appellant.

Messrs. *S. B. Johari*, *Harnandan Prasad* and *Saila Nath Mukerji*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit brought by them for a declaration that a certain house situate in the City of Budaun was an *Imambara* and that the *muafi* land specified at the foot of the plaint was *waqf* property, and that neither the house nor the *muafi* was saleable in execution of a decree for sale obtained by defendant No. 1 against defendant No. 2 on the 8th of February, 1923. The plaintiffs describe themselves as members of the Muhammadan public in the City of Budaun and alleged that the house and the *muafi* in dispute being *waqf* property, defendant No. 2 had no right to mortgage the same, and as such the property in dispute was not saleable in execution of the decree obtained by defendant No. 1. The defence to the suit was that the property in dispute was not *waqf* property but was the personal property of Intizam Ali.

The defence found favour with the trial Court and it accordingly dismissed the plaintiffs' suit, and the learned District Judge on appeal by the plaintiffs has affirmed the decision of the trial Court.

The decrees of the Courts below have been assailed before me on the ground that the fact of the property being *waqf* was conclusively proved by the documentary evidence, and the Courts below misdirected themselves in not treating that documentary evidence as conclusive and in holding, on the basis of the documents and judgments relied on by the defendants-respondents, that the property in dispute was not *waqf* property. It is urged that it was not at all necessary for the plaintiffs to prove an actual dedication at a particular time of the property in dispute, and that according to Muhammadan Law mere user is sufficient to stamp a particular property with the character of *waqf* property. In support of these contentions reliance has been placed by the learned Counsel for the appellants on the case of *Salig Ram* v. *Amjad Khan* (1) and on the case of *Court of Wards* v. *Ilahi Bakhsh* (2).

The question that the Courts below had to decide in this case was whether or not the property in dispute was *waqf* property. This was essentially a question of fact. In coming to a decision on this point the evidence adduced by both the parties had to be considered. The lower Appellate Court had given due weight to the documentary evidence produced by the plaintiff-appellants and has, as a matter of fact, before proceeding to consider the documentary evidence relied on by the defendant-respondents observed that "so far then the documentary evidence lends very great colour to the contentions of the plaintiffs." But after considering the documentary evidence adduced by the defendants the lower Appellate Court came to the conclusion that the documentary evidence of the defendants was entitled to greater weight and pointed to the conclusion that the property was not *waqf*. After taking all the facts into consideration the learned District Judge has summarised his conclusion in the following words "I am of opinion that no *waqf* was ever created or that any attempt has been made to give any *waqf* effect." This appears to me to be a finding of fact based on legal evidence and as such, cannot be challenged in second appeal. It is argued by Mr. Aziz that, in view of the decision in the *Court of Wards* v. *Ilahi Bakhsh* (2), referred to above, the lower Appellate Court should have treated the entries favouring the *waqf* in the revenue papers relied on by the plaintiffs as conclusive, and in this connection he naturally draws my attention to the fact that s. 44 of the Land Revenue Act (Act III of 1901) is practically identical with s. 44 of the Punjab Land Revenue Act which formed the subject-matter of consideration by their Lordships of the Privy Council in the case of the *Court of Wards* v. *Ilahi Bakhsh* (2). By s. 44 of the Land Revenue Act (Act III of 1901) the Courts are enjoined to presume the entries made in an annual register prepared under sub-s. (3) of s. 33 to be true until the contrary is proved. In the present case no such register has been produced in which the property in dispute is entered as *waqf* property, and even if there was any such entry in any such register, the accuracy of such an entry could be challenged by other evidence, as has been done in the present case by the defendants. The entry in an annual register is presumed to be true but the presumption is always a rebuttable presumption.

(1) 3 A. L. J. 546; A. W. N. (1906) 159.

(2) 17 Ind. Cas. 744; 40 C. 297; 1 P. W. R. 1913; 11 A. L. J. 265; 13 M. L. T. 318; (1913) M. W. N. 270; 17 C. L. J. 360; 27 P. R. 1913; 83 P. L. R. 1913; 15 Bom. L. R. 436; 25 M. L. J. 61; 40 I. A. 18 (P. C.).

The learned Counsel for the respondents does not quarrel with the proposition of law upon which stress has been laid by Mr. Aziz, *viz.*, that a *waqf* may be presumed by user, but on the findings of the lower Appellate Court a *waqf* by user has not been proved. Indeed the finding is that "there is no evidence of any kind to show that they have ever spent any money at all on religious purposes."

It may be that after making representations to the Government that they intended to spend or did actually spend the income of the *muafi* for the maintenance of the *Imambara*, the predecessors-in-title of defendant No. 2 succeeded in securing the remission of revenue from the Government and the Government may have actually remitted the revenue as it appears to have done for the expenses of the *Imambara*, but that by itself, in the absence of a clear proof of the fact that the revenue so remitted was actually spent for the purpose for which it was remitted by the Government, cannot in law be effectual to make the property a *waqf* property.

For the reasons given above, in my judgment, the decisions of the Courts below are perfectly correct and I dismiss the appeal with costs including in this Court fees on the higher scale.

If this decision of mine becomes final, a copy of this judgment is to be sent to the Collector of the district with a view to his taking such action as he thinks desirable for the purpose of assessing revenue on the *muafi* in dispute.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL SUIT No. 352 OF 1925.

November 17, 1926.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

F. G. NATESA IYER AND OTHERS—CLAIMANTS Nos. 3, 4, 5—APPELLANTS

versus

KAJA MARUF SAHIB—CLAIMANT No. 1—RESPONDENT.

Land Acquisition Act (I of 1894), s. 11—Compensation — Apportionment — Landlord and permanent lessee.

Where a person granted a permanent lease of his land on receipt of Rs. 150 from the tenant and on condition of payment of Rs. 4 per year reserving to himself the *melwaram* interest in the land and the land was subsequently acquired under the Land Acquisition Act:

Held, (*i*) that the interest of the landlord or *melwaramdar* was not confined to the right to receive the rent and could not, therefore, be valued merely at 20 years' purchase of the rent reserved in the lease; [p. 629, col. 1.]

(*ii*) that the apportionment of the compensation as between the landlord and tenant at $\frac{1}{3}$ and $\frac{2}{3}$ was not erroneous. [*ibid.*]

Appeal against the decree of the Court of the Subordinate Judge, Trichinopoly, dated the 23rd December, 1924, in O. P. No. 7 of 1924 (O. S. No. 163 of 1922 on the file of the District Court, Trichinopoly).

Mr. *T. V. Muthukrishna Iyer*, for the Appellants.

Mr. *K. Aravamada Iyengar*, for the Respondent.

JUDGMENT.

Krishnan, J.—This is an appeal in a land acquisition matter as between the landlord and the persons who claimed the land under him under a permanent lease. The actual appellant is said to be a purchaser from a purchaser of the permanent lease. The case has come before the Courts because the parties did not agree to the apportionment between them of the compensation awarded which came to about Rs. 1,400 and odd. Out of this the Subordinate Judge has granted about $\frac{2}{3}$ to the permanent tenants and about a third to the landlord. Now, it is very strongly contended before us by Mr. Muthukrishna Iyer, for the permanent tenants, that the landlord is only entitled to have a capitalised value of the Rs. 4 rent payable by the permanent tenant to the landlord for the land and, therefore, the amount given to him should be reduced to Rs. 80 taking the capitalisation at 20 years' purchase the balance should be given to the permanent tenants. The rights of the parties really depend upon the document executed by the landlord under which he parted with his rights in this land to the permanent tenant. That document is Ex. A. It is a sale of the landlord's *kudivaram* interest in the land to certain individuals. The value put upon over 8 acres of this land under Ex. A is Rs. 150. Besides paying the Rs. 150 the permanent tenants were to pay also Rs. 4 every year to the landlord. The document speaks of itself not as a sale of the land itself but as a sale of the *kudivaram* interest. Now, it is contended that all the interest that the landlord has reserved to himself at the time of the acquisition of this land is the right to receive Rs. 4 from the tenants and that he

has only a right to be compensated for that sum of money; in other words if we give him a capitalised sum which would bring him Rs. 4 at a reasonable rate of interest say 5 per cent. that will be the only compensation that he is entitled to. This argument overlooks the fact that the landlord does not part with all his interests in the land by this sale. He has only sold the *kudivaram* interest. The *melvaram* interest is with him. It is difficult to say exactly what these two interests are. *Kudivaram* interest, one understands, is the interest the man in occupation of the land gets in the land for cultivating the land or utilising the land for any purpose for which it has been given. He gets possession of the land and he has also the user of the land. The *melvaramdar* has the rest of the interest in the land in himself. It is not merely a right to receive rent; he has got several other rights. For example, he could recover the land itself from the tenant, *e.g.*, if the tenant denies his title there might be a forfeiture of the permanent tenancy. In that case the landlord would get back the land. There are other rights which the *melwaramdar* has in the land. To value the *melwaramdar*'s interest merely at 20 years' purchase of the rent that is reserved in his favour would, it seems to me, be quite unfair, so far as he is concerned. It is not an easy thing in any case to apportion the value of the land between two persons who have got somewhat indefinite rights in the land such as the *melwaramdar* and the *kudivaramdar*. The Subordinate Judge has divided the compensation as between the landlord and the tenant at $\frac{1}{3}$ and $\frac{2}{3}$. I am not satisfied that it is really erroneous. The suggestion made by the learned Vakil for the appellant seems to me on the face of it inequitable. When the land was leased out under Ex. A it was apparently a waste land fit only for pasturage of cattle and consequently valued at a very low figure. Now that the Railway Company has come forward and acquired the land, compensation has been given for it apparently on the footing of a building site. This enhanced value is not due to the exertion either of the landlord or the tenant. It is a sort of wind fall which has come to both the parties. There is no reason why one alone should have the whole of it and not the other. If we give the landlord only Rs. 80 we will be ignoring altogether the general right as *melwaramdar* which is in him. It seems to me, therefore, that this is not a fit case for interference in appeal. I would, therefore, dismiss the appeal with costs.

Odgers, J.—I agree. What we have to do is to see what the interests of the respective parties are under Ex. A in the lands which have been acquired compulsorily under the Land Acquisition Act and as far as possible to value those interests equitably between the parties. Now the difficulty in this case is largely caused by the expression used in Ex. A, '*kudivaram*' and '*melwaram*' because it is only faintly suggested that this is a settled estate such as would fall under the Act of 1908. There was no question that it is not so. The lendlord reserved a certain interest in this property. I think it is incorrect to say that Ex. A is an out and out sale subject to the reservation of a quit rent in favour of the landlord. In fact, it, in terms, purports to be an absolute sale of the *kudivaram* right. It may be that other rights are inherent in the landlord who is styled the *melwaramdar* in this document. In any case, the land in 1909 was practically waste land. It has now increased enormously in value owing to its proximity to the new railway works of the South Indian Railway now being erected near Trichinopoly. As my learned brother has said it is not owing to any exertions or expenditure on the part of either the landlord or the tenure-holder that this increase in value has come about. It is a pure piece of good fortune. Had Ex. A been an absolute sale of the land, of course, there would have been no question, but that the whole of the money paid by Government would go to the purchaser. But that it is not so. And it seems to me it would be eminently unfair to say under the circumstances that all that the *melwaramdar* is entitled to is the capitalised value of Rs. 4 a year. The case in *Dinendra Narain Roy* v. *Tituram Mukerjee* (1) was pressed upon us, but as pointed in *Bommadevara Venkata Narasimha Naidu* v. *Atmuri Subbarayadu* (2) it is not clear exactly what was the tenure and its terms which existed between the parties in that case. Here, I think, it is quite clear from Ex. A that something more than a mere quit rent of Rs. 4 a year was

(1) 30 C. 801; 7 C. W. N. 810.
(2) 12 Ind. Cas. 436; 36 M. 395; 10 M. L. T. 349 (1911) 2 M. W. N. 401; 25 M. L. J. 17.

intended to be reserved to the landlord. I am not satisfied that the Subordinate Judge was wrong in law and I consider it would be unfair to disturb his decision unless one was really satisfied that it was wrong in law and could not be sustained. I, therefore, agree that the appeal fails and should be dismissed with costs.

V. N. V. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 902, 912 AND 913 OF 1926.

January 5, 1927.

Present:—Mr. Justice Mukerjee and Mr. Justice Graham.

KHETRA MOHAN SAHA AND OTHERS —PLAINTIFFS—PETITIONERS

versus

JAMINI KANTA DEWAN AND OTHERS— DEFENDANTS—OPPOSITE PARTIES.

Stamp Act (II of 1899), ss. 2 (5) (b), 35—'Bond'—Negotiable Instruments Act (XXVI of 1881), as amended by Act VIII of 1919, s. 13, Expl. (i)—Explanation, whether can be read into definition of bond—Imposition of stamp duty and penalty after decision of case, legality of.

Explanation (*i*) introduced to s. 13 of the Negotiable Instruments Act by Act VIII of 1919 cannot be read into the definition of a bond as contained in s. 2 (5) (*b*) of the Stamp Act so as to make an instrument which on the face of it is not payable to order, one payable to order by virtue of the said Explanation and thus to take it out of the said definition. For the purposes of the Stamp Act documents, as they appear on the face of them have to be considered. [p. 631, col. 1.]

A Court has no jurisdiction after a case has been finally disposed of to pass an order under s. 35 of the Stamp Act directing a party to deposit stamp duty and penalty in respect of an insufficiently stamped document filed in the case. [*ibid.*]

Rules against an order of the Sub-Judge, First Court, Faridpur, in Money Suits Nos. 28, 29 and 30 of 1925.

Babus *Rajendra Chandra Guha* and *Debendra Nath Bhattacharjee*, for the Petitioner.

Babus *Dwarka Nath Chakravarty* and *Surendra Nath Guha*, for the Opposite Party.

JUDGMENT.—These three Rules are directed against as many orders passed by the Subordinate Judge, First Court, Faridpur, by which that learned Judge directed the petitioners to deposit stamp duty and penalty in respect of three documents. The petitioners had instituted three suits for recovery of money due upon the said documents and filed the same along with the plaintiffs. A Commissioner was appointed for the examination of one of the plaintiffs and the documents were proved in the course of the deposition of that witness taken by the Commissioner. Thereafter the suits were adjourned from time to time and ultimately resulted in a compromise on the basis of which decrees were passed on the 25th May, 1926. On the 3rd June, 1926, the decrees were signed and sealed. On the 2nd July, 1926, the *sheristadar* made a report stating that the documents were not promissory notes but bonds within the meaning of the Stamp Act and accordingly should have been stamped as such. On the said report the Subordinate Judge passed the orders against which these Rules are directed.

The two contentions urged on behalf of the petitioners are: First, that the Subordinate Judge had no jurisdiction to make these orders, and second, that the documents are promissory notes and not bonds within the meaning of the Stamp Act.

It will be convenient to deal with the second contention first. The documents are addressed to a particular person, namely, the plaintiff No. 1. Each of them contains an unconditional undertaking signed by the maker to pay on demand to the person in whose favour it is executed, a certain sum of money, principal together with interest. They are attested by a number of witnesses. The definition of promissory note as given in s. 2 (22) of the Stamp Act adopts the definition as given in s. 4 of the Negotiable Instruments Act of 1881 and includes some instruments not covered by that definition. The petitioner's contention is that as these documents are all dated subsequent to 1919, the amendment introduced by Act VIII of 1919 to s. 13 of the Negotiable Instruments Act of 1881 has to be taken into account in reading this definition, and if so read, these documents would be instruments payable to order as they do not contain words prohibiting transfer or indicating an intention that they shall not be transferable. They would thus be instruments attested by witnesses but payable to order and consequently would not satisfy the definition of bond as given in s. 2 (5) (*b*) of the Stamp Act. In my opinion this

argument is not sound. Explanation (*i*) which amongst other amendments, was introduced by Act VIII of 1919 to s. 13 of the Negotiable Instruments Act of 1881, was meant to enlarge the definition of a negotiable instrument. By this amendment a promissory note not payble to order, which previously was not negotiable, was brought within the class of negotiable instruments; and the amendment, in my opinion, cannot be read into the definition of a bond as contained in s. 2 (5) (*b*) of the Stamp Act so as to make an instrument which on the face of it is not payable to order, one payable to order by virtue of the said Explanation and thus to take it out of the said definition. For the purposes of the Stamp Act the documents, as they appear on the face of them, have to be considered. They are attested by witnesses and are not payable to order or bearer. In my judgment they are bonds within the meaning of the Stamp Act and should have been stamped as such. The second contention, therefore, must fail.

The arguments advanced on the first contention shortly put, are as follows: It is said that the documents were never admitted in evidence by the Court as the depositions recorded by the Commissioner had not yet been brought on the record by reading them in Court, and that the suit never reached the stage at which the documents could be sought to be used in Court and consequently the Subordinate Judge had no jurisdiction to act under s. 35 of the Stamp Act. It is also said that if the documents are treated as having been admitted in evidence by the Subordinate Judge he was not entitled to re-open the matter and deal with the documents again under s. 35 of the Stamp Act by reason of the provisions of s. 36. I am of opinion that it is not necessary to deal with the first branch of this contention because as the suits had already been disposed of and the decrees signed and sealed the provisions of s. 35 of the Act were wholly inapplicable to the case. The Subordinate Judge had no jurisdiction to proceed in the way that he did.

The Rules should be made absolute and the orders complained of set aside. In view of the fact that the petitioners have not been successful in their second and main contention there will be no order as to costs in their favour.

A. N. A. *Rule made absolute.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 206 OF 1926.
January 27, 1927.
Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

BADRI SINGH—DEFENDANT—APPELLANT
versus
BAM BAHADUR SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Finding based upon construction of documentary evidence, whether decision of fact.

A finding based upon the construction of or inferences drawn from documentary evidence but in no sense based upon the legal effect of the documents cannot be questioned in second appeal. [p. 632, col. 1.]

The decision, therefore, in a pre-emption suit that a certain *mahal* is not a portion of or identical with another *mahal* based upon the construction of certain documents is a decision of fact and cannot be disturbed in second appeal. [*ibid.*]

Chatenay v. *Brazilian Sub-marine Telegraph Co., Ltd.* (1) and *Midnapur Zeminary Co., Ltd.* v. *Uma Charan Mandal* (2), relied on.

Second appeal against a decree of the Additional Subordinate Judge, Gonda, dated the 29th March, 1926, upholding that of the Munsif, Tarabganj at Gonda, dated the 5th February, 1926.

St. *George Jackson* and Mr. *H. D. Chandra*, for the Appellants.

Mr. *S. M. Ahmad*, for the Respondent.

JUDGMENT.—This second appeal is based upon a plea that there is no right of pre-emption in *Mahal* Azmat Singh in village Rampur Kharahta in the Gonda District. In order to establish that there is no right of pre-emption in any village community in Oudh; it is necessary under the provisions of s. 7 of Act XVIII of 1876 to rebut the presumption that such a right does exist, and it was, therefore, unnecessary for the plaintiff who was asserting a right of pre emption to do more than rely upon the presumption, in order to establish that the right of pre-emption existed in the village of Rampur Kharahta. Upon facts the appellant succeeded in showing from the *wajib ul arz* of the adjoining village Kheriya Khas, that no right of pre-emption exists in the village of Kheriya Khas, and he was also able to show that in the village of Rampur Kharahta there is a *mahal* known as *Mahal* Khareya, in which as in Kheriya Khas, there is no right of pre-emption. We thus have it established at the commencement that under the provisions of s. 7 of Act XVIII of 1876 a right of pre-emption must be presumed to exist in

the village of Rampur Kharahta with the exception of that portion of the village which is known as *Mahal* Khareya, and this narrows down the question for our decision to a determination as to whether *Mahal* Azmat Singh is or is not identical with or a portion of *Mahal* Khareya. The Courts below have decided that *Mahal* Azmat Singh is not a portion of or identical with *Mahal* Khareya. This decision of the Courts below is a decision of fact. It is based upon the lower Courts' construction of certain documents, but it is not in any sense based upon the legal effect of those documents. The documents were here pieces of evidence which were considered in determining the question of fact. Findings, therefore, based upon the construction of or inferences drawn from such documentary evidence cannot be questioned by us in second appeal. This principle which is the same principle that was enunciated in 1891 in *Chatenay* v. *Brazilian Submarine Telegraph Co. Ltd.* (1), has been enunciated again by their Lordships of the Judicial Committee in *Midnapur Zemindary Co. Ltd.* v. *Uma Charan Mandal* (2). We are thus precluded from entering into the point at all. So far as this Court is concerned we arrive at no finding as to whether *Mahal* Azmat Singh is a part of or identical with *Mahal* Khareya in village Rampur Kharahta. Our decision upon this point is that we are precluded under the law from disturbing the finding of the Courts below upon this point. As a result we dismiss this appeal with costs.

G. H. *Appeal dismissed.*

(1) (1891) 1 Q. B. 79; 60 L. J. Q. B. 295; 63 L. T. 739; 39 W. R. 65.

(2) 74 Ind. Cas. 482; 21 A. L. J. 723; A. I. R. 1923 P. C. 187; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 45 M. L. J. 663; 25 Bom. L. R. 1287; 40 C. L. J. 16; 29 C. W. N. 131 (P. C.).

PATNA HIGH COURT.

CIVIL REVISION No. 424 OF 1926.

January 17, 1927.

Present :—Justice Sir B. K. Mullick, KT.

SITA RAM—PETITIONER

versus

HANUMAN PRASAD AND OTHERS—OPPOSITE PARTY.

Hindu Law—Partition—Manager how far liable to render account.

A member of a joint Hindu family in asking for an account in a partition suit cannot object to the various items of past expenditure by the *karta*, but he can call for an account for the purpose of ascertaining how much was saved each year out of the income in order that it may be at the disposal of the joint family for partition. [p. 633, col. 1.]

Application against an order of the Subordinate Judge, Second Court, Arrah, dated the 2nd August, 1926.

Messrs. *S. M. Mullick, N. N. Sen* and *Raghosaran Lal*, for the Petitioner.

Messrs. *N. C. Sinha, Nawal Kishore Prasad II* and *Kedar Nath Varma*, for the Opposite party.

JUDGMENT.—This is an application under s. 107 of the Government of India Act asking the Court to direct the Subordinate Judge to make certain amendments in a plaint filed before him on the 19th June, 1926. The plaintiff sues his two brothers for partition of joint family property. In January, 1924, there was a previous partition by an indenture duly registered. The plaintiff's case now is that this partition deed was fraudulent and he asks that it may be set aside and a fresh partition made of all the joint family properties. The first amendment to the plaint for which he asks is that the defendants should be directed to furnish a list of the entire ancestral joint property. I cannot see any objection to this prayer except the general ground which the learned Subordinate Judge takes, namely, that none of the prayers are *bona fide*.

The third amendment is similar to the first and it asks that the defendant No. 1 be directed to file in Court a complete list of the properties in the *gola* and a receiver be appointed to look after the business of the *gola*. It is a fact that the defendant No. 1 is in possession of the *gola* which is described in the deed of partition as being the separate property of this defendant. The application to appoint a receiver in respect of it cannot be entertained but I see no reason why the defendant No. 1 should not be required to disclose the property that is in it and which he claims to be his separate property. The case of the plaintiff is that the property in that *gola* is joint family property. It seems to me that the defendant is bound to make discovery. The learned Subordinate Judge thinks that a list of the ancestral joint property, both moveable and immoveable, was made long ago at the time of the partition deed and that it is merely for the purpose of harassment that the plaintiff now asks for another list. As the

plaintiff attacks the partition deed as fraudulent and claims that not only is it wrong in its details but that properties which belonged to the joint family have been omitted from it altogether I think he is entitled to ask for a fresh list.

With regard to the second prayer, namely, that the defendant No. 1 who is in possession of the properties should be directed to submit in Court an account and *bujharat* of the income and expenditure since 1957 *Sambat*, the objection taken by the learned Subordinate Judge is that the addition of this prayer will alter the nature of the suit. I do not think so. A member of a joint family in asking for an account in a partition suit cannot object to the various items of past expenditure by the *karta*, but he can call for an account for the purpose of ascertaining how much was saved each year out of the income in order that it may be at the disposal of the joint family for partition. I think, therefore, that the prayer should be allowed.

The learned Vakil for the opposite-party suggests that the plaintiff, instead of making the amendments in the plaint that has been filed, should file a fresh plaint with fresh Court-fee. There is no object in subjecting him to this extra expenditure, but what the plaintiff will have to do is to pay the necessary Court-fees when the proper time comes upon the prayer to set aside the partition deed as well as upon the prayer for accounts. He must give an estimate of the amount at which he values the relief for account and pay whatever Court-fee is legally payable thereon.

The application is allowed with costs hearing fee three gold *mohurs*.

A. N. A. *Application allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1113 OF 1924.

January 6, 1927.

Present:—Mr. Justice Iqbal Ahmad.

DWARIKA TEWARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MATA BADAL MALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Redemption, suit for—Failure to prove mortgage, effect of.

Where in a suit for redemption of a mortgage the plaintiff fails to prove that the property in dispute was mortgaged to the defendant, the suit must be dismissed. [p. 634, col. 1.]

Ganeshi Lal v. *Basanti Lal* (1) and *Bala* v. *Shiva* (2), distinguished.

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 9th of April, 1924.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *A. Sanyal*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit for redemption of a mortgage. The plaintiffs' case was that half of old plot No. 5 corresponding to plot No. 11 of the recent settlement was mortgaged by Sheo Sahai, grandfather of plaintiffs Nos. 1 and 2 and great grand-father of plaintiff No. 3 to Ram Prasad Mali grand-father of defendant No. 1 about 45 or 46 years prior to the institution of the suit for a sum of Rs. 49-15-0 and that the plaintiffs were entitled to redeem the mortgage.

The defence to the suit was that the plot in dispute never belonged to the plaintiffs and was never mortgaged to defendants' ancestor and that the defendants were in possession of the plot in dispute not as mortgagees but as fixed rate tenants.

Both the Courts below have accepted the pleas urged in defence and have dismissed the plaintiffs' suit.

The lower Appellate Court has found as a fact that a portion of plot in dispute was made a gift off by one Thakur Narain Singh, who was the *zemindar* of the plot in dispute, to two persons Mata Din Tewari and Sheo Sahai in 1248 *F.*, and that the plot in dispute all along continued in possession of Ram Prasad Mali as a tenant, and that the donees under the deed of 1248 *F.* never got actual possession of the same. It has further held that the plaintiff failed to prove that the plot in dispute was ever mortgaged to Ram Prasad Mali, and that the specific mortgage set up by the plaintiffs has not been proved. It has also held that the only right of Sheo Sahai as one of the donees under the deed of 1248 *F* was to realise a certain amount of rent from Ram Prasad Mali who was tenant of the plot in dispute and it was this right to realise rent that was actually mortgaged by Sheo Sahai to Ram Prasad Mali. These findings of the lower Appellate Court are based upon entries in the revenue papers and the learned Counsel for the appellants has failed to satisfy me that the lower Appellate Court has in any way misconstrued

the entries in the revenue papers. It is true that a perusal of the deed of 1248 *F*. leads to the conclusion that what was gifted by Thakur Narain Singh was not the right to realise rent but was a right to actual occupation of a portion of the plot in dispute, but even then Ram Prasad Mali, having continued in possession as a tenant after the gift, would acquire in the plot in dispute either the rights of an occupancy tenant or the rights of a fixed rate tenant. In either case the right to the possession of the plot would be with him and the plot itself could not have been mortgaged by Sheo Sahai.

On the finding arrived at by the lower Appellate Court that the plaintiffs failed to prove that the plot itself was mortgaged to Ram Prasad Mali and that the plaintiffs failed to prove the mortgage set up by them, the suit for redemption had been rightly dismissed by both the Courts below.

It is next urged by the learned Counsel for the appellants that the lower Appellate Court having held that what was mortgaged to Ram Prasad Mali was the right "to receive Rs. 2 3-3 as rent," a decree for redemption of that right at least ought to have been passed in the plaintiffs' favour. In support of this contention reliance has been placed by the learned Counsel for the appellants on the case of *Ganeshi Lal* v. *Basanti Lal* (1) and on the case of *Bala* v. *Shiva* (2). In my opinion, there is no force in the contention advanced on behalf of the appellants, and the authorities cited are distinguishable. All that was decided in the case of Ganeshi Lal was that though in a suit for redemption it lies in the first instance on the plaintiff to prove the mortgage set up by him, still if the plaintiff has given a *prima facie* proof of the same the burden shifts on the defendant. In the present case the mortgage set up by the plaintiffs has been definitely found not to have been proved. It is not the case here that the plaintiffs succeeded in adducing some *prima facie* proof of the existence of the mortgage which they sought to redeem and the defendants did not succeed in rebutting the case made out by the plaintiffs. The plaintiffs' allegation as to the mortgage of the plot *itself* has been found to be false by the lower Appellate Court. In the Bombay case relied on by the learned Counsel for the appellants it was held that where "the plaintiff did not tie himself down to a specific mortgage made at a particular time, he was entitled to succeed if he proved that the land was held by the defendants as mortgagees." In the case giving rise to the present appeal it has been found by the lower Appellate Court that the plaintiffs have failed to prove that the defendants are the mortgagees of the land sought to be redeemed, and as such, the Bombay case is distinguishable.

For the reasons given above, in my judgment, the decision of the lower Appellate Court is perfectly correct and I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 20 Ind. Cas. 29.
(2) 27 B. 271; 5 Bom. L. R. 85.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 582 OF 1925.
December 16, 1926.

Present:—Mr. Justice Srinivasa Iyengar.

TIMMASETTI SANJIVAPPA AND OTHERS —DEFENDANTS—PETITIONERS

versus

PINNU VENKATANARAPPA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), as amended by Act (XVIII of 1919), Sch. I, Art. 158—Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 14 (c)—Application to set aside award—Limitation—Dismissal of application without advertence to amendment of Art. 158—Revision—Intentional absence of dissenting arbitrators—Validity of award of majority.

Under Art. 158 of Sch. I of the Limitation Act of 1908 as amended by Act XVIII of 1919 the period of ten days prescribed for filing an application in Court to set aside an award must be computed from the date when the award is filed in Court and notice of the filing has been given to the parties. [p. 635, col. 1.]

The omission of a Court in deciding a point of limitation to have advertence to an amendment of the Article concerned, is not a mere error in the decision of a question of law and affords good ground for interfering in revision under s. 115, Civil Procedure Code. [p. 635, col. 2.]

Where a matter is not really heard by all the arbitrators appointed, there is material on which the Court may find the award to be bad on its face. But if the dissenting arbitrators merely absent themselves in order to render infructuous a contemplated award by the majority of the arbitrators, the Court will not set aside the award merely on that ground. [p. 636, col. 1.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise a decree of the Court of the District Munsif, Penukonda, in O. S. No. 626 of 1923.

Mr. *G. Musalappa Reddi*, for the Petitioners.

Mr. *N. Chandrasekhara Iyer*, for the Respondent.

JUDGMENT.—I am satisfied in this case that the learned District Munsif dismissed the application of the defendants objecting to the award on the ground that it was barred by the law of limitation without any reference even to the actual Article of the Limitation Act applicable or the wording of it. This is what he states: "The award was submitted on 8th December, 1924, and this application is made today" and then, because the application to set aside the award was made on grounds of corruption, misconduct, etc., he comes to the conclusion that the application must be made within ten days after the award is submitted to the Court under Art. 158 of the Limitation Act and says, "This petition comes in too late and so is dismissed."

The present Art. 158 of the Limitation Act is in these terms:—"Under the Code of Civil Procedure, 1908, to set aside an award, ten days," and in the third column it is provided that the ten days should be computed from when the award is filed in Court and notice of the filing has been given to the parties. The former Art. 158, is, "Under the Code of Civil Procedure, 1908, to set aside an award, ten days, from when the award is submitted to the Court." Having regard to the language used by the learned District Munsif in his order, particularly the expression "after the award is submitted to the Court," I have not the slightest doubt that the learned District Munsif was referring to the Articles of the Limitation Act as it stood before the amendment which was made I believe in or about 1919 or 1920 and did not even refer to the Article as amended and as it stood on the date on which the application of the order was made. It has been strenuously contended by Mr. Chandrasekara Iyer for the respondent that having regard to the fact that it is provided that there should be no appeal against the judgment directing a decree to be passed in terms of the award except when the order of the Court goes beyond the terms of the award, the present petitioner has no right to come to this Court by way of a civil revision petition to have such order revised and set aside. It has been argued that even when the lower Court has proceeded on a wrong view of the law, that mere fact is no ground for interference of this Court in revision. Assuming it to be so, I am not inclined merely to regard as an error in the decision of a question of law the omission of the lower Court to have advertence to the proper Article of the Limitation Act as it stood amended on the particular date. If the lower Court had considered the terms of the Article and for some reason concluded that having regard to the terms thereof the application for setting aside the award was barred by limitation, it may be that this Court may refuse to interfere. But this is not such a case. The lower Court has not even considered the question and, therefore, I cannot regard it merely as a case where the lower Court in considering a question has come to a wrong decision. I am, therefore, satisfied that this is a case in which this Court should properly interfere and set aside the order. No doubt the petitioner has nowhere stated that he was served with the notice of the award on a date computing from which his application would not be barred by the law of limitation. I have a sort of an idea that the petitioner's advisers were also probably labouring under the same mistake as the learned District Munsif. However, that may be, as it is clear that the lower Court has not had advertence even to the proper Article of the Limitation Act, in deciding this question and as there are no materials before me on which I can now say whether or not having regard to the terms of the Article the application is or is not barred by the law of limitation, it is necessary that the case should be sent back to the lower Court for being disposed of according to law. If the lower Court should come to the conclusion that having regard to the date on which the notice, if any, has been served of the filing of the award on the petitioner the application is barred by the law of limitation, then it may deal with it accordingly. But if it is not barred by the law of limitation, then of course it will go on to hear the application on the merits and dispose of the same according to law.

The learned Vakil for the petitioner also argues that the award is on the face of it wrong, because only three out of five arbitrators have purported to act in the matter of the arbitration. As against this Mr. Chandrasekara Iyer has argued that

the whole of the hearing was conducted by or before all the five arbitrators and that it was only when it became clear to the two arbitrators who were siding with the defendants and dissenting from the other arbitrators that the award of the majority was likely to be the other way that they purported to have nothing more to do with the further proceedings in arbitration. This would also, therefore, be a matter for the lower Court to consider in deciding on the application. If the lower Court should come to the conclusion that the case before the arbitrators was not really heard by all the arbitrators appointed, then of course it follows that there may be material on which the Court may find the award to be bad on its face. But if on the other hand what the two dissenting arbitrators did was merely to render infructuous the contemplated award by the majority of the arbitrators, then the Court will not set aside the award merely on that ground but consider the other grounds on which if any, the applcation is based.

Costs of this petition will abide and follow the result.

V. N. V. *Order set aside.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1538 OF 1924.
January 28, 1927.
Present :—Mr. Justice Dalal and Mr. Justice Pullan.

MUHAMMAD SIDDIQ AND ANOTHER — PLAINTIFFS—APPELLANTS
versus
SHAHAB-UD-DIN AND ANOTHER— DEFENDANTS—RESPONDENTS.

Muhammadan Law—Dower—Marriage of minor—Guardian whether liable for dower.

Under the Muhammadan Law a father does not, by merely giving his consent to the marriage of his minor son, become automatically a surety for the payment of the dower-debt. [p. 636, col. 2.]

Second appeal from a decree of the District Judge, Budaun, dated the 3rd of July, 1924.

Messrs. *Akhtar Husain Khan* and *A. M. Khwaja*, for the Appellants.

Mr. *Mushtaq Ahmad*, for the Respondents.

JUDGMENT.—The parents and heirs of a deceased wife sued the deceased's husband and the husband's father for recovery of their share of the dower-debt. The suit was decreed against the son alone who does not appear to own any property. The plaintiffs have come here in second appeal to obtain a decree against the father. Both the subordinate Courts have held it as a finding of fact that the father was not a surety for the payment of the debt at the time of the marriage. The husband was a minor at the date of the marriage, which was arranged by the father. The question which arises is whether the father by his consent to the marriage becomes a surety for the payment of the dower-debt fixed at the time. It would appear from a statement in Mr. Tyabji's Principles of Muhammadan Law, Second Edition, page 179, s. 104 (1) that his becoming such a surety would be presumed. What he says is that where the marriage has been contracted on behalf of a minor of the male sex by his guardian for marriage, the property of the minor is liable for the dower, and, if he has no property, the guardian is liable to pay it to the wife. The statement is not very clear, but possibly it means that the guardian would be perpetually liable and not only till the minor attains the age of majority according to Muhammadan Law, *i. e.*, on his reaching puberty. Unless such were his opinion, it will not help the appellants because obviously the son was sixteen years of age at the time of the death of the plaintiffs' daughter and was a major according to Muhammadan Law. As pointed out by the learned Judge of the lower Appellate Court, Mr. Tyabji, who as a rule gives Baillie for his authority, has not given any reference in support of this particular opinion of his to that authority. We have referred to Baillie's Edition, 1875. What he says at page 141 is that when a man has married his infant son to a woman, and becomes his surety for the dower, and the transaction has taken place while the father was in good health, the suretyship is valid if accepted by the woman. The conditions for the liability of the father according to this authority are his becoming a surety, his being in good health and the acceptance by the bride. We are of opinion that if this authority had desired to lay down in accordance with the text that a father simply by giving his consent to the marriage automatically becomes a surety for the payment of the dower-debt, he would not have laid down this rule of the father becoming a surety at

the time of the marriage and the other conditions attached to the validity of such surety. It may be admitted that the passage from Amir Ali quoted by the lower Appellate Court is not helpful, because there the question considered is only of the death of the son without leaving any property and no statement is made as to the liability of the guardian, who gave the consent if the son did not happen to possess any property. At the same time if there had been such a tenet of Muhammadan Law as to make a guardian of the minor bridegroom liable for the payment of dower-debt simply because he arranged the marriage and gave his consent, a statement to that effect would have been found in Amir Ali's book. In consideration of all these points we are not prepared to follow the principle of law laid down in s. 104 of Mr. Tyabji's book.

We dismiss this appeal and make no order as to costs.

A. N. A. *Appeal dismissed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL NO. 64 OF 1926.

January 17, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

MATA GHULAM SINGH—PLAINTIFF—APPELLANT

versus

KALI DIN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Transfer of land by Crown—Right of pre-emption—Oudh Laws Act (XVIII of 1876), s. 9.

Where the Crown 'grants and transfers' land to an officer the transfer is not a sale pure and simple but there is an outstanding element of grant and no right of pre-emption arises under the Oudh Laws Act.

Second appeal from a decree of the Sub-Judge, Partabgarh, dated the 14th December, 1925, in Civil Appeal No. 381 of 1925, confirming that of the Munsif, Partabgarh, dated the 19th September, 1925, in Civil Suit No. 151 of 1924.

Mr. *Ali Zaheer*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Partabgarh, dated the 14th of December, 1925, affirming the decree of the Munsif of the same place dated the 19th of September, 1925.

The appeal arises out of a suit for pre-emption. The facts are as follows:—

The claim relates to certain specified plots of land situate in the village of Pura Ajmer Shah, Pargana and District of Partabgarh. The total area of the plots in suit is 2 *bighas* 5 *biswas* and 12 *biswansis*. These plots together with other immoveable property were originally acquired by the Secretary of State for India in Council for public purposes under the provisions of the Land Acquisition Act, 1894.

The plots in suit, however, remained unused and under the deed of the 12th of May, 1924, the Secretary of State has transferred them to the defendants, Kalidin and Lakpat Singh, for an ostensible consideration of Rs. 58.

On a plea raised by the defendants the Courts below dismissed the suit for pre-emption on the ground that the transferor, the Secretary of State, was not a "co sharer" and that for the purpose of a claim for pre-emption it was necessary that the transferor must be a co-sharer. In support of this view they have relied on a decision of a Bench of the High Court at Allahabad in the case of *Gaya Singh* v. *Raja Ram Singh* (1).

We are of opinion, that the appeal can be disposed of on a short ground. The provisions of the law of pre-emption as enacted in s. 9 and the sections following it in the Oudh Laws Act, 1876, are abundantly clear on the point that a claim for pre-emption arises only when the transfer is either by way of sale or a mortgage ending in a decree for foreclosure. It is admitted that there is no case of foreclosure before us On a proper construction of the deed of transfer of the 12th of May, 1924, we are of opinion, that the transfer evidenced by that deed is not a transfer by sale pure and simple. It has an outstanding element of grant by the Crown in favour of a *jamadar* of the army, as one of the defendants is. Indeed the deed says that "the Secretary of State hereby grants and transfers." While the lands in suit were held by the Secretary of State it must be presumed that they bore no liability for payment of revenue. In the hands of the transferees, however, the lands are clearly assessed with revenue and the liability is imposed on the transferees.

(1) 28 A. 235; 2 A. L. J. 787; A. W. N. (1905) 259.

On the above grounds we dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 96 OF 1926.

January 5, 1927.

Present:—Mr. Justice Ashworth.

BABU RAM AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

MUNNA LAL AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Application to set aside ex parte *decree—Order erroneously treating application as within limitation—Revision, whether competent.*

An erroneous decision that an application to set aside an *ex parte* decree is within limitation is not open to revision under s. 115 of the Civil Procedure Code. [p. 638, col. 2.]

Section 115 of the Civil Procedure Code is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. [p. 639, col. 1.]

Civil revision from an order of the Munsif, Pilibhit, dated the 1st of May, 1926.

Messrs. *S. C. Das* and *S. N. Gupta*, for the Applicants.

Mr. *Saila Nath Mukerji*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against an order of the Munsif of Pilibhit, dated the 20th May, 1926, setting aside an *ex parte* decree. The present applicants brought a suit against the father of the non-applicant. A written statement was filed in the suit by the father which shows that he must have been served with the summons referred to in Art. 164 of the Limitation Act. The father then died. Presumably the non-applicant was brought on the record as a son of the defendant. He, however, failed to appear on the date fixed for the hearing of the case and a decree was passed *ex parte* against him on the 15th December, 1925. On the 19th April, 1926 the non-applicant applied for setting aside of the *ex parte* decree against himself on the ground that, although he was aware of the case against his father being fixed for the 15th December, he had been under the impression that this date was not for final disposal but merely for bringing his name on the record and reached the Court late that day. The Munsif wrote the following order on the application for restoration:

"The suit restored. The applicant to pay Rs. 7 as costs subject to which the case is restored. Fix 20th, May, 1926, for the final hearing. I believe the appellant."

It may be mentioned that the case has never been heard owing to this application against the order of restoration.

The Munsif's order restoring the case is impunged on two grounds. One is, that the application for setting aside the *ex parte* decree was beyond time under Art. 164 of the Limitation Act. This appears to be correct but it affords, in my opinion, no ground for revision. The plea of limitation presumably was not raised by the present applicant because no reference is made to it by the Munsif. It must, however, be held that the Munsif's granting of the application on the 1st of May, 1926, amounted to a decision in law that the application was within time. Such a decision even if wrong does not fall under either cl. (*a*), (*b*) or (*c*) of s. 115 of the Code of Civil Procedure. There has been no illegal or irregular exercise of jurisdiction within the meaning of cl. (*c*). In *Sarman Lal* v. *Khuban* (1) it was held that it is no ground for revision under s. 25 of the Small Causes Court Act that the Court whose order it is sought to revise may have come to an erroneous decision on a point of limitation and in a Full Bench case *Sarman Lal* v. *Khuban* (2) it was held that the considerations to be applied to applications under s. 622 of the then Civil Procedure Code, which is now re-placed by s. 115, were practically the same as those applicable to s. 25 of the Small Causes Court Act. In brief it was held that an erroneous decision on a point of law not connected with the exercise of jurisdiction would not give a right to apply in revision. It has been urged by the applicants' Counsel that under the law of limitation the Court had no power to set aside an *ex parte* decree and in doing so it exceeded its jurisdiction. This appears to me to be a wrong use of the word jurisdiction. I am not aware that it has ever been held that a Court wrongly allowing a time-barred application can be said to be acting without

(1) 17 A. 422; A. W. N. (1895) 112; 8 Ind. Dec. (N. S.) 592.

(2) 16 A. 476; A. W. N. (1894) 183; 8 Ind. Dec. (N. S.) 309.

jurisdiction. In the Privy Council case *Balakrishna Udayar* v. *Vasudeva Aiyar* (3) it is stated that s. 115 of the Civil Procedure Code is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

Another ground taken is that the lower Court decided the application merely on the opposite party's statement without requiring him to produce any further evidence. The lower Court has stated that it believed that party's statement. There is nothing in law to require further evidence in such circumstances.

For the above reasons I dismiss this application with costs.

Z. K. *Application dismissed.*

(3) 40 Ind. Cas. 650; 40 M. 793 at p. 799; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 142 OF 1925.

December 9, 1926.

Present:—Mr. Justice Waller and Mr. Justice Madhavan Nair.

VANKA RAMAYYA—APPELLANT

versus

VENKA NARAYYA AND OTHERS—RESPONDENTS.

Hindu Law—Widow—Alienation—Surrender to next reversioner—Reversioner's right to sue alienee for possession during life-time of widow—Surrender by daughter succeeding widow, effect of.

When a reversioner obtains the estate through surrender by the life-estate-holder of her estate he is not entitled to question her alienations during her lifetime but must wait till her death to do so, the reason for the rule being that an alienee for consideration from a widow is reasonably entitled to calculate that the alienation which she has made to him will hold good at least during her life-time. [p. 640, col. 1.]

This rule is equally applicable where the alienation is made by a widow and the daughter who succeeds after her death surrenders the estate to the next reversioner without having questioned the alienation within the period of limitation; in such a case the daughter must be deemed to have acquiesced in the alienation made by her mother and treated it as if it was her own, so as to render the alienation not liable to be questioned during the daughter's life-time also. [p. 640, col. 2.]

Letters Patent appeal against the judgment of Mr. Justice Jackson, dated the 27th of August, 1925 in C. M. A. No. 303 of 1925, preferred against a decree of the Court of the Subordinate Judge, Rajamundry, in A. S. No. 109 of 1924, (A. S. No. 26 of 1924, on the file of the Court of the Additional Subordinate Judge, Coconada), preferred against that of the Court of the District Munsif, Ramachandrapur, in O. S. No. 551 of 1919.

Mr. *C. Rama Rao*, for the Appellant.

Mr. *B. Somayya*, for the Respondents.

JUDGMENT.—The facts are these. The plaintiffs are reversioners to the estate of one Venkayya. When he died, his widow Papadu succeeded to his estate and alienated certain of his properties. Item No. (1) was purchased by the 1st defendant from the father of the defendants Nos. 2 to 5 to whom Papadu had sold it. Item No. (3) was sold to defendants Nos. 2 and 3 by Papadu herself. Papadu died more than 25 years ago. Her daughter Manickkam who then succeeded to the properties of her father executed a surrender-deed, Ex. A, dated 29th January, 1919, in favour of the present plaintiffs and they have sued for recovery of possession of these properties from the defendants.

The plaintiffs' case is that the alienations are not binding on the reversioners and their right to succeed by inheritance is accelerated by the surrender effected by Manickkam. The District Munsif held that the surrender was neither valid nor *bona fide*. The learned Subordinate Judge, holding that the surrender is valid, remanded the suit for a fresh consideration of the question whether the surrender was real and *bona fide*. The 1st defendant appealed.

Mr. Justice Jackson dismissed the appeal in a short judgment stating that it does not appear "that the point now argued was taken in the lower Court, though it may well be taken in future." The point argued before the learned Judge was that according to the decisions of this Court, it was not open to the plaintiffs to institute their suit for possession of the properties during the lifetime of Manickkam. The same point has again been argued before us in Letters Patent Appeal. It appears to us that this question must have been argued before the lower Courts, since the decisions bearing upon it are referred to in the appellate judgment. We must, therefore, allow the appellants' learned Vakil to argue this question before us.

In this Court, it has been held that when a reversioner obtains the estate

through the surrender by the life-estate holder of her estate, he is not entitled to question her alienations during her life-time but must wait till her death to do so. [See *Subbamma* v. *Subramanyam* (1) and *Nelakanti Sundarasiva Rao* v. *Ivatuary Viyamma* (2)]. The reason for the rule is that an alienee for consideration from a widow is reasonably entitled to calculate that the alienation which she has made to him will hold good at least during her life-time. In this case, Manickkam never filed any suit for a declaration that the alienations of Papadu would not bind her nor did she file a suit for possession of these properties. It was long after the period of limitation that Ex. A was executed. It is clear from the recitals in Ex. A that the express object of the surrender was to enable the plaintiffs to sue for possession. The enforcement of the rule just referred to will entail a dismissal of the plaintiffs' suit; but Mr. Somayya contends that the rule should be applied only in cases where the surrender has been made by the widow and not by her daughter as in this case, and that, being a rule of equity, it should never be given effect to in favour of transferees (like the defendants here) who by force of law of limitation are in the position of trespassers who have become owners of property. We cannot accept this contention. The alienations by Papadu in favour of the defendants were voidable. Manickkam who had the right to complain against the alienations did not take any steps to do so; in fact she allowed her right of action to become barred. Not having sued in time we think she must be deemed to have acquiesced in the alienations made by her mother and treated them as if they were her own. In these circumstances, the alienees are reasonably entitled to expect that during Manickkam's life-time also the alienations will not be questioned. The reason for the enforcement of the equitable rule exists in this case also. The suit by the plaintiffs is, therefore, premature. We allow the Letters Patent appeal and dismiss the plaintiffs' suit with costs throughout except of the second appeal.

V. N. V. *Appeal allowed.*

(1) 32 Ind. Cas. 813; 39 M. 1035; 30 M. L. J. 260.

(2) 91 Ind. Cas. 401; 49 M. L. J. 266; (1925) M. W. N. 643; 22 L. W. 398; A. I. R. 1925 Mad. 1267; 48 M. 933.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 149 OF 1926.

February 3, 1927.

Present :—Mr. Justice Mukerji.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—APPLICANTS

versus

DWARKA PRASAD—PLAINTIFF—OPPOSITE PARTY.

Negligence—Fire—Emission of sparks from Railway engine—Liability of Company for damages—Burden of proof of want of negligence.

Where fire is caused by a spark from a Railway engine, the Company will be liable for damages caused by such fire in the absence of evidence to show that the Company had taken all reasonable precautions to avoid the emission of such sparks as are likely to destroy the adjoining property. In such cases it is not on the injured party to prove negligence on the part of the Company, but the onus is on the Railway Company to prove that it had taken the necessary precautions. [p. 641, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes at Aligarh, dated the 6th August, 1926.

Mr. *G. W. Dillon*, for the Applicants.

Mr. *G. Agarwala*, for the Opposite Party.

JUDGMENT.—This is an application to revise a judgment of the Court of Small Causes at Aligarh by which the respondent's suit for damages was decreed against the Secretary of State as represented by the Agent of the East Indian Railway.

The respondent's case is that his *dhobi* lived near the Railway line. On the morning of the 27th of May, 1925, two trains were running a race on the Railway lines that ran by the *dhobi's* house. One of the trains was going to Delhi and the other to Bareilly and for a short distance the two trains ran parallel to each other. A spark from one of the engines burnt the thatched hut of the *dhobi* and along with the hut the plaintiff's clothes that had been given to the *dhobi* for being washed.

The Court below found that the two drivers were driving the two trains at a furious speed and the spark which caused the fire came out of one of the engines. It also found that no precaution had been taken to protect the flying of sparks from the engine.

In this Court it has been contended that the finding of the learned Judge on the question of race is perverse and that it had been established that the engines were fitted with spark protectors and the Railway was not negligent.

On the first point. On the evidence it is difficult to believe that the two trains were really running a race. The *dhobi's* hut was situated only a furlong off the Railway Station and the Station Master's evidence is to the effect that the two trains left within three minutes of each other. In the circumstances it is difficult to believe that the trains could raise up speed so as to run a race within a furlong of the Station.

But the main question is whether there was negligence on the part of the Railway. There can be no doubt that the fire was caused by a spark from an engine, so race or no race the Railway would be liable, if it had failed to take all reasonable precaution to avoid emission of such sparks as are likely to destroy the adjoining property. Mr. Dillon, the learned Government Advocate, argued on the authority of a statement of law contained at page 501 of Pollock's Law of Torts, 12th Edition, that the burden of proof lay initially on the plaintiff to establish that proper precaution had not been taken by the defendant Company. My reading of the book is that it has not been sufficiently established, by authority, that the burden of proof would be on the party injured. On the other hand, the majority of authority is to the effect that the burden of proof is on the Railway Company. The provision of the Indian Evidence Act, s. 106, would also lead to the same conclusion, as nobody but the Railway Company would be in a position to show what was the precaution taken by them. In this case the Railway Administration did take up that burden and adduced evidence in the person of witnesses to show that the engines were fitted with 'spark protectors'. The lower Court has not believed that evidence. Two witnesses were examined on the point. Ram Lal was one of the engine drivers. According to him, his engine was fitted with a spark protector. But there does not seem to be any reason why the driver of the other engine was not examined. The Guard was not in a position to give any definite evidence and, therefore, his evidence on the point is not useful. Some better authority than an engine driver could have been examined by the Railway to show that at the date in question the spark protectors were used with all the engines. Ram Lal says that for some time, when he was giving his evidence the spark protectors had been removed from the engines. On the question of fact, therefore, I am not disposed to differ from the Court below. I hold, therefore, that the Court below was right in finding negligence on the part of the Railway Company. I, accordingly, dismiss the application with costs.

A. N. A. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1159 OF 1924.

November 30, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cammiade.

RAJANI KANTA SHAHA BANIK—PLAINTIFF—APPELLANT

versus

RAMANI MOHAN GOSWAMI RECEIVER TO THE ESTATE OF CHUNILAL SHAHA, INSOLVENT AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Sale of property by Insolvency Court—Suit by claimant for mere declaration, maintainability of—Consequential relief.

An Insolvency Court ordered certain property to be sold as that of the insolvent. Plaintiff applied to that Court for determination of his title to the property but the Court upheld its order for sale. Plaintiff sued for declaration of title. In the course of the suit the properties were sold by the Insolvency Court and purchased by a third party:

Held, that the plaintiff was bound to get rid of the sale of the property as belonging to the insolvent and could not maintain a suit for a mere declaration of title. [p. 642, col. 1.]

Appeal against the decree of the First Additional District Judge, Dacca, dated the 25th of February, 1923, affirming that of the Subordinate Judge, Fifth Court of that District, dated the 1st of May, 1922.

Babu *Hemendra Kumar Das*, for the Appellant.

Babu *Rajendra Chandra Guha*, for the Respondents.

JUDGMENT.—The question raised in this appeal is that the decision of the lower Appellate Court is wrong by which that Court has confirmed the decree of the Court of first instance which dismissed the plaintiff's suit on his failure to put in proper Court-fees on the plaint. The property is claimed by the plaintiff under a mortgage-decree and the subsequent purchase by him in execution of the mortgage-decree against the insolvent who is his father-in-law. His case is that subsequent to his

purchase his father-in-law took a lease of the house and has been living in it. The Insolvency Court ordered the property to be sold as that of the insolvent. The plaintiff applied to that Court for determination of his title to the property but the Insolvency Court upheld the order passed by it for the sale of the property and refused to go minutely into the question of title. Thereupon the plaintiff brought the present suit for a mere declaration of his title to the property. Both the Courts below have found that the suit is barred under s. 42, Specific Relief Act, and that the plaintiff is bound to sue for consequential relief and properly to stamp the plaint. We think that this view is correct. The plaintiff must get not only a declaration of his title but must get rid of the sale of the property as belonging to the insolvent by the Insolvency Court. There has been a further complication since the institution of the suit, *viz.*, the property has been sold under order of the Insolvency Court and purchased by a third party. The suit in our opinion, even if it be held to be properly stamped, will be fruitless. The learned Vakil for the appellant asks for permission to withdraw the suit We think that we should give him that permission but he must pay the costs of the respondent in all the Courts.

A. N. A. *Order accordingly.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 104 OF 1926.

December 1, 1926.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Reilly.

D. K. ASHER—DEFENDANT No. 2—APPELLANT

versus

V. C. GOPALARATNAM—PLAINTIFF—RESPONDENT.

Letters Patent (Madras), cl. 15—'Judgment'—Order of Judge on Original Side refusing inspection of documents disclosed in affidavit - Appeal.

An order of a Judge of the High Court sitting on the Original Side refusing to allow inspection of certain accounts disclosed in the affidavit of documents filed by a party to the suit is not a judgment within the meaning of cl. 15, Letters Patent, and no appeal lies against that order. [p. 644, col. 1.]

Appeal from the order of Mr. Justice Srinivasa Iyengar, dated the 12th October, 1926, and made in C. S. No. 421 of 1925 on the file of the High Court of Judicature in the exercise of its Ordinary Original Civil Jurisdiction.

Mr. *G. Krishnaswami Iyer*, for the Appellant.

Mr. *T. Krishnaswami Iyengar*, for the Respondent.

JUDGMENT.

Kumaraswami Sastri, J.—This is an appeal against an order of Srinivasa Iyengar, J., refusing to allow inspection of certain accounts which were disclosed in the affidavit of documents of the defendant. A preliminary question arises as to whether an appeal lies against such an order and the question is whether an order in an interlocutory application refusing inspection is a judgment within the meaning of cl. 15 of the Letters Patent. Mr. G. Krishnaswami Iyer who appears for the appellant is unable to cite any authority in support of his argument that an appeal lies. He bases his contention on the ground that such an order is not an order on a mere matter of procedure but deprives the party of a substantive right and is, therefore, a judgment, I am unable to agree with him.

The definition of the word "judgment" within the meaning of cl. 15 of the Letters Patent has, I think, so far as Madras is concerned, been settled by the decision of the Full Bench in *Tuljaram Row* v. *Alagappa Chettiar* (1) where Sir Arnold White, C. J., observes as follows:—

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

"I think, too, an order or on independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective if obtained) *e. g.*, an order

(1) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

on an application for an *interim* injunction, or for the appointment of a Receiver is a 'judgment' within the meaning of the clause."

This view has been followed in the *Official Assignee of Madras* v. *Ramalingappa* (2) where the learned Chief Justice after referring to *Tuljaram Row* v. *Alagappa Chettiar* (1) observes as follows:—

"Applying that and endeavouring as best as I can to see what is its true application, I think it is this, that a determination, call it what you will, which has the effect, whether on a technical ground or on the merits of putting an end to the proceedings as regards the particular people or *in toto* is a judgment and is appealable, but, if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause."

In *Mahalingam* v. *Natesa Iyer* (3) Sir John Wallis, C. J., and Seshagiri Iyer, J., following *Tuljaram Row* v. *Alagappa Chettiar* (1) held that no appeal lies against an order refusing leave to amend a plaint. In *Savan Durga Bai Ammal* v. *Ramanatha Rao* (4) it was held that an order refusing leave to amend a written statement is not appealable.

It is difficult to see how if an order refusing a commission, or an order refusing to raise an issue or an order refusing leave to amend pleadings which very often may have far-reaching effects on the defendant's conduct of the suit are not appealable as judgments, an order refusing inspection can amount to a judgment. I may point out here that it is always open to a party to take out subpœna or give notice for the production of the document of which inspection is refused and have the matter as to its relevancy discussed when tendering the document in evidence. The only right which is denied to him is the right to see the document in advance and prepare his case after such inspection. This is, no doubt, often a very important matter for the plaintiff or the defendant but that by itself could not make the order of refusal a judgment within the meaning of the Letters Patent. I think an order like the present, is to use the words of Sir Arnold White, C. J., merely an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit and which does not, therefore, amount to a judgment.

Reference has been made by Mr. G. Krishnaswami Iyer to *Sonachalam Pillai* v. *Kumaravelu Chettiar* (5) where Krishnan and Wallace, JJ., held that an order of a Single Judge of the High Court refusing to stay execution of a decree of a Muffasal Court pending an appeal therefrom to the High Court is a "judgment" within the meaning of cl. 15 of the Letters Patent. It is only necessary to point out that the application was not in any matter in a pending suit and Krishnan, J., at page 321*, while referring to the cases observed that the cases where Letters Patent Appeals were refused fell under the second part of the definition of Sir Arnold White, C. J., in *Tuljaram Row* v. *Alagappa Chettair* (1) as being an adjudication on an application which was merely a step towards obtaining a final decree in the suit. Waller, J., though inclined to proceed on the wider definition of Bittleston, J., in *De Souza* v. *Coles* (6) thought that he was bound by the decision of the Full Bench in *Tuljaram Row* v. *Alagappa Chettair* (1). *Babu Sah* v. *Purushothama Sah* (7) was also referred to. In that case it was held by Spencer, O. C. J., and Srinivasa Iyengar, J., that the final order of a Judge of the High Court sitting on the Original Side allowing or refusing to allow a plaintiff to sue as a pauper is a judgment under cl. 15 of the Letters Patent. But this case has no application as the learned Judges were of opinion that the order was not an interlocutory one but was an adjudication of the substantive right of a party given under the Code. I may point out that the learned Judges declined to follow the decision of another Bench in *Appasami Pillai* v. *Somasundra Mudaliar* (8) where a contrary view was taken. In view of the observations of their Lordships of the Privy Council in *Bindeshwari Prasad Singh* v. *Kesho Prasad Singh*

(2) 91 Ind. Cas. 456; 49 M. 539; 50 M. L. J. 361; 23 L. W. 592; (1926) M. W. N. 366; A. I. R. 1926 Mad. 554.

(3) 32 Ind. Cas. 423; 3 L. W. 107; (1916) 1 M. W. 146.

(4) 91 Ind. Cas. 566; 49 M. L. J. 632; (1925) M. W. N. 785; 22 L. W. 865; A. I. R. 1926 Mad. 64.

(5) 79 Ind. Cas. 109; 47 M. 316; 46 M. L. J. 138; (1924) M. W. N. 167; 19 L. W. 427; A. I. R. 1924 Mad. 597.

(6) 3 M. H. C. R. 384.

(7) 85 Ind. Cas. 201; 48 M. 700; 20 L. W. 845; 33 M. L. T. 136; 47 M. L. J. 932; A. I. R. 1925 Mad. 167.

(8) 26 M. 437.

*Page of 47 M.—[*Ed.*]

(9) as to the desirability of following the constitutional practice of a reference to a Full Bench where one Bench thinks itself constrained to differ from another Bench the question is likely to be settled by a Full Bench should it arise again.

I am of opinion that the order refusing inspection is not a judgment within the meaning of s. 15 of the Letters Patent and that no appeal lies against that order.

The appeal is dismissed with costs.

Reilly, J.—I agree.

V. N. V. *Appeal dismissed.*

(9) 95 Ind. Cas. 1025; 53 I. A. 164 at p. 171; A. I. R. 1926 P. C. 79; 7 P. L. T. 553; 44 C. L. J. 86; 5 Pat. 634; 51 M. L. J. 587; 31 C. W. N. 74 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1381 OF 1924.

January 21, 1927.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

Musammat AHMADI BEGAM—PLAINTIFF APPELLANT

versus

ABDUL AZIZ AND OTHERS—DEFENDANTS RESPONDENTS.

Muhammadan Law—Gift—Delivery of possession—Donor out of possession—Validity of gift—Doctrine of musha*—Evasion of the doctrine.*

The mere fact that the donor was out of possession at the time of the gift and that consequently there was no delivery of possession to the donee does not invalidate a gift under Muhammadan Law, provided the donor did all that he could do to perfect the gift. [p. 644, col. 2.]

Mahomed Buksh Khan v. *Hosseini Bibi* (1), followed.

A gift which is invalid under Muhammadan Law under the doctrine of *musha* becomes a valid gift if the donee obtains possession. [p. 645, col. 1.]

Muhammad Mumtaz Ahmad v. *Zubaida Jan* (3), followed.

This principle applies not only where the gift is impugned by the donor himself but also as against strangers. [*ibid.*]

Mahib Ullah v. *Abdul Khalik* (2), approved.

A gift of an undivided portion of a house can be validly effected by the donor selling it first at a fixed price and then absolving the debtor from payment of the price. [*Ibid.*]

Second appeal from the decree of the District Judge, Bareilly, dated the 6th August, of 1924.

Dr. *S. M. Sen* and Mr. *B. Mallick*, for the Appellant.

Mr. *Akhtar Husain Khan*, for the Respondents.

JUDGMENT.—The plaintiff, *Musammat* Ahmadi Begam, sued for partition of her share of 8 shops and a yard for the collection of wood. This property belonged to her father and the defendants are the other heirs. She claimed a share specified as 1974 out of 6,502. The dispute between the parties related to a gift made by the father in his lifetime to the plaintiff of 1000 *sihams*. The gift was objected to on two grounds: (1) that the father himself not having been in possession at the time, could not have given possession to the daughter, and so the gift was invalid for want of possession, and (2) that the gift was an invalid one of *musha*, *i. e*, an undivided share of joint property.

Both the Subordinate Courts upheld the contention and held the gift to be inoperative. They further declared plaintiff's title in the property in accordance with the right as an heir, ignoring the gift. This is a second appeal by the plaintiff. The learned Judge of the lower Appellate Court has not quoted any ruling in support of his view. The father himself was out of possession at the time of the gift and he did all that was possible for him to do in putting his daughter in the same position in which he was. He and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree.

Under these circumstances want of possession at the time of the gift would not render the gift invalid. In the case of *Muhammad Buksh Khan* v. *Hosseini Bibi* (1) their Lordships observed at page 702*: "In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the *hibanama* itself authorised the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold under these circumstances, that there could be no objection to the gift on the ground that the donor had not possession, and that she herself did not give possession at the time."

This ruling fully supports the claim of the plaintiff that the gift cannot fail for want of possession at the time of the gift.

There is a Single Judge ruling of this Court [*Mohib Ullah* v. *Abdul Khalik* (2)] in

(1) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 1010 (P. C.).

(2) 30 A. 250; A. W. N. (1908) 104; 5 A. L. J. 566.

*Page of 15 C.—[*Ed.*]

which the principle enunciated by their Lordships of the Privy Council in the case of *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3) was applied to a house. Possibly the case which was before their Lordships was one where the donor himself questioned the validity of the gift, and it may be argued that it could not be applied generally where no such question of equity arose. This is how Mr. Tyabji interprets the ruling in his book on Muhammadan Law at page 422. This Court, however, has gone further in the matter and held the gift to be valid even where it is not the donor himself who questions it. We are in agreement with that view. Mr. Ameer Ali in his Muhammadan Law has stated the principle to be that a *hiba-bil-musha*, *i. e.*, gift of an undivided joint property is not void, but only invalid, and possession remedies the defect. Mr. Tyabji does not appear to accept that view, but he has suggested a device by which the operation of the doctrine may be condoned, and that device was adopted in the present case. At page 403 he quotes a *Hanafi* lawyer as laying down that a gift of a moiety of a house can validly be effected by the donor selling it first at a fixed price and then absolving the debtor of the debt which was the price. This was exactly what the plaintiff's father did, and on this ground also the doctrine of *musha* will not apply.

For these reasons we decree the appeal and declare the share of the plaintiff to be that which she claimed in her plaint. This is a preliminary decree for partition and this declaration will be sufficient. The plaintiff shall receive her costs of all Courts including costs in this Court on the higher scale.

A. N. A. *Appeal allowed.*

(3) 16 I. A. 205; 11 A. 460; 5 Sar. P. C. J. 433; 6 Ind. Dec. (N. S.) 721 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 717 OF 1924.

November 2, 1926.

Present:—Mr. Justice Curgenven.

CHAIRMAN, MUNICIPAL COUNCIL, MASULIPATAM—DEFENDANT—APPELLANT

versus

CHITTA VENKATA LAKSHMANNA—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (V of 1884), ss. 207, 214—Power to direct removal of latrine—Notice not specifying place to which it must be removed, whether defective.

Section 207, Madras District Municipalities Act of 1884, empowers a Municipality to take order with latrines in the interests of the general public and in particular of the neighbouring residents and such alteration need not be in the interests of the owner or occupier of the buildings. [p. 646, col. 1.]

A notice which requires the owner of a house to remove a latrine from its existing place and construct it in another place leaving to the owner to decide at his own peril whether that other place is or is not equally open to objection, is not beyond the competence of a Municipal Council under s. 214 (2) of the Act. [*ibid.*]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Masulipatam, in A. S. No. 15 of 1923, A. S. No. 59 of 1923, on the file of the District Court, Kistna, preferred against that of the Court of the District Munsif, Masulipatam, in O. S. No. 197 of 1921.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *C. Venkatasubbaramiah*, for the Respondent.

JUDGMENT.—Plaintiff who is the owner and occupant of a house within the Masulipatam Municipality, was served with a notice issued in pursuance of a resolution of the Municipal Council to remove the latrine attached to her house and have it constructed in another place. She thereupon filed the suit, out of which this second appeal airses for an injunction restraining the Municipal Council from enforcing the order. On behalf of the plaintiff questions were raised whether the order was within the competence of the Municipality and if it were within its competence, whether on the merits it was an order which in the circumstances should have been given. The defendant, on the other hand, contended that a suit of this character would not lie. This point, however, as well as the contention that this Court can enter into the merits of the case for removing the latrine, has now been given up and we are only concerned with the question whether the notice was *intra vires*.

At the time when it was issued Madras Act IV of 1884 was still in force. There are two sections which deal with private latrines, s. 207 and s. 214. The drafting of the Act seems in respect of this topic to have been somewhat defective because not only is the issue of notice dealt with in each of these two separated sections but the latter section is to be found under a portion of the Act which is headed "drains."

Inasmuch, however, as s. 214 expressly deals with private latrines and privies, I do not think that the presence of that heading can affect the application of this section to any case to which it might otherwise apply. Section 207 empowers the Municipal Council by notice to require the owner or occupier of every building to provide a latrine or alter any existing latrine in accordance with any directions contained in such notice. The learned Subordinate Judge appears to entertain the view that the alteration to be ordered by such notice should be in the interest of the owner or occupier of the building, but, I think it is quite clear that this is a misreading of the section and that the intention is to empower the Municipality to take order with latrines in the interests of the general public and in particular of the neighbouring residents. If this were the only provision in the Act which empowered the Municipality to interfere with private latrines, I should be inclined to hold, even assuming that the word "alter" refers to locality as well as to structure, that it was incumbent on the Municipality to give directions as to what kind of alteration should be effected; because the words "in accordance with directions contained in such notice" seem to me to lay it upon the Municipal Council to decide upon the exact nature of the alteration necessitated by the case. The lower Courts have made a point that the notice in this respect is ineffective. It merely requires that the latrine should be removed from its existing place and be constructed in another place leaving to the owner to decide at his own peril whether that other place was or was not equally open to objection and liable to be again condemned by the Municipal Council on a further occasion. But I have further to consider the application of s. 214, sub-s. (2) of which empowers the Municipal Council by notice to require the owner of any land or building to which any latrine belongs to close or demolish it or to alter or repair in such a manner as the Municipal Council may think necessary. It will be seen that the latter part which I have quoted substantially reproduces the provision of s. 207; but the section also enables the Council to direct that the latrine be closed or demolished altogether, and it is an argument difficult to resist that if it possesses such a power it may couple with that power the condition or the permission that a latrine may be erected in some other place. It is sufficient in order to justify the notice issued to the plaintiff that the Municipality should have a statutory power to direct her to close or demolish the latrine and since it has that power I cannot say that it has acted beyond its authority in directing her to remove it to some other place not specified. Although, therefore, I think that the notice can be brought within the terms of s. 214 (2) of the Act, I cannot help thinking that it would have been more considerate on the part of the Municipal authorities to have assisted the plaintiff with advice or directions as to where the re-erection was to be made, before requiring the demolition of the latrine. It is, of course, open to the owner to obtain approval of the Municipal Council before re constructing the latrine elsewhere.

I set aside the decree of the lower Appellate Court and dismiss the suit; but in view of the practical defect which I have adverted to in the action of the Municipal Council I direct that each party bears its own costs throughout.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1160 OF 1924.

January 7, 1927.

Present:—Mr. Justice Iqbal Ahmad.

Kuar SARDAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAN SINGH—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 111 (g)—Landlord and tenant—Denial of landlord's title—Forfeiture of tenancy—Denial, equivocal, effect of.

The denial of a landlord's title by a tenant in order to work a forfeiture under s. 111 of the Transfer of Property Act, must be an unequivocal and unambiguous denial. [p. 647, col. 2.]

Plaintiff instituted a suit in the Small Cause Court to recover rent of a house from the defendant. Defendant pleaded that the house did not belong to the plaintiff and the Court thereupon returned the plaint to the plaintiff. The plaintiff, then, instituted a suit for ejectment of the defendant on the ground that he had denied the plaintiff's title to the house. It was found that the site of the house belonged to the plaintiff and that the house itself belonged to the defendant:

Held, that the plaintiff not being the owner of the house itself there could be no question of the denial of his title by the defendant in the previous suit and that inasmuch as there was no specific denial by the defendant in the previous suit of the title of the

plaintiff to the site of the house, the plaintiff, was not entitled to eject the defendant from the site. [p. 647, col. 2.]

Second appeal from the decree of the Additional Subordinate Judge, Moradabad, dated the 25th April, 1924.

Messrs. *Kashi Narain Malaviya* and *R. K. Malaviya*, for the Appellants.

Mr. *Shabd Saran*, for the Respondent.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit for possession of a house.

It appears that the plaintiffs brought a suit in the Court of Small Causes for rent of the house in dispute against the defendant-respondent, on the allegation that the house in dispute belonged to the plaintiffs, and that the defendant was in occupation of the same as a lessee on behalf of the plaintiffs. This allegation of the plaintiffs was denied by the defendant in the written statement filed in the Court of Small Causes, and the defendant asserted that he was the owner of the house. Thereupon the plaint filed in the Court of Small Causes was returned to the plaintiffs, and the plaintiffs then filed the suit that has given rise to the present appeal.

The plaintiffs' case was that the house in dispute belonged to them and that as the defendant, who was a mere lessee on behalf of the plaintiffs, had denied the plaintiffs' title to the house in dispute in the written statement filed by him in the Court of Small Causes, he was liable to ejectment.

The defendant respondent resisted the suit on the very grounds which he had taken in the written statement filed by him in the Small Cause Court. The trial Court held that though the site of the house belonged to the plaintiffs and the house itself belonged to the defendant, but as the defendant had denied the plaintiffs' title he was liable to ejectment, and accordingly passed a decree for possession of the site in favour of the plaintiffs and allowed the defendant to remove the materials within four months from the date of its decree. The lower Appellate Court has reversed the decree of the trial Court and has dismissed the plaintiffs' suit It has pointed out that on the finding of the trial Court, the house in dispute belonged to the defendant, and as the plaintiffs in the Small Cause Court had claimed not only ground rent but rent for the house itself, the defendant was right in denying the allegation of the plaintiffs and in asserting a proprietary right in himself to the house in dispute. It further pointed out that the defendant never claimed any title to the site in himself, and as such the lease, if any, of the site could not be determined by forfeiture It also held that the suit was barred by cl. (*g*) of s. 111 of the Transfer of Property Act, inasmuch as prior to the instruction of the suit the plaintiffs had not done any act showing their intention to determine the lease. It has been held by this Court in the case of *Prag Narain* v. *Kadir Bakhsh* (1) that "a landlord wishing to take advantage of his tenant's denial of title to determine the lease must do some act showing his intention to do so before he can file a suit for ejectment." But it is argued by the learned Counsel for the appellants that s. 111 (*g*) of the Transfer of Property Act can only apply to leases granted after the passing of the Transfer of Property Act and in support of this contention reliance has been placed by the learned Counsel for the appellants on the case of *Padmanabaya* v. *Ranga* (2).

In my judgment no question of law arises in the present case. On the finding of the trial Court that the house itself did not belong to the plaintiffs—a finding which has not been challenged before me—the defendant was perfectly within his rights to contest the suit of the plaintiffs filed by them in the Small Cause Court for recovery of the house rent on the allegation that they were the owners of the house. The plaintiffs not having any title to the house itself, there can be no question of the denial of their title to the same The defendant has never specifically denied the title of the plaintiffs to the site of the house and as pointed out in the case of *Prag Narain* v. *Kadir Bakhsh* (1) "The denial of his landlord's title by a tenant in order to work a forfeiture under s. 111 (g) of the Transfer of Property Act, 1882, must be an unequivocal and unambiguous denial." There being no such denial in the present case by the defendant of the title of the plaintiffs to the site in dispute there has been no forfeiture of the lease.

For the reasons given above, in my judgment, the decision of the lower Appellate Court is perfectly correct and I dismiss the appeal with costs including in this Court fees on the higher scale.

Z K. *Appeal dismissed.*

(1) 18 Ind. Cas. 728; 35 A. 145; 11 A. L. J. 115.

(2) 6 Ind. Cas. 447; 34 M. 161; 8 M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1129 OF 1923.
September 23, 1926.
Present:—Mr. Justice Wallace and Mr. Justice Madhavan Nair.

R. SIVARAMAKRISHNA IYER—PLAINTIFF—APPELLANT

versus

SIVAKAMI ACHI—DEFENDANT—RESPONDENT.

Trust—Execution of trust deed appointing trustee for fixed period—Revocation of trust by original owner—Subsequent sale to third person—Suit for possession by vendee, dismissal of, on ground of invalidity of revocation—Subsequent suit for recovery of income and accounts, maintainability of.

A person executed a trust deed appointing another as his trustee and empowering him to manage the properties for a fixed period, to collect the income, pay maintenance to named persons and hand over the balance to the original owner. He then revoked the trust and executed a sale-deed to a third person of the lands comprised in the trust deed. A suit by the vendee for possession was dismissed on the ground that the revocation of the trust deed was invalid. In a second suit against the trustee for recovery of the net income from the properties:

Held, (1) that at the date of the sale-deed the vendor had no ownership or saleable interest in the property which was vested in the trustee, the revocation having been held to be invalid; [p. 649, col. 2.]

(2) that the interest of the *cestui que trust* which was only a minor interest could not in law be and was not in fact conveyed under the sale-deed which purported to transfer the absolute property and not any interest therein apart from it; [p. 650, col. 1.]

(3) that the vendee having repudiated the trust deed ought not to be allowed to claim any benefit thereunder. [*ibid.*]

Second appeal against the decree of the District Court of East Tanjore at Negapatam, in A. S. No.247 of 1921 (A. S. No. 65 of 1920 on the file of the Court of the Subordinate Judge, Tanjore and A. S. No. 1061 of 1919 on the file of the District Court of West Tanjore) preferred against that of the Court of the District Munsif, Mayavaram, dated the 16th June, 1919, in O. S. No. 183 of 1915.

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *T. V. Muthukrishna Iyer*, for the Respondents.

JUDGMENT.—Plaintiff is the appellant One Sivaraman Chetty the son of the defendant executed a trust deed appointing the defendant, his mother, as trustee and empowering her to manage his properties for a period of 15 years. Under the provisions of the deed, the defendant was to collect the income from the properties, pay maintenance to persons mentioned in the trust deed and hand over the balance to her son. The deed also provided that at the end of the term mentioned in it the defendant was to place Sivaramanchetty in possession of the properties covered by it. On 14th September, 1909. this trust deed was revoked by Sivaraman Chetty by a registered document and 4 days thereafter properties covered by the deed, about 5 *velis* of land were sold by him to the plaintiff. Original Suit No. 366 of 1909 was instituted by the plaintiff to recover possession of the properties on the strength of the sale-deed executed to him. In that suit the present defendant contended amongst other things that Sivaraman Chetty had no power to revoke the trust and the plaintiff was not entitled to possession of the properties. The District Munsif overruled the contentions of the defendant and gave the plaintiff a decree for possession. This decree was set aside on appeal by the Subordinate Judge who decided that the trust was not capable of revocation. In second appeal the decree of the Subordinate Judge was confirmed. After the decision of the High Court the plaintiff instituted the suit out of which this second appeal arises for a declaration of his right to the properties sold to him under Ex. A after the expiry of the period mentioned in the trust deed and also for the taking of an account according to the terms of the trust deed. To this suit only the trustee was made a party. Amongst the various issues raised in the suit Issues Nos. 1 to 3 related to the validity of the sale-deed under which the plaintiff claims. The 4th issue is to that effect, "whether the plaintiff is entitled by virtue of his sale-deed to claim the net income from the suit properties till the period fixed in the trust deed or to recover possession thereof at the end of that period." After the decision by the High Court that this suit was not barred by *res judicata* by reason of the decision in the prior suit, the District Munsif, heard the case and without taking any oral evidence decided it in favour of the plaintiff mainly on the ground that the sale-deed was admitted by the defendant. Holding that there was no such admission, the Subordinate Judge on appeal directed the District Munsif to decide the Issues Nos. 1 to 3 after taking evidence and to submit his findings. The District Munsif found on an exhaustive examination of the evidence that the sale-deed

was not a *bona fide* transaction and that it was not supported by proper consideration (see para. 41). Accepting the finding the Subordinate Judge set aside the decree of the District Munsif and dismissed the plaintiff's suit. Against this decree the plaintiff has preferred this second appeal.

Mr. Ramachandra Iyer on behalf of the appellant argued that in the circumstances of the case it was not open to the Appellate Court to call for a finding on issues of undue influence and consideration as regards the sale-deed and that, therefore, the appellate decree should be set aside. It appeared to us even if we accept Mr. Ramachandra Iyer's view regarding the decision by the Appellate Court on issues Nos. 1 to 3, still, the plaintiff's suit will have to be dismissed, if the defendant's plea raised in the 4th issue is found in her favour. The 4th issue as already pointed out raised the question whether the plaintiff is entitled by virtue of his sale-deed to claim the net income from the suit properties till the period fixed in the trust deed or recover possession thereof at the end of that period. In passing it may be pointed out that the plaintiff confines his relief in his second appeal to get the income from the properties till the period fixed in the trust deed is over. When the suit was instituted, the 15 years' period provided for in the deed has not run and neither Sivaraman Chetty nor his reversioners had been made parties to the suit. Sivaraman Chetty is now dead. The question as regards the possession of the properties at the end of the 15 years, namely, the latter part of Issue No. 4, cannot, therefore, now be decided. The first part of the issue is mainly a question of law. The respondent in her memorandum of appeal to the lower Court had pointed out that the District Munsif had erred in law in not deciding this issue in her favour. In the view that the Subordinate Judge took of the case as regards the Issues Nos. 1 to 3 he also did not consider it necessary to decide the 4th issue. We came to the conclusion that arguments should be heard on this issue before considering the Subordinate Judge's judgment on the other issues; for, as already observed if the defendant succeeds on the question raised in this issue the plaintiff's suit will have to be dismissed, irrespective of other considerations. This course was accepted by the learned Vakils appearing for the plaintiff as well as the defendant.

The appellant's claim in this second appeal is a very simple one. His right to recover possession of the properties under his sale-deed based on the revocation of the trust deed by Sivaraman Chetty having been found against he says now that he is entitled to get at least the income reserved in the trust deed in favour of his vendor, the vendor being entitled to deal with it as he liked. The trust deed, no doubt, states that the surplus funds after meeting all payments mentioned in it shall be paid to vendor of the plaintiff Whether the plaintiff would be entitled to get this or not would depend mainly upon the construction of the document Ex. A and the intention of the parties that can be gathered from it and the surrounding circumstances. Exhibit A begins by saying that "it is an absolute sale deed of *nanja* and *punja* lands described later. It is stated that the specified properties have this day been absolutely sold unto you for Rs. 10,000, being the price money settled by mutual consent." After describing the details of consideration the document runs as follows: "As thus I have in all received Rs. 10,000 as per the aforesaid particulars, and I have left it to you all the rights, interests and enjoyments belonging to me in the said properties, with all absolute rights derivable under an absolute sale, you shall, therefore, hold and enjoy the said properties with all the absolute rights derivable under an absolute sale, those of alienating the same by means of gift, sale or otherwise, and as long as the sun and the moon exist." It appears to us that the initial difficulty in the way of the appellant is that at the date of the sale his vendor had no ownership in the property at all because it was vested in the trustee by the deed. Under the law the trustee is the absolute legal owner of the property; the revocation of the trust being found to be invalid Sivaraman Chetty had no saleable right on the property covered by the deed. Mr. Ramachandra Iyer's argument that notwithstanding the trust deed some ownership still remained with the plaintiff's vendor and he could convey the interest assumes that the trust deed is only a power-of-attorney for managing the properties but this assumption is unwarranted in view of the High Court decision in

the prior suit. That being so and there being no specific transfer of interest in immoveable property it is argued by the learned Vakil for the respondent that the interest of the *cestui que trust* which is only a minor interest cannot be conveyed under Ex. A. Assuming it can be transferred, it is clear that the document does not convey the interest of the *cestui que trust*. It is equally clear that it was not at all the intention of the plaintiff's vendor to convey any such interest. This is evident from Ex. A itself. A bare perusal of the deed is enough to show that what was intended to be conveyed was the *absolute property* in the lands and nothing else. The deed is called an absolute sale and it purports to convey all the rights, interest and enjoyment belonging to the vendor on the said properties. It is, therefore, clear that the vendor did not intend at the time when he executed the sale-deed that if it failed to take any effect the vendee should get something else in its place. What the appellant claims is a benefit under the trust. It appears to us that it is not open to him now to say that he should be allowed to receive this benefit under the trust when he himself has repudiated the trust deed. It will be possession of the property based on the assumption that the trust deed is not binding on his vendor and that it had been revoked by him. How can the plaintiff then claim any benefit under a document which he had repudiated?

For these reasons we are of opinion that the appellant is not entitled by virtue of the sale-deed to claim the net income from the suit properties till the period fixed in the trust deed. In this view, the other questions raised in the second appeal need not be considered and we dismiss the second appeal with costs.

We do not say anything here about the appellant's right to recover the suit properties after the 15 years as that period though now over, had not run at when the suit was first instituted and persons whose presence would be necessary for the decision of the question have not been made parties to this suit.

V. N. V. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1252 OF 1924.

January 26, 1927.

Present:—Mr. Justice Iqbal Ahmad.

MEWA RAM—PLAINTIFF—APPELLANT

versus

LAL SAHAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Co-owners—Adverse possession—Mere non-participation in cultivation, effect of—Agra Tenancy Act (II of 1901), s. 22—Succession to tenancy—'Male lineal descendant', whether includes illegitimate son of jat—Jats, *whether* Sudras—*Practice—Omission to raise clear issue—Parties not prejudiced—Procedure.*

In the absence of an ouster coupled with a denial of title the mere non-participation of a co-owner in the cultivation of the joint holding does not enable the other co-owners to prescribe a title by adverse possession for 12 years. [p. 651, cols. 1 & 2.]

Jats are *Sudras*. [p. 651, col. 2.]

An illegitimate son of one belonging to a *Sudra* caste by a kept woman is entitled to succeed to the holding of his father as a 'male lineal descendant' within the meaning of s. 22 of the Agra Tenancy Act. [*ibid.*]

The omission of a clear issue on a point is not very material when the parties have adduced evidence on the point and have not in any way been prejudiced thereby. [p. 651, col. 1.]

Second appeal from the decree of the Third Subordinate Judge, Moradabad, dated the 7th of July, 1924.

Messrs. *Shabd Saran* and *Benod Behari Lal*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.- This is a plaintiff's appeal and arises out of a suit for a declaration that he and defendant No. 1 are the sons of Kundan, and as such entitled in equal shares to the holding in dispute that belonged to Kundan, and in the alternative for recovery of joint possession of the same along with defendant No. 2.

The plaintiff's case was that the holding in dispute belonged to Kundan and that he, as one of the sons of Kundan, was entitled to a half share in the holding in dispute, but defendant No. 1 had got the holding in dispute entered in the revenue papers in the name of son-in-law, defendant No. 2, without the plaintiff's consent.

The defence to the suit was that the plaintiff was not the son of Kundan, and that the holding in dispute was acquired by defendant No. 1 and not by Kundan and as such the plaintiff in no case was entitled to the reliefs prayed for by him. It was also contended by the defendants that the suit was time-barred.

The trial Court held that the plaintiff was the son of Kundan and that the suit was not time-barred. It further held that

only some of the plots claimed by the plaintiff belonged to Kundan and passed a decree with respect to the same in the plaintiff's favour.

On appeal by the defendants the lower Appellate Court has modified the decree of the trial Court and has dismissed the plaintiff's claim in full. The lower Appellate Court has held that the plaintiff "is not the son lawfully born of Kundan" and that the *karao* marriage alleged to have taken place between the plaintiff's mother and Kundan was not proved. It has further held that the plaintiff and the defendants "have never been joint in family or cultivation" and as such the suit was time-barred.

It is abundantly clear from the perusal of the written statement that the assertion of the defendants was that the plaintiff was not the son of Kundan. It was never the defendants' case that the plaintiff, though born of Kundan, was illegitimate, because the plaintiff's mother was not married to Kundan. That accounts for the fact that no clear issue on the question of a *karao* marriage between the plaintiff's mother and Kundan was framed by the trial Court. In the absence of a clear issue on that point, I would have been prepared, in view of the case of *Balkaran Singh* v. *Dulari Bibi* (1), to remit an issue to the lower Appellate Court for a finding thereon, after giving the parties an opportunity to adduce further evidence as to whether or not the plaintiff's mother was married in *karao* form to Kundan. But I have refrained from adopting that course, as on the perusal of the record, I find that the plaintiff did adduce evidence on that point. It is thus clear that, by the omission of a clear issue on the point, the plaintiff has not been prejudiced in any way. The finding as to the legitimacy of the plaintiff is a finding of fact and I must accept it in second appeal.

But I cannot accept the finding of the lower Appellate Court that the present suit was time-barred. If the plaintiff was a co-owner with the defendants in the holding in dispute, the mere fact of the non-participation of the plaintiff in the cultivation of the holding could not enable the defendants to prescribe a title by adverse possession for more than 12 years, unless it was proved that there was an ouster of the plaintiff coupled with the denial of the plaintiff's title to the holding in dispute. This fact has not been proved in the present case. As such, I am unable to accept the finding of the lower Appellate Court on this point.

It appears to me that, notwithstanding the fact that the plaintiff is the illegitimate son of Kundan, the plaintiff is entitled to a decree for joint possession of such plots as belonged to Kundan. The parties to the suit are *Jats* and it has been held in *Bhagwani* v. *Khushi Ram* (2) that *Jats* are *Sudras*. An illegitimate son of one belonging to a *Sudra* caste by a kept woman is entitled to succeed to the holding of his father as a "male lineal descendant" within the meaning of s. 22 of the Agra Tenancy Act, 1901, *vide Ram Kali* v. *Jamma* (3). It has not been argued before me that the plaintiff is not even an illegitimate son of Kundan.

The lower Appellate Court has not recorded any finding on the point as to which of the plots in dispute belonged to Kundan. Before finally deciding this appeal, I must have a finding from the lower Appellate Court on the following point :—

Which of the plots in dispute constituted the holding of Kundan?

No further evidence will be allowed. On receipt of the finding, the usual ten days will be allowed for filing objections.

A. N. A. *Order accordingly.*

(1) 97 Ind. Cas. 292; 24 A. L. J. 920.

(2) 24 Ind. Cas. 982

(3) 30 A. 508; A. W. N. (1908) 229; 5 A. L. J. 629.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 396 OF 1926.

January 17, 1927.

Present:—Mr. Justice Raza.

Pandit SHEO DUTT—PLAINTIFF—APPELLANT

versus

GANGA CHARAN—DEFENDANT—RESPONDENT.

Transfer of Property (Amendment) Act (XXVII of 1926)—Act not retrospective.

Transfer of Property (Amendment) Act XXVII of 1926 is not retrospective in its nature so as to apply to documents executed prior to its coming into force. [p. 652, col. 1.]

Girja Nandan v. *Hanuman Das* (1), followed.

Second appeal against the decree and order of the Additional Subordinate Judge, Unao, dated the 14th August, 1926, passed

in Appeal No. 60 of 1926, reversing the decision of the Munsif, Safipur, dated the 16th January, 1926.

Mr. *Ram Bharose Lal*, for the Appellant.

Mr. *Putto Lal*, for the Respondent.

JUDGMENT.—This is an appeal from a decree of the Additional Subordinate Judge, Unao, dated the 14th August, 1926, setting aside a decree of the Munsif, Safipur at Unao, dated the 16th January, 1926.

The dispute in this case relates to a 7/10ths share in two houses numbered 2185 and 1214 in Safipur. I think this appeal is concluded by findings of fact. The plaintiff bases his claim on a deed of gift alleged to have been executed by Darshan and certain other persons. The learned Additional Subordinate Judge has found that the deed is not duly proved. I have gone through the evidence on record on that point. I am not prepared to disagree with the finding of the learned Additional Subordinate Judge. It is not satisfactorily proved that the marginal witnesses had signed their names after seeing the actual execution of the deed. None of the executants has been examined and due attestation of the deed is not also proved. The deed in question must, therefore, be rejected.

The appellant's learned Counsel has drawn my attention to the Transfer of Property (Amendment) Act (XXVII of 1926), but that Act is not retrospective in its nature so as to apply to documents executed prior to its coming into force [see the Full Bench decision of the Allahabad High Court in the case of *Girja Nandan* v. *Hanuman Das* (1)].

When the plaintiff's title-deed is not duly proved his claim must be rejected. I should like to note that the plaintiff's possessory title is not also made out as held by the lower Appellate Court. We may leave the question of adverse possession out of consideration, but it has been found at least that the plaintiff has not been in possession of the property in suit within limitation.

The result is that the appeal fails and must be dismissed. I dismiss the appeal with costs. The decree of the lower Appellate Court is confirmed in all respects

G. H. *Appeal dismissed.*

(1) 99 Ind. Cas. 161; 24 A. L. J. 921; A. I. R. 1927 All. 1.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEALS NOS. 124 AND 125 OF 1923.

January 7, 1927.

Present:—Mr. Justice Lindsay and Mr. Justice Sulaiman.

ABDUL KARIM AND OTHERS—DEFENDANTS—APPELLANTS

versus

GAURI SHANKAR AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Construction*—'Intiqal', *meaning of*—*Perpetual lease, whether can be pre-empted.*

The word '*intiqal*' used with reference to the custom of pre-emption in a *wajib-ul-arz*, is a word of wide import and includes a transfer by way of perpetual lease. [p. 653 col. 1.]

Lalji Misir v. *Jaggu Tiwari* (1) followed.

First appeals from the decrees of the Subordinate Judge, Ghazipur, dated the 22nd December, 1922.

Mr. *Mukhtar Ahmad*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—Both these appeals arise out of two pre-emption suits. The defendants-appellants in both appeals are Abdul Karim and others. They were impleaded in both suits for pre-emption on the ground that they were the perpetual lessees of 33 *bighas* of *sir* land included in a four-anna share which was sold to the vendees under a deed of sale executed by Raja Madho Lal on the 21st of December, 1921.

The perpetual lease in favour of these appellants was executed by Raja Madho Lal on the 4th of October, 1921. The lease was granted in consideration of a premium of Rs. 1,000. The document of lease reserved an annual rent of Rs. 100 per annum.

The pre-emptors came into Court alleging that the two transactions, dated the 4th of October, 1921, and the 21st of December, 1921, were in fact part and parcel of one transaction of sale, and they sought pre-emption on that footing. The Subordinate Judge who tried the suits was apparently in some doubt as to whether it could properly be held that the two transactions by way of lease and sale amounted in fact to a transfer by way of sale which was split up into two transactions in order to avoid a claim for pre-emption. He found, however, that in any case under the custom of pre-emption, as recorded in the village, the plaintiffs could pre-empt the lease. The language of the *wajib-ul-arz* shows that the

custom of pre-emption in this village can be exercised in cases of all transfers (*intiqal*) of property. We think on the terms of the *wajib-ul-arz* this decision of the Subordinate Judge cannot be questioned. The word '*intiqal*' as has been held by this Court, is a word of wide import and would certainly include a transfer by way of perpetual lease. [*Lalji Misir* v. *Jaggu Tiwari* (1)]. In our opinion, the defendants-appellants cannot be heard to maintain that under the custom of pre-emption prevalent in this village their perpetual lease was not liable to pre-emption. We dismiss the appeals with costs.

A. N. A *Appeals dismissed.*

(1) 7 Ind. Cas. 930; 7 A. L. J. 1022; 33 A. 104.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 86 OF 1925.

January 26, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Broadway.

NATHU MAL—DECREE-HOLDER—APPELLANT

versus

MOHAN SINGH AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Decree—Preliminary decree directing sale of property, whether executable—Execution proceedings—Appeal from final order—Right to challenge interlocutory orders not appealed against.

An appeal need not be preferred against every order in execution proceedings; it is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of an interlocutory order made in the course of the proceedings. [p. 654, col. 2.]

Chandanbala Debi v. *Probodh Chandra Ray* (1), followed.

A decree which contains a clear direction that the judgment-debtors are to pay the sum mentioned therein and that in default of payment by them, the money is recoverable by attachment and sale of certain property is not a mere preliminary decree but is a decree capable of execution. [p. 654, cols. 1 & 2.]

Letters Patent Appeal against the judgment of Mr. Justice Harrison, passed in Civil Appeal No. 1190 of 1924, on the 12th January, 1925, reported in 92 Ind. Cas. 299, reversing that of the District Judge, Amritsar, dated the 24th January, 1924, (which reversed that of the Sub-Judge, First Class, Amritsar, dated the 26th July, 1922.

Mr. *Jagan Nath Aggarwal*, for the Appellant.

Mr. *J. G. Sethi*, for the Respondents.

JUDGMENT.

Broadway, J.—On the 6th June, 1916, one Nathu Mal instituted a suit against Sohan Singh and Mohan Singh asking for a decree for a certain sum of money to be realised from certain specified property and from other property belonging to the judgment-debtors if the specified property proved insufficient. On the 27th June, 1916, a decree was passed in plaintiff's favour for Rs. 1,898-8-6 and interest payable by the judgment-debtors and in default of such payment the specified property was to be sold, and, if that proved insufficient, making the amount recoverable from other property of the judgment-debtors.

On the 4th January, 1917, the decree-holder applied for execution of his decree by the attachment and sale of certain property specified in the application. Notice was issued to the judgment-debtors calling upon them to appear in Court on the 31st January, 1917, to "settle the terms of the sale." The judgment-debtors failed to appear on the date fixed and the sale was ordered to be held by the 13th March, 1917. On that date proceedings were stayed as the judgment-debtors had obtained an order to that effect from another Court.

On the 29th October, 1919, the decree-holder again applied for execution but this application was dismissed in default. A third application was filed on the 10th March, 1920, which met with the same fate on the 23rd April, 1921.

After this, on the 4th July, 1921, the decree-holder again applied for execution of his decree by sale of the property. These proceedings continued to the 12th April, 1922, when the executing Court held that the decree was a preliminary one and, therefore, not capable of execution.

On the 1st May, 1922, the decree-holder filed an application in the Court asking that the decree be made final and, at the same time, strenuously urged that, strictly speaking, the decree was final already and, therefore, capable of execution. The executing Court issued notice and finally held that the application to make the decree final was barred by limitation. Against this order the decree-holder preferred an appeal to the District Court. In this appeal he again urged that the decree of which he was seeking execution was a final one already and as such capable of execution. At the same time he also urged that his

application to have it made final should be treated as within time. The learned District Judge held that although the decree sought to be executed was not in the form for a preliminary decree prescribed in Appendix (D) to the First Schedule of the Civil Procedure Code, he thought it was intended to be preliminary, and that, in the circumstances, time should be extended under s. 14 of the Limitation Act. He accordingly directed that the decree-holder should be given a final decree in the proper form. Against this order the judgment-debtors preferred a second appeal to this Court and it was held by the learned Judge in Chambers that the decree in question was intended to be preliminary and was preliminary and that time could not be extended under s. 14 of the Limitation Act. He accordingly accepted the appeal and restored the order of the first Court. Against this decision the decree-holder has preferred this appeal under s. 10 of the Letters Patent through Mr. Jagan Nath Aggarwal who has contended, firstly, that the decree in question was a final one and capable of execution; secondly, that having regard to the fact that the decree-holder has asked for the sale of the property in his application of the 4th January, 1917, and notice had been issued to the judgment-debtors calling upon them to attend the Court to settle the terms of the sale, it should be held that the intention of the decree-holder was that the Court should, if necessary, make the decree a final one before directing a sale of the property. Finally, it was urged that inasmuch as the judgment-debtors had notice of the application for sale made on the 4th January, 1917, and failed to appear they were now precluded from alleging that the decree was not capable of execution.

Mr. Sethi on behalf of the respondents urged that the view taken by the learned Judge in Chambers was correct, that the points now raised were not raised before the learned Judge in Chambers and could not, therefore, be brought before this Court and that the only question was whether the application to make the decree final was within time, a question on which there could be no two opinions. After an examination of the decree sought to be executed and a reference to Form 4 in Appendix (D) to the First Schedule of the Civil Procedure Code, I am of opinion that the decree is certainly capable of execution for it contains a clear direction that the judgment-debtors were to pay the sum mentioned therein and that in default of payment by them the money was recoverable by attachment and sale of certain property. It is perfectly clear that throughout the proceedings the position taken up by the decree-holder has been that this was the correct interpretation to be placed on the decree. No doubt it was possible for him to have preferred an appeal against the order of the Execution Court dated the 12th of April, 1922. Instead of doing this, however, he complied with the order passed by that Court and on the 1st May, 1922, asked that the decree be made final. At the same time in the same application he clearly reiterated the fact that the decree was already capable of execution. In *Chandanbala Debi* v. *Probodh Chandra Ray* (1) it was held by a Division Bench of the Calcutta High Court that an appeal need not be preferred against every order in execution proceedings and that it was open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings.

In the present case, as in *Chandanbala Debi* v. *Probodh Chandra Ray* (1) when an appeal was preferred against the final order, the previous interlocutory order was specifically attacked as being bad. The decree-holder has throughout challenged the correctness of the order passed on the 12th April, 1922, and having regard to the authority cited above, in my opinion, it was open to him to challenge the said order in the manner that he has done. In my judgment the decree being capable of execution this appeal should be accepted and execution proceeded with. The appellant is entitled to his costs.

In view of my conclusion I do not think it necessary to discuss the other points raised.

Shadl Lal, C. J.—I concur.

R. L.

A. N. A. *Appeal accepted.*

(1) 2 Ind. Cas. 338; 36 C. 422; 9 C. L. J. 251.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 165 OF 1926.
January 14, 1927.
Present :—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.
Musammat GAURA—DEFENDANT—APPELLANT
versus
RAM CHARAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 74—Bond payable by instalments—Limitation.

A bond provided that the money due under it would be payable within 18 years by 18 annual instalments. The creditor, on the expiry of the period, brought a suit to recover the entire sum due:

Held, that the plaintiff would be entitled to recover the last three instalments only under Art. 74 of the Limitation Act as the claim in respect of the other instalments was barred by time.

Pherai v. *Pudai Ram* (1), followed.

Appeal against the decree of the Subordinate Judge, Hardoi, dated the 25th of January, 1926, affirming that of the Munsif, Hardoi, dated the 18th September, 1925.

Mr. *Naim Ullah* for Mr. *Hyder Husein*, for the Appellant.

Mr. *Hakim-ud-din*, for the Respondent.

JUDGMENT.—This is a defendant's appeal from the decree of the Subordinate Judge of Hardoi, dated the 25th of January, 1926, affirming the decree of the Munsif of the same place dated the 18th of September, 1925. The appeal arises out of a suit for recovery of Rs. 566 odd on the basis of a bond dated the 22nd of September, 1905. It was executed by the deceased husband of the defendant-appellant in favour of the plaintiff. The principal sum borrowed thereunder was Rs. 99 and it was agreed that it would be paid back within a period of 18 years. The entire principal amount was divided into 18 instalments, each instalment to be payable annually and interest at the rate of Rs. 2 per cent. per mensem was also provided for. The claim has been decreed by the Courts below in its entirety. The sole point in second appeal is as to whether any portion of it is or is not barrred by the rule of limitation.

On the construction of the bond we are clearly of opinion that it is a bond payable by instalments and the proper Article applicable to it is Art. 74 of the First Schedule to the Indian Limitation Act, 1908. Under that Article the plaintiff-respondent would be entitled to recover last three instalments with interest thereon at the stipulated rate. It was, however, argued on behalf of the respondent that the Article applicable to the case was Art. 75 and that under the bond in question the creditor had an option to waive the right to sue as each successive default in payment of the annual instalment was made and was given the right to sue for the whole amount at the expiry of the entire period of 18 years. We are unable to accept this argument. We think that the decision in *Pherai* v. *Pudai Ram* (1), decided by a Bench of the late Court of the Judicial Commissioner, is correct and is applicable to the facts of this case. Before we take leave of this case we may mention that their Lordships of the Judicial Committee in the case of *Pancham* v. *Ansar Husain* (2) seem to have thrown some doubt on the point of view which was taken in the Oudh decision mentioned above, but they distinctly say in the judgment that they do not decide the point. We, therefore, think that the decision in the Oudh case should be followed so long as it is not expressly overruled by their Lordships of the Judicial Committee. We accordingly allow this appeal and modify the decree of the Courts below by giving the plaintiff a decree for a sum of Rs. 16-8-0 and interest thereon at the rate of Rs. 2 per cent. per mensem for three years up to the date of the suit and the plaintiff will further be entitled to interest at the rate of 6 per cent. per annum till the date of realization. The parties will pay and receive costs according to their success and failure in all Courts.

G. H. *Appeal allowed.*

(1) 85 Ind. Cas. 280; 27 O. C. 318; 10 O. & A. L. R. 1087; 1 O. W. N. 647; A. I. R. 1925 Oudh 502.

(2) 99 Ind. Cas. 650; 53 I. A. 187; A. I. R. 1926 P. C. 85; 24 A. L. J. 736; (1926) M. W. N. 520; 24 L. W. 241; 48 A. 457; 31 C. W. N. 324 (P. C.).

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 42 OF 1925.
December 6, 1926.
Present:—Mr. Justice Krishnan and Mr. Justice Odgers.
P. M. A. M. VELLAIYAPPA CHETTY AND OTHERS—DEFENDANTS—APPELLANTS
versus
NATARAJAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Illegitimate sons and daughters of deceased member of family—Right to

claim maintenance—Nattukottai Chetties, whether Sudras.

Under the Hindu Law the illegitimate son of a permanently kept concubine of a deceased *Sudra* is entitled to maintenance from the co-parcenary property of the family of which his father was a member. [p. 669, col. 2.]

The illegitimate daughter, however, has no such right of maintenance. No Hindu Law text makes any provision for her and she cannot be regarded as a member of the joint family of the father. [p. 659, col. 1.]

[Case-law reviewed.]

Nattukottai Chetties are *Sudras.*

Appeal from the judgment and decree of Mr. Justice Kumaraswami Sastri, dated the 16th January, 1925, in Original Civil Suit No. 615 of 1919 and reported as 95 Ind. Cas. 972

Messrs. *A. Krishnaswamy Ayyar* and *S. Rangaswamy Ayyangar*, for the Appellants.

Mr. *K. S. Krishnaswami Iyengar* (with him Mr. *A. E. Rencontre*), for the Respondents.

JUDGMENT.

Krishnan, J.—This is an appeal in a suit by certain minor plaintiffs-represented by their mother Chinnammal as their next friend for maintenance against the 1st defendant in the first instance. The learned Judge on the Original Side has given a decree to the plaintiffs at the rate of Rs. 100 a month for each of the two boys, the first two plaintiffs, for their lifetime and Rs. 50 a month to the girl, the 3rd plaintiff, till she attains the age of 18. The appeal is against this decree by defendants Nos. 2 to 5.

The plaintiffs' case is that they are the sons of the 1st defendant by their mother Chinnammal who was a continuously and exclusively kept concubine of the 1st defendant, Muthiah Chetty, and that as *Sudras* they are entitled to at least a right of maintenance against their putative father. Muthiah Chetty died after filing the written statement in which he denied that these plaintiffs were his children. He also denied that Chinnammal was a continuously and exclusively kept concubine of his, though he admitted that he used to visit her occasionally as a dancing girl, Chinnammal being a member of the dancing girl caste. Defendants Nos. 2 to 5 were brought on record as his legal representatives, they being the co-parceners in the joint family to which Muthiah Chetty belonged. The real question now is, whether the plaintiffs can claim any maintenance against the joint family property in the hands of the defendants assuming that they were the sons of Muthiah Chetty.

The issues framed in the case are set out in the 5th page of the printed book, Part 1, and are as follows:—

(1) Was Chinnammal kept continuously and exclusively by the defendant as concubine?

(2) Are the plaintiffs the children of the defendant by such continuous concubinage?

(3) Is the defendant bound to pay any maintenance to the plaintiffs and is the said maintenance a charge on the family property as alleged in the plaint?

(4) Is the defendant a *Vysia*, and if so, are plaintiffs entitled to maintenance beyond the period of their majority?

(5) What maintenance, if any, are the plaintiffs entitled to?

No alteration was made in the form of these issues on account of the defendants Nos. 2 to 5 coming on record.

Now, the main question of fact tried in the case is the first issue On that the learned trial Judge after taking the evidence and discussing it very fully in his judgment has come to a decided conclusion that Chinnammal was kept continuously and exclusively by the 1st defendant as his concubine from 1904 or 1905 to about 1919. The learned Judge has set out the circumstances at length and it seems hardly necessary, therefore, to do so once again in appeal in detail.

[His Lordships then considered the evidence and proceeded:—]

I have no doubt on a consideration of the whole evidence in this case that the plaintiffs' version that Chinnammal was a continuously and exclusively kept concubine of the 1st defendant Muthiah Chetty, is true and would, therefore, confirm the finding of the learned Judge on that point.

On this finding the question that arises for decision is what relief, if any, can be given to the plaintiffs in this case. So far as the two boys are concerned, namely, the first two plaintiffs there does not seem to be much difficulty in the law that has to be applied. In the Mitakshara there is an express text which deals with illegitimate children of *Sudras.* That Nattukottai Chetties are *Sudras* has been settled by authority. In s. 12, Ch. 1, there is a text which says, "Even a son begotten by a *Sudra* on a female slave may take a share by the father's choice. But if the father be dead, the brethern should make him

partaker of the moiety of a share, and one, who has no brothers, may inherit the whole property, in default of daughter's sons." (See Setlur's translation of law books on Inheritance, page 35).

As a commentary on this it is stated that "the son begotten by a man of a regenerate class or a female slave does not obtain a share even by the father's choice, nor the whole estate after his death. But if he be docile, he receives only maintenance."

This is the text upon which the right of the illegitimate children among *Sudras* has been based. The present case is not one in which any share can be asked for and it is, therefore, that maintenance only is asked for by the two boys. The text does not expressly deal with maintenance of *Sudras*. It is true, but the authorities are quite clear that where the illegitimate son cannot ask for a share he is entitled to get maintenance from his putative father's joint family estate even in the hands of his co-parceners.

It has now been settled that the children to get a share need not be the children of a *dasi* strictly speaking, but may be of any concubine provided that the concubine is a continuously and exclusively kept concubine and the children are not born in either adulterous or incestuous connection. The fact that the woman kept is a *dasi* or slave, or a dancing girl is immaterial. The children would take the right of illegitimate children under the text, that is, where they claim a share in the property of their father, but where they merely claim maintenance even this does not seem necessary. It is sufficient to show that they are the children of their putative father. It is recognised by a Bench of this Court in *Subramanya Mudali* v. *Velu* (1) that where the illegitimate son of an unmarried woman is claiming maintenance only out of the estate of his putative father it did not matter whether he was the result of adulterous intercourse or not. In the present case it is not necessary to go so far, for we have here evidence that Chinnammal was a continuously kept concubine of Muthiah Chetty. As pointed out by Sir John Wallis, C. J., in the Full Bench ruling in *Soundararajam* v. *Arunachalam Chetty* (2) "The limitation as to her being an exclusive and continuous concubine is not to be found in the texts and appears to have been imposed by the Courts as necessary to secure due evidence of the paternity, just as the further restriction that the connection must not have been incestuous or adulterous was imposed on general grounds of morality." As I have already stated we have here clear evidence to show that the children were born to Chinnammal who was kept in exclusive and continuous concubinage by Muthiah Chetty and there can be no doubt whatever about the paternity and the rights of the boys under the text of Mitakshara already cited. In *Ananthaya* v. *Vishnu* (3) it was held that under the Mitakshara Law an illegitimate son is entitled to maintenance as long as he lives in recognition of his status as a member of his father's family and the question is not one of giving maintenance during the minority of the illegitimate son or anything of that sort, but the giving of maintenance is really in lieu of his rights in his father's estate. The case in *Ananthaya* v. *Vishnu* (3) is a case of the regenerate class and the commentary on the text in the Mitakshara expressly applies to it nevertheless the further question as to what is the period for which the maintenance should be given is the same whether it is a case of the regenerate class or of a *Sudra* son. In the case of a *Sudra* son, the position seems to be that, because he could not be given a share that the text allows him to get in certain circumstances, he is given in lieu thereof a right to maintenance against his father's estate, very much in the same manner as a widow gets a right to maintenance against her husband's estate when he dies undivided from his co-parceners. There again the maintenance is given not for any particular period but for the whole lifetime. It has been conceded by Mr. Alladi Krishansami Ayyar that the authorities have invariably laid down that the illegitimate son of a *Sudra* is entitled to maintenance if he is not entitled to get a share in his father's property and that it is too late for him now to argue that no maintenance could be given; but he tried to argue that the maintenance could not be enforced against the joint family property in the hands of the father's co-parceners. It seems to me that this argument is untenable; the maintenance

(1) 5 Ind. Cas. 919; 34 M. 68; 7 M. L. T. 161; (1910) M. W. N. 138; 20 M. L. J. 350.

(2) 33 Ind. Cas. 858; 39 M. 136 at p. 151; 29 M. L. J. 793; 2 L. W. 1247; 18 M. L. T. 552; (1916) 1 M. W. N. 31.

(3) 17 M. 160; 6 Ind. Dec. (N. S. 110.

will be a charge upon that estate for so long as the illegitimate children are alive. The whole law on the subject has been considered rather fully in the Full Bench decision, *Subramania Iyer* v. *Rathnavelu Chetty* (4). There again it is recognised that the illegitimate sons have a right to get maintenance if they do not get their share. In these circumstances it seems to me that the decree so far as it gives maintenance to the sons for their life is correct.

As to the question of the claim for maintenance by the illegitimate daughter, the 3rd plaintiff, it seems to me that there is some difficulty in the matter. The learned trial Judge has given her also maintenance on the ground, so far as I can make out, that she is a member of the joint family. The learned Judge says that the father being bound to maintain his illegitimate daughter, the co-parceners who take his property by survivorship are equally bound to do so. It seems to me that there is no legal basis in Hindu Law for the view that the father is bound to maintain his illegitimate daughter; he is under no more than a personal obligation to do so under the Criminal Procedure Code. An illegitimate daughter gets no kind of right against her father's property so far as I can make out. There is no text in her favour, the Mitakshara being expressly confined to sons. The learned Advocate for the respondent tried to put it on the ground that joint family property is burdened with the liability to maintain all the members of the joint family and consequently that an illegitimate daughter being a member of the joint family the liability is on the joint family property to maintain her. The very fact that the learned Judge has found it necessary to restrict the maintenance up to the age of 18 indicates that, whatever her right of maintenance may be, it is very different from those of the sons. It seems to me that, whether the child is legitimate or illegitimate, it has got a personal right of maintenance against its father only during its minority when it is unable to look after itself and that the right under the Hindu Law to get maintenance out of the father's estate in lieu of a share in it is a different right. It is not possible to postulate that the illegitimate daughter of a person is a member of the joint family to which he belongs. In fact it cannot be said even as regards illegitimate sons that they are members of a joint family, for no rights exist between the illegitimate sons and the collaterals or co-parceners of the father in the joint family. They cannot be treated as relations of one another and they are not entitled to share and cannot ask for a partition against the co parceners, and except for the bare right of maintenance charged on the joint family property of their father the illegitimate sons have no right against the other co-parceners. The cases cited to us have all been cases of illegitimate sons and not of illegitimate daughters except one or two cases which I shall refer to presently. One is the case in *Parvati* v. *Ganpatrao Balal* (5) where Sargent, C. J., says :—" Unless, therefore, the expression '*dasiputra*' can be held to include 'daughter' there is no authority for a daughter having a claim to maintenance. It was said that a 'son' is to be construed as including a daughter, as 'brethren' was interpreted as including 'sisters' by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak Anandrav* v. *Lakshmibai* (6), which was decided upon the authority of the Mayukha. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and, as the right to maintenance is laid down in terms in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters is, we think, that they were not contemplated as having the same right."

If it was contemplated by the text in the Mitakshara that besides the illegitimate sons, illegitimate daughters also should get some right of maintenance, such right would certainly have been extended by the commentator to regenerate classes as well. But it does not seem that, under the text, any right passes to the daughter for maintenance. This view of the Bombay High Court was supported and followed again in *Bhikya Sakharam* v. *Babu Vedu* (7) where it was held that an illegitimate daughter could not succeed to her father's property in preference to the son of a

(4) 42 Ind. Cas. 556; 41 M. 44; 22 M. L. T. 94; 6 L. W. 149; 33 M. L. J. 224; (1917) M. W. N. 688 (F. B.).

(5) 18 B. 177; 9 Ind. Dec. (N. S.) 626.

(6) 1 B. H. C. R. 117 at p. 123.

(7) 32 B. 562; 10 Bom. L. R. 736.

divided brother among *Sudras*. The learned Judges declined to construe the word 'son' occurring in the text so as to include daughters. With all respect, it seems to me that this is the correct view. They even held that the illegitimate daughter had no right of succession at all. It would follow from this that she has no right of maintenance either which is something given in lieu of the right of succession.

The learned Advocate for the respondent tried to put the claim of the illegitimate daughter to maintenance on the ground that she was a member of the family as stated already. It seems to me impossible to support that view. No authority has been cited in support of it, nor indeed for the position that he is taking up that the illegitimate daughter has got any right to maintenance at all. I have, therefore, come to the conclusion, though with considerable reluctance, that the 3rd plaintiff cannot be given any right to maintenance, she being only an illegitimate daughter of Muthiah Chetty. Before concluding this case I may mention that though an issue was raised as to whether Nattukottai Chetties were *Vysias* or not, it has been conceded that they are *Sudras*. The matter has been settled by authority in this Court.

The last question that has been argued is as to the amount of maintenance which has been granted to the sons. It is urged by the learned Vakil for the appellants that Rs. 100 a month for each boy is excessive and out of proportion to the property of the father. The learned trial Judge has discussed this question and, no evidence having been given against the circumstance mentioned by him in his judgment, it is not clear how we can interfere with the amount that has been fixed by the learned Judge. If the defendants really meant to contest the point, they ought to have adduced proper evidence as to what the income of Muthiah Chetty was and what the value of his share of the family property was. This they have not done. In these circumstances I think that it would not be right to interfere with the award of Rs. 100 for each of the boys. I have already stated that in my view the illegitimate daughter is not entitled to any relief in this suit.

In the result, I would modify the decree of the lower Court and dismiss the suit of the 3rd plaintiff and confirm the decree that has been given to the 1st and 2nd plaintiffs. The defendants will pay costs of the plaintiffs Nos. 1 and 2 in this appeal, but as between the 3rd plaintiff and themselves they will each bear their own costs.

Odgers, J.—This is an appeal from the decree of Mr. Justice Kumaraswami Sastri sitting on the Original Side whereby he allowed a sum of Rs. 100 a month for each of the 1st and 2nd plaintiffs during their lifetime and Rs. 50 a month for the 3rd plaintiff till she attains the age of 18. The suit was brought by the mother of these minor plaintiffs against the defendant claiming that she was the exclusive and continuously kept concubine of the defendant. The first point that has been urged before us is that the continuous and exclusive intercourse between the mother of the plaintiffs and the 1st defendant alleged to have existed from 1901 to 1919 was not proved. The appellant alleged that from 1913 for about a year and a-half intimacy existed with a certain Muhammadan called Kadir Meera Sahib and that another man called Thiyagaraja Pillai was also keeping her upto 1917. Mention was also made of certain others, Kannan and Swami. Mr. A. Krishnaswami Iyer for the appellants has in my view very properly not relied on the evidence of intimacy with other men very seriously except with regard to the Muhammadan and this only in so far as the oral evidence is corroborated by letters which passed between him and the plaintiffs' mother. I feel at a disadvantage in judging of the character of these letters because I am naturally not in a position to judge of the average love letter of a Muhammadan to a Hindu woman or *vice versa*, but I am content to express my agreement in this matter with the opinion of the learned trial Judge. He came to the conclusion that these letters are nothing more than mere business requests or transactions and I must say the tone of the letters strikes me as the very reverse of amorous. These are letters from Chinnamal to the Muhammadan as her Doctor and even more definitely as a magician in whose spells Chinnamal relies to win back the affections of the Chetty. I ought to add that I further state the doubts of both my learned brothers as to the genuineness of these letters and for the reasons stated by them. We have been taken through the evidence at great length and I have come to the conclusion that the attempt to show that the plaintiffs' mother was not the continuous and exclusively kept con-

cubine of the defendant has failed. The bedroom incident referred to in my learned brother's judgment is quite incredible.

Then arises an interesting question of law, for it is said, to begin with, that the illegitimate sons, though they may be entitled to maintenance from their putative father personally, have no right as against the joint family property of which their father was a member at the time of his death. This argument is now raised owing to the fact that the defendant is now dead and the allowance given to the male plaintiffs has been charged on the family property of which the deceased was a member. Texts referring to this matter are extremely meagre and they are contained in the Mitakshara Chap. I s. 12, Placita Nos. 1 to 3. There it is said that "a son begotten by a *Sudra* on a female slave may take a share by the father's choice. But if the father be dead, the brethern should make him partaker of the moiety of a share; and, one who has no brothers may inherit the whole property in default of daughter's sons." The law developed from the texts seems to be perfectly clear. In *Krishnayyan* v. *Muttusami* (8), a continuous concubine was held to be a *dasi* within the meaning of the Mitakshara and an illegitimate son cannot take the interest of his father or succeed as collateral heir, as there is no *sapinda* relationship as it is founded on a legal marriage. In *Ranoji* v. *Kandoji* (9), the texts are all examined and an illegitimate son is held not entitled to a share of joint family property at partition but he is entitled to maintenance. In *Parvathi* v. *Thirumalai* (10), an illegitimate son of a *Sudra* is always entitled to maintenance as a member of his father's family by reason of his sunship even though he may be the son by a married woman. Yagnavalkya's text applied to a separated house-holder. In *Ananthaya* v. *Vishnu* (3), the case of a Brahmin, an illegitimate son was held entitled to maintenance for life in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. This maintenance may be secured on the family property. In *Annayyan* v. *Chinnan* (11), the rule is regarded as well established in Madras that an illegitimate son of a *Sudra* by an unmarried *Sudra* woman is entitled to a share of the family property if the concubinage was continuous and if the connection was not incestuous or adulterous or in violation of or forbidden by law. This rule was confirmed by the Full Bench in *Soundararajam* v. *Arunachalam Chetty* (2). There are other authorities in Madras, as for instance, *Kuppa* v. *Singaravelu* (12), *Gopalasami Chetti* v. *Arunachelam Chetti* (13) and *Subramanya Mudali* v. *Velu* (1) and *Muthusawmi Jagavera Yettappa Naicker* v. *Vencataswara Yettaya* (14). Therefore, it seems to me it is well established in Madras that though an illegitimate son may be entitled to a share of the family property if there are no collaterals he is at least entitled to maintenance for life such as he has been awarded here. The learned Judge sitting on the Original Side was, therefore, in my opinion, quite right in awarding such maintenance and nothing has been shown to us to induce me to think that the rate of maintenance is excessive. The latest case appears to be *Panchapakesa Odayan* v. *Kanaka Ammal* (15), where it was held that the illegitimate son of a permanently kept concubine is entitled to maintenance against the co-parcenary property of the family of which the father is a member.

Turning to the daughter, 3rd plaintiff, more difficuty exists. From what has been said it is clear that the right of a son by a female slave in the case of *Sudras'* estate which is the heading of the section of the Mitakshara, is an altogether exceptional provision, and it is at least doubtful whether one ought to assume that the same provision would have appeared to the ancient sages fit to be made for an illegitimate daughter in the same way. An argument has been addressed to us by the learned Counsel for the respondent, if one may say so in general terms, based on the fact that even an illegitimate daughter may be regarded as a member of the family and the duty of a father to provide for his infant children. In *Parvati* v. *Ganpatrao*

(8) 7 M. 407; 8 Ind. Jur. 427; 2 Ind. Dec. (N. s.) 867.

(9) 8 M. 557; 3 Ind. Dec. (N. s.) 382.

(10) 83 M. 334; 3 Ind. Dec. (N. s.) 986.

(11) 5 Ind. Cas. 84; 33 M. 366; 7 M. L. T. 140; 20 M. L. J. 355.

(12) 8 M. 325; 3 Ind. Dec. (N. s.) 223.

(13) 27 M. 32.

(14) 12 M. I. A. 203; 11 W. R. P. C. 6; 2 B. L. R. P. C. 15; 2 Suth. P. C. J. 175; 2 Sar. P. C. J. 395; 20 E. R. 316; 4 Mad. Jur. 137; 1 Ind. Dec. (N. s.) 492.

(15) 42 Ind. Cas. 344; 33 M. L. J. 455; 6 L. W. 408.

Balal (5) Sargent, C. J. uses the following words which I think are exceedingly useful in coming to a decision of the present nature: "Unless, therefore, the expression '*dasiputra*' can be held to include 'daughter' there is no authority for a daughter having a claim to maintenance. It was said that a 'son' is to be construed as including a daughter, as 'brethern' was interpreted as including 'sisters' by Nanda Pandita. But that mode of interpretation has been much controverted, as may be seen by the discussion of the authorities in the judgment in *Vinayak Anandram* v. *Lakshmibai* (6), which was decided upon the authority of Mayukha. Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down, in terms, in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters, is, we think, that they were not contemplated as having the same right.' In *Ghana Kanta Mohanta* v. *Gereli* (16) the real point that was decided was that the order of the Magistrate under the Criminal Procedure Code was no bar to a civil suit for maintenance. The learned Judges said that under the Hindu Law the father of an illegitimate child is bound to provide for its maintenance. Whether the child was a daughter or not it does not appear. Further in *Bhikya Sakharam* v. *Babu Vedu* (7), a case of inheritance, it was held that the language of the texts and their context prohibits the idea that illegitimate daughters were intended to be included as heirs. Even illegitimate sons in order to inherit were expressly mentioned and among *Sudras* illegitimate daughters cannot succeed to their father's property in preference to the son of a divided brother of which the father is a member. One is, therefore, driven with some reluctance to decide that as the right of an illegitimate child under Hindu Law depends on the special text and that his recognition is of a somewhat exceptional nature the illegitimate daughter was not so recognised and there is no authority or justification for holding that she must stand in the same position as an illegitimate son There is no case that has been cited to us where an illegitimate daughter has been held entitled to maintenance from the joint family property of which the father was a member. I do not think we shall be justified on the general ground that the father should provide for his infant children or by some generality of language that an illegitimate daughter is a member of the family ingrafting a further exception in Hindu Law in her favour. I, therefore, think that that part of the learned Judge's decree must be varied and that the illegitimate daughter, 3rd plaintiff, must be declared not entitled to any allowance from the estate of the deceased father. As to the amount of the boys' maintenance, I agree that we cannot now go into this. I agree with the order proposed by my learned brother.

V. N. V. *Decree modified.*

(16) 2 Ind. Cas. 550; 32 C. 479; 13 C. W. N. 150.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 449 OF 1923.
January 20, 1927.
Present :—Mr. Justice Dalal and Mr. Justice Pullan.

ABDUL AZIZ KHAN AND OTHERS —DEFENDANTS
versus
MUHAMMAD HUSAIN—PLAINTIFF AND ABDUL RAZZAQ KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law--Inheritance—Co-heirs — Mortgage by co-heirs in possession, for ancestor's debt—Share of absent co-heir, whether liable—Decree by absent co-heir against other heirs for his share effect, of.

A mortgage executed by the heirs of a deceased Muhammadan who were in actual possession of his estate, for a debt of the deceased, can be enforced against the whole estate including the share of the co-heirs who were not in possession and who had not joined in the execution of the mortgage. [p. 662, col. 2.]

The fact that in a suit brought by one of the co-heirs against the executants of the mortgage for the recovery of his share in the estate, the question was not raised does not in any way debar the mortgagee from enforcing his charge against the entire estate. [p. 662, col. 1.]

Jaffri Begam v. *Amir Muhammad Khan* (1), followed.

First appeal from a decree of the Subordinate Judge of Bulandshahr, dated the 5th of July, 1923.

Mr. *P. L Banerji*, for the Appellants.

Mr. *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The question for decision in this appeal is whether the whole

property should be liable to pay the mortgage-debt, or only that portion of the property which belongs to the present appellants. The property belonged to one *Musammat* Azizun-Nissa, who died in the year 1901, leaving as her heirs her two daughters Ghafurun-Nissa and Halimun-Nissa, and her brother Murad. The property was at that time subject to a mortgage in favour of one BehariLal. Murad made no claim for possession of the property and the whole property passed into the hands of the two daughters Ghafurun-Nissa and Halimun-Nissa, who obtained mutation on the 27th February, 1902. Subsequently the mortgagee sought to recover his money, and the two daughters executed a usufructuary mortgage in his favour of the whole property in 1910. Again on the 1st February, 1911, these two ladies executed a further simple mortgage in satisfaction of the usufructuary mortgage and recovered possession. It was after this, namely, in 1913, that the heirs of Murad came forward for the first time and sued Ghafurun-Nissa and Halimun-Nissa for their one-third share in the property of their grandmother. In this suit they obtained a decree. The present suit has been brought by the mortgagee on the basis of the mortgage of 1911 and he has implicated the present appellants who are donees from Ghafurun-Nissa and Halimun-Nissa and the heirs of Murad. The lower Court has given a decree exempting the share of the heirs of Murad. In appeal, reliance is placed upon a Full Bench ruling of the Allahabad High Court reported in *Jafri Begam* v. *Amir Muhammad Khan* (1). In that case the heir of a Muhammadan who was out of possession brought a suit against a decree-holder for recovery of the share of the property which had been sold in execution of a decree, and the Full Bench held that he was not entitled to recover his share of the property without first paying his proportionate share of the ancestor's debt for which the decree was passed. The principle of this ruling would appear to apply to the case before us, but the respondents urge that the question should have been raised in 1913 when they brought their suit for recovery of their one-third share in the property from Ghafuran-Nissa and Halimun-Nissa. It is argued that as that question was not raised then it cannot be raised now, and the possession of the respondents must be held to be free from any burden imposed by this mortgage which was executed by the two ladies in respect of the whole property before the respondents came forward to claim their share. We are unable to accede to this view. In our opinion the one-third share which was recovered by the respondents in 1913 was bound by the debt which was incurred to pay off a debt due by the ancestor from whom both parties claimed possession. It was not necessary that the defendants in that suit should make any reference to the mortgage and the mortgagee was no party to the suit. In our opinion, the respondents obtained a one-third share in the property which was as much liable to pay the mortgage as the two-thirds share of the property which belonged to the two ladies and which has passed to the present appellants.

The plea of limitation referred to in the grounds of appeal has not been raised by the opposite party and we see no reason to discuss it here. We allow this appeal with costs including costs in this Court on the higher scale and order that the decree of the lower Court be modified as desired by the appellants.

A. N. A. *Appeal allowed.*

(1) 7 A. 822; A. W. N. (1885) 248; 4 Ind. Dec. (N. S.) 636.

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 142 OF 1925.

January 8, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Broadway.

NEKI RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PIRBHU DAYAL—PLAINTIFF—RESPONDENT.

Contract—Agreement to lease shop—Possession not given to lessee—Damages, measure of—Profits derivable from business, whether recoverable—Contract Act (IX of 1872), s. 73.

The plaintiff, a commission agent, took a shop on lease from the defendant after paying him a certain amount as advance. The defendant did not give him possession. The defendant did no business for 8 months although similar shops were available in the same locality, and sued the plaintiff for recovery of the advance amount and damages calculated on the basis of what he could have earned as a commission agent during those 8 months. His claim was allowed by the lower Courts. On Letters Patent Appeal:

Held, that the plaintiff was not entitled to the damages claimed.

Letters Patent Appeal against a decree of Mr. Justice Jai Lal, dated the 9th April, 1925 in Civil Appeal No. 3143 of 1924.

Mr. *Shamair Chand*, for the Appellants.

Mr. *Balwant Rai*, for the Respondents.

JUDGMENT.

Broadway, J.—One Pirbhu Dial instituted a suit against Neki Ram and Ramji Lal for the recovery of Rs. 993. He alleged that the defendants had leased him a certain shop in the Rui Mandi at Delhi at a monthly rental of Rs. 62-8, and that he had paid the sum of Rs. 193 in advance, further that they had refused to give him possession of the premises leased and that he was thus unable to carry on his business and claimed to recover the sum of Rs. 193 paid by him in advance and a sum of Rs. 800 as damages.

The trial Court found that the amount paid in advance was Rs. 49 and granted the plaintiff a decree for that amount plus Rs. 800 as damages calculating damages at the rate of Rs. 100 a month for 8 months that being the amount which the plaintiff said he had been earning as a commission agent before he entered into this lease. The appeal by the defendants to the District Judge having proved unsuccessful they preferred a second appeal to this Court. This appeal was heard by Mr. Justice Jai Lal, and was dismissed on the 9th April, 1925.

Against this order of dismissal the defendants have preferred this appeal under s. 10 of the Letters Patent. On their behalf Mr. Shamair Chand urged that the Courts had erred in granting the plaintiff a decree for Rs. 800, and the question for the determination is whether the view taken by the learned Judge in Chambers as to the principle on which the damages should be assessed is correct. The learned Judge in Chambers has based his conclusion on two cases decided by the Madras High Court. Those cases are, however, clearly distinguishable for they both dealt with land that had been leased out for purposes of cultivation. In those cases it was held that in a suit by a lessee against his lessor for failure to give possession of the lands leased out to him, the measure of damages is the net profits which the lessee could have derived during the period he was out of possession, regard being had to the means which existed of mitigating the loss. That principle cannot be applied in the present case for the plaintiff clearly intended to occupy the premises leased to him for the purpose of carrying on his business there. His income would depend on his own ability and business capacity as a Commission agent. It is also in evidence that there were two or three similar shops available in the same Mandi and instead of occupying one of these he apparently chose to do no business for 8 months, and it cannot, therefore, be said that he suffered a loss of Rs. 800 because of the failure on the part of his lessors to give him possession of the premises leased to him. I would, therefore, accept this appeal and dismiss the plaintiff's claim for damages leaving him the decree for Rs. 49. In the circumstances the parties will pay their own costs throughout.

Shadi Lal, C. J.—I concur.

A. N. A. *Appeal partly allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 222 OF 1926.

February 1, 1927.

Present:—Mr. Justice Hasan and Mr. Justice King.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

MURLI DHAR VARMA—PLAINTIFF—RESPONDENT.

Railway—Reservation of right of re-measurement, re-weighment, etc., effect of—Goods accepted at owner's risk at lower rate—Right to charge higher rate at place of destination.

The reservation by the Railway of their right of re-measurement, re-weighment, re-classification and re-calculation of rate on arrival of goods at the place of destination cannot be so interpreted as to permit any basic alteration in the terms of the contract. [p. 665, col. 1.]

Where, therefore, goods are offered to and accepted by the Railway for being carried to a certain place at owner's risk and a lower rate of freight is charged, it is not open to the Railway to claim at the place of destination a higher rate on the ground that the goods carried on a certain section of the Railway should have been charged at a higher rate and that the booking clerk made a mistake in charging them at a lower rate. [p. 664, col. 2.]

Chunni Lal v. *Nizam's Guaranteed State Railway Company* (1), *Bombay, Baroda & Central India*

Railway Co. v. *Firm Budh Sen-Pusp Chand* (2), *Gulab Dei* v. *Great Indian Peninsular Railway* (3) and *Firm Ram Nath-Ladhu Ram* v. *North-Western Railway* (4), followed.

Second civil appeal against the judgment and decree of the Second Additional Subordinate Judge, Lucknow, dated the 16th April, 1926, reversing those of the Munsif, South Lucknow, dated the 11th January, 1926.

Messrs. *G. H. Thomas* and *H. K. Ghosh*, for the Appellants.

Messrs. *G. N. Mukerji* and *Sri Ram*, for the Respondent.

JUDGMENT.—This is the defendant's appeal from the decree of the Second Additional Subordinate Judge, Lucknow, dated the 16th of April, 1926, reversing the decree of the Munsif, (South), Lucknow, dated the 11th of January, 1926. The appellant is the Secretary of State for India in Council, representing the administration of the East Indian Railway, Oudh and Rohilkhand branch.

The facts are as follows:—

On the 28th of August, 1924, the respondent offered 180 bags of castor-cakes (manure) weighing 270 maunds at the Oudh and Rohilkhand Railway Station Bholaganj for being carried to Chapra a station on the B. N. W. Railway. The offer was accepted by the appellant's agent at the Bholaganj station and a railway receipt No. 3705 was granted to the respondent. This receipt carried with it the condition that the goods were to be despatched at the owner's risk. It was in the well-known Risk Note form B. The rates for carrying the consignment were naturally lower than they would have been had the goods been undertaken to be carried at the Railway risk. The consignment was accepted as one of manure and at the rate mentioned above the entire freight was charged in respect of the consignment as such. The goods reached Chapra in due course. They were, however, not delivered to the respondent and a claim for a higher rate of freight was made. The position taken up was that unless the respondent paid an additional sum of Rs. 40-1-0 the goods would not be delivered to him. He refused to pay the additional charge for which the claim was made and after some correspondence between him and the Railway Administration, the suit, out of which this appeal has arisen, was instituted with the relief of damages to the extent of Rs. 1,425-2-0.

The only defence, with which we are concerned, may be described as one of justification of the claim for the additional freight. The Court of first instance upheld the defence and dismissed the suit. The lower Appellate Court, on appeal by the respondent, has decreed the suit for a sum of Rs. 1,375-2.

It is not disputed before us that if the appeal fails the decree of the Court below as to the measure of damages is correct. The case on the side of the appellant is that the goods carried on that portion of the Railway line, which was O. & R. R. section, should have been charged at a higher rate as oil cakes and the booking clerk made a mistake in charging them as manure at a lower rate. The alternative case is that even if the goods were to be charged as manure the rate of freight on the B. N. W. Railway section of the journey is always a higher rate and the difference between the freight paid and the freight chargeable on that basis is more than what was claimed at the destination. The reply to this argument is simple. It is argued that the claim in its original form as well as in the alternative clearly seeks to override the terms of contract under which the goods were accepted by the Railway Administration to be carried to the place of destination and this cannot be permitted. The argument of the learned Advocate for the appellant in reply is that his client is entitled to ask for the payment of a proper freight on the basis of condition sixth printed on the reverse of the receipt. That condition, the learned Advocate argued, must be treated as a part of the contract and is binding, having regard to the provisions of s. 54 of the Indian Railways Act.

The argument put forward by the learned Advocate for the appellant must certainly prevail if it were applicable, but we are of opinion that it is not. The condition sixth is as follows:—

"That the Railway Administration have the right of re-measurement, re-weighment, re-classification and re-calculation of rates terminals and other charges at the place of destination, and of collecting before the goods are delivered, any amount that may have been omitted or undercharged". The precise matter which has the effect of altering the contract is that the claim for undercharge necessarily carries with it the

alteration of that part of the agreement between the parties which related to the carrying of the goods at the owner's risk. The higher rate of freight on the O. & R. section of the Railway will impose the legal liability of all risks to the goods on the Railway Administration. This will happen if the first aspect of the defence is accepted. From the alternative case of the appellant similar consequences follow. On the B. N. W. Railway manure as such is carried at a higher rate of freight and consequently at the Railway risk and not at the owner's risk. There is a consensus of opinion that condition sixth cannot be so interpreted as to permit any basic alteration in the terms of the contract. The clause itself defines the scope within which alteration may be permissible. Those are the cases of mistakes in re-measurement, re-weighment, re-calculation and re-classification of rate. The present case, as we have said above, is not of such a nature. The leading case on the subject is considered to be that of *Chunni Lal* v. *Nizam's Guaranteed State Railway Company* (1). It has been repeatedly followed in the same Court, see the cases of *Bombay Baroda & Central India Railway Co.* v. *Firm Budh Sen-Pusp Chand* (2) and *Gulab Dei* v. *Great Indian Peninsular Railway* (3), but the most precise case on the point on which our decision proceeds will be found in *Firm Ramnath-Ladhu Ram* v. *North Western Railway* (4).

The appeal, therefore, fails and is dismissed with costs.

G. H. *Appeal dismissed.*

(1) 29 A. 228; 2 M. L. T. 42; A. W. N. (1907) 21; 4 A. L. J. 80 (F. B.).

(2) 79 Ind. Cas. 562; 46 A. 55; 21 A. L. J. 830; 9 O. & A. L. R 1074; A. I. R. 1924 All. 180.

(3) 90 Ind. Cas. 99; 48 A. 217; L. R. 6 A. 615 Civ.; 24 A L. J. 129; A. I. R. 1926 All. 146

(4) 96 Ind. Cas. 904; 7 Lah. 412, A. I. R. 1926 Lah 631; 27 P. L. R. 602.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 644 OF 1924.

November 1, 1925.

Present:—Mr. Justice Curgenven.

P. SUNDARAMMAL—PLAINTIFF—APPELLANT

versus

ARUNACHALA MUDALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 41—'Reasonable care'—Omission to scrutinise title-deeds, effect of.

The mere fact that a *bona fide* purchaser of property did not scrutinise the title-deeds thereof is not conclusive evidence of want of reasonable care within the meaning of s. 41, Transfer of Property Act, so as to disentitle him to the benefit of the section. [p. 665, col. 2.]

In India the mere omission by a purchaser to call for title-deeds does not constitute constructive notice. [*ibid.*]

The question whether a person has exercised reasonable care under s. 41 of the Transfer of Property Act is one which must be decided upon the particular circumstances of each case. [p. 666, col. 1.]

A criterion which would be reasonable in England cannot always be applied to circumstances in which sales take place in this country. [p. 665, col. 2.]

Second appeal against a decree of the District Court of North Arcot, in A. S. No. 129 of 1923, preferred against the decree of the Court of the District Munsif, Tirupattur, in O. S. No. 139 of 1922 (O. S. No. 650 of 1920, District Munsif's Court, Ranipet, O. S. No. 164 of 1920, District Munsif's Court, Chittor).

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *B. C. Seshachala Iyer*, for the Respondent.

JUDGMENT.—The respondent in this case purchased certain property from the husband and son of one Nagammal, who is the appellant's (plaintiff's) mother. The property really belonged not to the vendors but to Nagammal, and the question is whether the purchasers are entitled to the benefit of the provisions of s. 41 of the Transfer of Property Act. It is not disputed that they bought in good faith, and the only point for consideration is whether in so doing they exercised reasonable care. Admittedly, whatever else they did, they failed to scrutinize the title-deeds. It is argued on behalf of the appellant that this is conclusive evidence that they failed to exercise reasonable care. I do not think that in this country the argument in this unqualified form can be accepted. It is true that in certain Calcutta cases, *Ram Charan Das* v. *Joy Ram Majhi* (1) and *Radha Madhab Paikara* v. *Kalpataru Roy* (2), the English rule has been quoted that an omission to call for title-deeds constitutes constructive notice. But it is obvious that a criterion which would be reasonable in England cannot always be applied to the circumstances in which sales take place in

(1) 16 Ind. Cas. 825; 16 C. L. J. 185; 17 C. W. N. 100.

(2) 16 Ind. Cas. 811; 17 C. L. J. 209.

this country. If, for instance, a Solicitor accepts responsibility for securing proof of clear title, his omission to call for and examine the title-deeds would necessarily involve him in a charge of negligence. Another case of the Calcutta High Court *Niras Purbe* v. *Tetri Pasin* (3) has been referred to and in that case the Court accepted certain considerations as going to show that due care had been exercised notwithstanding the failure of the purchaser to require production of the deeds. The only principle, I think, that can be derived from the case-law is the general one that each case must be decided upon its own particular circumstances. It may be, as was held in *Partab Chand* v. *Saijida Bibi* (4) and *Ballu Mal* v. *Ram Kishun* (5), that mere verification that the property was registered either in the revenue accounts or in the Municipal registers in the name of the ostensible owner would not be sufficient, especially where, as was found in those cases, suspicious circumstances existed which would have put the purchaser upon further enquiry. In the present case both Courts have concurred in finding that there were a number of circumstances which justified the purchasers in coming to the conclusion that the property belonged to the vendors. There was in the first place the fact that the *patta* for about 20 years had been registered in the father's name and that he had apparently been in possession of it, as was shown by the *kist* receipts among other things. Further, in respect of the property covered by all the sales except one, there had been prior mortgages by the father and the son to certain banks. The sales were effected in the presence of Village Munsif and the *karnam* and it was to be supposed that those officers must have known to whom the property belonged, so that the purchasers were entitled to rely on their presence and their failure to interpose any objection as some proof of its ownership by the vendors. The vendors themselves were persons of some status. Lastly, the wife, who apparently could have been the only alternative owner and who must have known that the sales were taking place was present at the sales and made no objection. These points have all been considered by the lower Courts and the conclusion which they have come to that reasonable care was shown by the purchasers appears to me to be a fair inference from the facts and certainly one which I am not prepared to interfere with in second appeal. The second appeal is accordingly dismissed with costs.

V. N. V. *Appeal dismissed.*

(3) 32 Ind. Cas. 82; 20 C. W. N. 103.
(4) 23 A. 442; A. W. N. (1901) 137.
(5) 64 Ind. Cas. 14; 43 A. 263; 19 A. L. J. 11.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 1224 AND 1225 OF 1925.

January 24, 1927.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

RISALDAR MAJOR BHAGWAN SAHAI—DEFENDANT—APPELLANT

versus

NANAK CHAND AND ANOTHER—PLAINTIFFS AND RAM LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Transfer pending pre-emption suit—Lis pendens—Withdrawal of suit by rival pre-emptor, effect of.

The doctrine of *lis pendens* applies to pre-emption suits. [p. 667, col 1.]

A and *B* who had equal right to pre-empt instituted separate suits for pre-emption. *B* got a transfer of the property from the original vendee and withdrew his suit. *A* impleaded *B* as a party to his suit and claimed to pre-empt the entire property:

Held, that *A* was entitled to pre-empt one half and one-half only of the property. [p. 668, col. 1.]

Second appeal from a decree of the District Judge, Bulandshahr, dated the 27th March, 1925.

Mr. *B. Mullick* (for Dr *S. N. Sen*) and Mr. *Ajudhia Nath*, for the Appellants.

Messrs. *P. L. Banerji* and *K. C. Mital*, for the Respondents.

JUDGMENT.—Both these appeals arise out of a suit for pre-emption which was brought by one Moti Ram now represented by Nanak Chand and others. It appears that on the 17th of October, 1922, the defendants Nos. 2 to 6 in the suit sold certain *zamindari* property to one Ram Lal for the sum of Rs. 4,830.

On the 7th or 8th of October, 1923, Moti Ram filed his suit for pre-emption.

On the 13th of October, 1923, a rival suit for pre-emption was filed by Risaldar Major Bhagwan Sahai who is the appellant before us.

After this, that is to say, on the 20th of October, 1923, we find that Ram Lal the original purchaser sold the property to

the Risaldar for the sum for which he himself had purchased.

Moti Ram having become aware of this transfer to the Risaldar impleaded Risaldar Bhagwan Sahai as a defendant in his suit. He also amended his plaint and pleaded that the transfer to the Risaldar was collusive and that in any case he had a better right to pre-empt the property than Bhagwan Sahai.

It is further to be noted that Bhagwan Sahai having obtained a conveyance from Ram Lal withdrew his suit on the 14th April, 1924.

It has been found by the Courts below, and there is no dispute, that so far as the right to pre-empt was concerned Moti Ram and Bhagwan Sahai stood on the same footing; each had an equal right to pre-empt the sale in question.

The first Court gave Moti Ram a decree for pre-emption for half the property. Both parties appealed to the District Judge and the learned District Judge has decreed the claim of the plaintiff in its entirety differing from the Court below. The learned Judge was of opinion that the sale to Bhagwan Sahai on the 20th of October, 1923, was a transfer *pendente lite*, and inasmuch as Bhagwan Sahai had withdrawn his suit he came to the conclusion that on the date the lower Court pronounced its decree it ought to have awarded Moti Ram the whole of the property, presumably because on that date Bhagwan Sahai was no longer in the position of a rival plaintiff for pre-emption.

Bhagwan Sahai has come here in second appeal. As the memorandum of appeal stands it would seem that Bhagwan Sahai is still claiming that he was entitled to retain the whole of this property and that Moti Ram's suit ought to have been dismissed *in toto*. However, this attitude has been modified here and Mr. Mullick who has argued the cases on behalf of the appellant is constrained to admit that in no case can his client recover more than half the property if these appeals be decided in his favour.

It is now definitely settled in the course of a number of decisions of this Pre-emption Bench that the doctrine of *lis pendens* does apply in pre-emption suits and consequently no transfer made during the pendency of a pre-emption suit can have any effect on the right of the plaintiff as it stood at the moment the suit was brought.

According to the respondents' argument here when Moti Ram brought his suit on the 7th or 8th October, 1923, his right was a right to pre-empt the entire property, but we think this is not a correct statement of the legal position. It is admitted as we have said, that Bhagwan Sahai has just as good a right to pre-empt this property as Moti Ram, and we know that on the 13th October, 1923, he brought a suit to enforce that equal right. It appears to us, therefore, that when Moti Ram brought his suit on the 7th or 8th October, 1923, it could not be said that his right was a right to pre-empt the entire property for clearly his right of pre-emption was subject to the rights of other pre-emptors with equal claims who might bring suits for pre-emption within the period of limitation. In other words, Moti Ram's right of pre-emption at the date the suit was brought was a right to share the property under pre-emption with other pre-emptors of equal degree who might bring their suits within limitation.

It cannot be denied that the transfer to Risaldar Bhagwan Sahai was made *pendente lite*, and we must give full effect to this principle, but it seems to us that it cannot really be said that this transfer made on the 20th October, 1923, necessarily affects the rights of Moti Ram, the plaintiff. Had the two rival suits for pre-emption been fought out it is quite clear that both parties would have been entitled to take the property in equal shares, and we do not think that these rights were affected by the transfer which was made in favour of Bhagwan Sahai on the 20th October, 1923. Bhagwan Sahai had asserted his right of pre emption by suit and he had satisfied his claim by taking over the property from Ram Lal. He had withdrawn his own suit but he had been joined as a defendant by Moti Ram. We, therefore, think that the situation was that Bhagwan Sahai, by taking this transfer, could not improve the position in which he stood while he was still asserting his right of pre-emption as a rival plaintiff, and so we have come to the conclusion that, on the facts as they stand, Bhagwan Sahai could not be heard to say that he was entitled to retain the whole of this property. On the other hand, we think that Moti Ram, for the reasons

given above, could not assert that he had an absolute right to take the whole of the property by pre-emption. The rights of the parties were to take the property in equal shares and that is the right which ought to be enforced under these appeals. Mr. Mullick in the course of his argument has referred to a Full Bench ruling reported in *Manpal* v. *Sahib Ram* (1). That was a peculiar case and has been commented upon in several subsequent decisions. We refer in this connection in particular to the decision of the Pre-emption Bench in *Kamta Prasad* v. *Ram Jag* (2) where the learned Judges state that the Full Bench case just referred to was decided on a misapprehension of the facts. For the reasons we have just given we are of opinion that the proper order to make in this case is that the plaintiffs were entitled to pre-empt a one-half share of the property on payment of one-half of the consideration. We, therefore, allow these appeals, set aside the decrees of the lower Appellate Court and restore the decrees of the Court of first instance in each case. Parties will bear their own costs in all Courts.

A. N. A. *Appeal allowed.*

(1) 27 A. 544; 2 A. L. J. 428; A. W. N. (1905) 94 (F. B.).

(2) 22 Ind. Cas. 266; 36 A. 60; 12 A. L. J. 9.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

November 29, 1926.

Present:—Lord Phillimore, Lord Sinha, Lord Blanesburgh and Lord Salvesen.

RADHA KISHUN AND OTHERS—APPELLANTS

versus

HIRA LAL SAH AND OTHERS—RESPONDENTS.

Debtor and creditor—Mutual current accounts, nature of—Appropriation of payments—Burden of proof—Circumstantial evidence—Interest—Agreement to pay compound interest—Burden of proof.

A one-sided account of loans made from time to time and payments from time to time in whole or partial discharge of the advances is not a mutual current account. [p. 668, col. 2.]

The burden of proof that payments made by a debtor were towards a particular debt and not towards earlier advances is upon the debtor. But the circumstances of the various payments may imply that they were to be appropriated and were in fact appropriated towards particular advances. [p. 669, col. 1]

The burden of proving an agreement for compound interest is on the creditor. [p. 669, col. 2.]

Appeal against the judgment of the Patna High Court.

Sir *George Lowndes* and Mr. *S. Hyam*, for the Appellants.

Messrs. *A. M. Dunne* and *B. Dube*, for the Respondents.

JUDGMENT.

Lord Phillimore.—The plaintiffs and defendants are respectively firms of Indian bankers who are close neighbours. They had business relations for a considerable period, the business beginning on the 5th *Chait* in the *Fasli* year 1309 and the relations ending on the 27th *Katik* in the *Fasli* year 1324.

The account is sometimes described as a mutual current account, but as far as their Lordships have been permitted to see the papers, it was a one-sided account of loans made from time to time by the plaintiffs' firm and payments from time to time in whole or partial discharge of the advances. But the question of mutuality is not a material one.

Plaintiffs sued for the balance of the account with compound interest at the rate of 8-annas per cent. per mensem. The defendants claimed to reduce the rate of interest by one pie and disputed the claim of compound interest, and further pleaded that all the earlier items were barred by the Indian Limitation Act. The way in which they put their case as to limitation was this: they said that in the *Fasli* year 1321 they were in money difficulties, and that the plaintiffs refused to make them further advances; that there was an interval of about 16 months, and then a new arrangement was come to by which the plaintiffs agreed to make advances provided that the sums advanced never exceeded Rs. 5,000 and provided that each advance was re-paid before another was made; and the defendants claimed to appropriate their payments made, since the new arrangement began, to the new advances.

The plaintiffs, on the other hand, contended that there was no such specific appropriation, and that they might, as the creditors, appropriate the payments made by the debtors to the earlier items, which would otherwise be statute-barred. They denied that there was any change in the mode of transacting business from the start to the finish or any new arrangement made as suggested in the *Fasli* year 1323.

The accounts were sent to a Commissioner, whose report, except in respect of one item, was not questioned, and the matter then came before the Subordinate

Judge for trial. The principal plaintiff and his *gumasta* gave evidence on the one side, and the principal defendant and his *gumasta* gave evidence on the other. Some other witnesses were examined, but their evidence is unimportant; and, except the accounts, there were no documents to consider.

Laying aside one disputed item, the books of both parties were in substantial agreement. They showed a number of entries at various intervals; loans and payments in discharge very frequently made, with a gap of approximately 16 months, and then during the later period advances of round sums never exceeding Rs. 5,000, always, except in one case which could be explained, paid off (but not necessarily in one payment) before another advance was made, and paid off so speedily that simple interest on all the advances during this period came to a smaller sum than Rs. 100. Defendants' evidence was, as already stated, that in the *Fasli* year 1321 they had got into financial straits, and the plaintiffs' firm refused to make them further advances, but that towards the end of 1323 their position had improved, and they then induced the plaintiffs to agree to finance them to the extent of Rs. 5,000, on the terms that each advance was specifically re-paid before another was made.

The plaintiffs' case was that they never knew that the defendants were in financial straits, that they never refused credit, that it did just so happen for no particular reason that they knew that the defendants had not come for advances during the 16 months, but that they never made any stipulation as to Rs. 5,000.

The Subordinate Judge came to the conclusion that the defendants' story was the true one. He came to this conclusion not so much because he thought the defendants' oral evidence more trustworthy, but because he thought that the circumstances of the various payments clearly implied that they were to be appropriated, and were in fact appropriated, each distinct debt being satisfied as shortly as possible after the date of the loan, and before a subsequent debt was incurred. No doubt, the fact that the particularity with which these re-payments were made is not only remarkable in itself, but in strong contrast with the accounts in the previous years. In his view, it was unnecessary to decide whether there was a previous agreement. He thought that the circumstances indicated that each time the defendants made a payment, they appropriated it to discharge a particular advance. Accordingly, he made a decree for Rs. 52 12 8, being simple interest on the several advances in the later period.

From this view, the High Court differed. The learned Judges thought that there had indeed been a fresh agreement made in the *Fasli* year 1323; but it was an arrangement according to which the defendants were to be allowed a further credit of Rs. 5,000 in addition to their old debt, whatever it was. They laid stress on the fact that only on 6 of the 23 occasions was the sum advanced re-paid in one re-payment. But they seem not to have noticed, or, if they noticed, they failed to appreciate, the fact that in all the remaining 17 cases but one, the whole previous advance was re-paid before a fresh advance was sought for. It is to be noted that there are expressions in the judgment of Das, J., which would lead their Lordships to suppose that if he had appreciated this fact, he might have come to a different conclusion.

Moreover, it is to be observed that to support his decision, Das, J., assumes in favour of the plaintiffs that an agreement was made to which the principal plaintiff never deposed, and which is indeed inconsistent with his story.

The burden is upon the defendants to prove the appropriation for which they seek. Indeed, in their Lordships' opinion, it is a heavy burden, and one which must be completely discharged. If all allowance for this is made, still the inference to be drawn from the accounts may be such as to justify the Subordinate Judge in accepting the defendants' evidence, while the reasoning by which the High Court supports a different conclusion is not satisfactory.

Still, however, their Lordships would be in doubt if it were not for another consideration. Strangely enough, both sides say that they were quite unaware how much was due in respect of the old debt incurred before the interval. This is probably because the interest columns had not been worked out in the books of either side.

Now there were two disputes about interest, one of slight importance, though it bulks rather largely in the judgment of the Subordinate Judge, whether the rate was

8 annas or 7 annas 9 pies as the defendants said.

Plaintiffs agreed to this extent that they were ready to allow one pie as a deduction when the compound interest for which they contended was reckoned up.

The Subordinate Judge took the view that the rate must be 7 annas 9 pies and the objection to his finding has not been pressed.

Compound interest is another matter. The burden is on the plaintiffs of proving an agreement to pay compound interest. They say that it is arrived at by taking yearly rests. The defendants say that it is only chargeable if and when an account has been stated; and in the present case no account was stated till the plaintiffs brought their suit.

Here again the Subordinate Judge was in favour of the defendants, and the High Court was in favour of the plaintiffs.

Now, as already observed, no entries or calculations as to interest were made in the books of either side, and no balance was struck at the end of any year. In itself, with so moderate a rate of interest, compound interest would not be unnatural or unusual; but it is difficult to see how it could be intended to be charged if no balance were struck and no intimation given; and there is a passage in the evidence of the plaintiffs' *gumasta* that certainly looks as if he took the same view as the defendants take as to the general practice; though in this case he deposed to there being a special agreement to pay compound interest.

Their Lordships do not think that this special agreement is made out, and in their view the Subordinate Judge was right upon this point, and his decision should not have been reversed.

There remains the one disputed item. This, as found by the Commissioner, is a principal sum of Rs. 6,910. The Subordinate Judge found in favour of the defendants on this item, but the Judges of the High Court thought that his decision was uncertain, and as they were remitting the case back to him, desired him to re-consider this point. It does not appear that, as things stood, the High Court would have taken upon itself to reverse his finding.

If the question of appropriation is decided against the plaintiffs, neither the point of compound interest nor the point of this item becomes material. But in determining the question of appropriation it is not without importance to consider how the balance stood before the 16 months' interval.

If it is not a large figure, it is more likely to have been left out of consideration when dealings were renewed between the parties; and as their Lordships read the Commissioner's findings, if both these matters were decided against the plaintiffs, their share would only be Rs. 1,761, with some simple interest due to the plaintiffs before the 16 months' interval. Moreover, as already stated, neither side apparently cared what it was. These facts assist their Lordships in coming to the conclusion that the Subordinate Judge was right in his finding on the question of appropriation. His decision should not have been reversed, and their Lordships will humbly recommend His Majesty that the appeal should be allowed, and that the decision of the Subordinate Judge should be restored with costs here and below.

A. N. A. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitor for the Respondents:—Mr. *H. S. L, Polak.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 469 OF 1923.

December 6, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

Thakurain ANPURNA KUNWAR —DEFENDANT—APPELLANT

versus

RAM PADARATH AND OTHERS—PLAINTIFFS AND *Thakurain* BALRAJ KUNWAR AND OTHERS—DEFENDANTS —RESPONDENTS.

Mortgage—Prior and puisne mortgagees—Agreement by mortgagor extending limitation for suit on prior mortgage, whether binding on puisne mortgagee —Subsequent usufructuary mortgage renewing prior simple mortgage—Dispossession of mortgagee - Suit on simple mortgage—Limitation—Enjoyment of usufruct, effect of—Declaration of prior charge in puisne mortgagee's suit, whether operates as res judicata—*Limitation, whether extended—Failure to redeem in puisne mortgagee's suit, effect of.*

A executed a simple mortgage of eight villages to *B* in 1898. He subsequently mortgaged the same villages to *C* in the same year. In 1900, *A* execut-

ed a usufructuary mortgage of two villages to *B* for the amount due under the first mortgage and other amounts. Under this mortgage *B* was entitled on dispossession to sue for the amount due to him and to recover the same from the villages comprised in the first mortgage. *B* was dispossessed in 1911 and sued in 1922 to enforce his first mortgage. *C* who had in the meanwhile sued on his mortgage impleading *B* also as a party and purchased two of the villages under his decree contested *B*'s right to enforce his charge against the items purchased by him:

Held, (1) that the provision in the usufructuary mortgage giving *B* a fresh right to sue on the simple mortgage from the date of dispossession was not binding on *C*; [p. 671, col. 2.]

(2) that if *B* retained a right to sue at all on the simple mortgage he did so only in accordance with the rule of limitation applicable to that bond and that the suit was, therefore, time-barred; [p. 672, col. 1.]

(3) that the enjoyment of the usufruct under the usufructuary mortgage did not amount to a payment of interest of the debt due under the simple mortgage, within the meaning of s. 20 of the Limitation Act; [*ibid.*]

(4) that the fact that in *C*'s suit *B*'s charge was declared to have priority did not in any way prevent the suit from being barred by limitation or debar *C* from contending that it was so barred; and [*ibid.*]

(5) that *B* could not base his suit on the mortgage of 1900 and obtain a decree for sale subject to *C*'s mortgage inasmuch as an opportunity had been given to him in *C*'s suit to redeem *C* and he had refrained from doing so and allowed *C* to purchase in execution [p. 672, col. 2.]

Mahomed Ibrahim Hussain Khan v. *Ambika Pershad Singh* (1) and *Deputy Commissioner of Lucknow* v. *Sukhnandan* (2), followed.

First appeal from the decree of the Subordinate Judge, Jaunpur, dated the 14th of August, 1923.

Dr. *K. N. Katju*, Messrs *Mushtaq Ahmad* and *K. Verma*, for the Appellant.

Messrs. *Haribans Sahai*, *M. A. Aziz*, *S. S. Sastry* and *Gadadhar Prasad*, for the Respondents.

JUDGMENT.—The plaintiffs brought this suit to enforce a simple mortgage of 15th March, 1898, by the sale of certain villages. The mortgage was for Rs. 13,200 bearing interest at $1\frac{1}{4}$ per cent. per month for a period of three years, and eight villages were hypothecated. The mortgage was contracted to pay off earlier mortgages. On the 1st of November, 1898, the mortgagor executed a second mortgage of the same villages to Babu Inder Sen Singh who is now represented by *Musammat* Anpurna Kunwar. On 4th May, 1900, the mortgagor executed an usufructuary mortgage in favour of the plaintiffs for payment of the sum of Rs. 17,712 due on the mortgage of 15th March, 1898, and other items, amounting in all to Rs. 22,500 giving possession of the two villages of Rajdharpur and Konda. Under this mortgage the mortgagee was entitled to sue for the amount due to him on dispossession, and he would in that case be entitled to recover also from the property hypothecated under the bond of 15th March, 1898. It is this condition with which we are mainly concerned in this appeal, as the plaintiffs admit that their right to sue arose when they were dispossessed of the village of Konda on the 24th of February, 1911. Meantime the plaintiffs had in 1904 purchased the village of Rajdharpur, but as the result of a suit brought by the second mortgagee *Musammat* Anpurna in 1909, the village of Rajdharpur was again sold and purchased by *Musammat* Anpurna.

The plaintiffs filed this suit on 9th December, 1922, and have obtained a decree against three villages, namely, Rajdharpur and Pura Sarwan in the possession of *Musammat* Anpurna and Khalispur which had been purchased in 1919 by Durbali Tewari (defendant No. 4). This appeal is filed by *Musammat* Anpurna who claims that the suit is barred by limitation as against the villages of Rajdharpur and Pura Sarwan. The suit has been decreed on two grounds, first, because the mortgage of 1898 has been held to have become merged in the mortgage of 1900, and thereby acquired the period of limitation applicable to that deed, and secondly, because the order of the District Judge of Azamgarh passed in 1912 in Anpurna's own suit, to the effect that her claim was subject to the prior charge of the plaintiff's mortgage operates as "practically" *res judicata*. We do not agree with either of these findings. The deed of May, 1900 although executed to satisfy the mortgage of March, 1898, is of an entirely different nature. Under the simple mortgage the mortgagee had a right to sue for the principal after three years, under the usufructuary mortgage he could sue at once if he failed to get possession, or a claim was brought for ex-proprietary rights, but otherwise he could only sue on being dispossessed. This was an entirely new burden on the property of which the junior mortgagee had no notice, and we are not prepared to find that she should be bound by an agreement altering the period of limitation allowed for a suit on the prior mortgage. In a ruling reported as *Mahomed Ibrahim*

Hossein Khan v. *Ambika Pershad Singh* (1) their Lordships of the Privy Council held that when a suit was brought on a simple mortgage of 1888 seeking to make certain property covered by that mortgage and by a *zarpeshgi* deed of 1877 liable for the decretal amount, the right of priority set up by the plaintiffs on the *zarpeshgi* deed was barred by limitation, as the suit should have been brought within 12 years of the date when the money due on that deed became re-payable. The principle in that case is the same as in the appeal before us. The same view was taken by Mr. Justice Lindsay when Judicial Commissioner of Oudh [*Deputy Commissioner of Lucknow* v. *Sukhnandan* (2)]. It may be that the simple mortgage of March, 1898, was kept alive by the mortgage of May, 1900, but it was not given a second birth, and if the plaintiffs retained a right to sue on the simple mortgage of March, 1898, at all, they did so only in accordance with the rule of limitation applicable to that bond, and their suit became time-barred in March, 1913.

In order to meet this position the plaintiffs argue that the usufruct of the two villages enjoyed by them in accordance with the mortgage of May, 1900, should be regarded as a payment of interest on the simple mortgage of March, 1898. This objection is easily answered by a reference to the terms of the mortgage of May, 1900. This mortgage was for a sum of Rs. 22,500 and the usufruct of the two villages was given to satisfy the interest on that sum, and not the interest due on the prior mortgage for Rs. 13,200. In our opinion there has been no payment or acknowledgment which would bring the suit within time under s. 20 or s. 19 of the Limitation Act.

As to the second finding of the learned Judge of the Court below that the decree of 1912 has practically the effect of *res judicata*, we are of opinion that this view is mistaken. In 1912 the mortgage of March, 1898, was still within time, and still had priority to the mortgage of November, 1898, on which the plaintiff in that suit based her claim. The fact that the plaintiffs' charge was then declared to have priority in no way prevents the claim from subsequently becoming barred by time.

(1) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 9 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C.).

(2) 23 Ind. Cas. 448; 17 O. C. 38

Nor can the plaintiff base his suit on the deed of May, 1900, and obtain a decree for sale subject to the appellant's mortgagee rights because when an opportunity was given to the plaintiff in 1912 to redeem the intermediate mortgage, he refrained from doing so, and allowed the sale to be executed in favour of *Musammat* Anpurna.

In our opinion, the plaintiffs' suit as against the villages of Rajdharpur and Pura Sarwan was barred by limitation. We allow the appeal with costs against the contesting respondents including fees in this Court on the higher scale, and order that these two villages shall be exempted from the decree.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 602 OF 1926.
January 13, 1927.
Present :—Mr. Justice Addison.
THE FIRM TIRKHA RAM-CHUNI LAL—PLAINTIFF—PETITIONER
versus
MAMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 109—Mortgage of property in the possession of tenant—Mortgagee's right to sue for rent—Attornment by tenant, necessity of.

Under s. 109, Transfer of Property Act, a mortgagee of property which has been leased by the mortgagor possesses all the rights of the mortgagors and can maintain a suit for rent or for its equivalent, namely damages for use and occupation against the tenants of the mortgagor who continue to remain in possession after the date of the mortgage even if the tenants have not attorned to him. [p. 673, col. 1.]

Petition for revision of the decree of the Additional Subordinate Judge, Fourth Class, with Small Cause powers, Sonepat, District Rohtak, dated the 8th May, 1926.

Mr. *Shamair Chand*, for the Petitioners.

Mr. *Rama Nand*, for the Respondents.

JUDGMENT.—The house in suit belongs to Ram Richpal and his nephew, defendants Nos. 2 and 3. They mortgaged it with the plaintiff firm. It is alleged that defendant No. 1, Maman, was the tenant of the mortgagors and continued to be the tenant under the mortgagee. The mortgage was entered into on the 6th April, 1925. On the 24th April, 1925, the plaintiff firm gave a notice to Maman, demanding Rs. 6-12 for six months' rent which they said was in arrears and also

asking him to vacate the house by the 25th May, 1925, otherwise the rent would be increased to Rs 36 a year instead of Rs. 13-8. The plaintiff firm then instituted this suit on the 19th April, 1926, for recovery of Rs. 35-6-8 as rent from the 6th April, 1925, to the 29th March, 1926.

In the second paragraph of the plaint it was stated that defendant No. 1 was the tenant of the mortgagors and that after the mortgage he continued a tenant as before, but the tenant of the plaintiff, *i. e.*, of the mortgagee, at a fixed rent of Rs. 36 a year as to which a notice had been given by the plaintiff firm to him. In another paragraph of the plaint it was claimed that the mortgagors should be held liable if Maman was held not to be liable. The Judge, Small Cause Court, Sonepat, has dismissed the suit and the plaintiff firm has presented this revision petition.

Maman's main plea was that he was not the tenant of this house at any time after the mortgage, *i. e.*, he had vacated the house before the mortgage. Had this issue been tried and determined that would have ended the matter. The Judge, however, seems to have dismissed the suit, so far as I can understand his judgment, on the ground that the tenant had to attorn to the mortgagee before he could become the mortgagee's tenant. This is against the principle laid down in s. 109 of the Transfer of Property Act. Under it the mortgagee possesses all the rights of the lessors. There is no doubt, therefore, that the plaintiff firm could maintain this suit for rent against Maman or for its equivalent, namely, damages for use and occupation.

In these circumstances I accept this petition and remand the suit to the Small Cause Judge to decide it on the merits, that is to say, to decide whether defendant No. 1 was or was not a tenant or whether he occupied or did not occupy the property during the period sued for, and if so what he should pay as rent or as damages for use and occupation of the building, for the period after the 6th April, 1925, he has been in occupation thereof. Costs here will be costs in the cause.

I might add that the mortgagor, Rachpal Singh, pleaded that rent was payable by the tenant, Maman, to the mortgagee.

Petition accepted.

R. L.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 4 OF 1924.

January 24, 1927.

Present :—Mr. Justice Dalal and Mr. Justice Pullan.

Musammat HUSENI BEGAM *alias* MASITI BEGAM—PLAINTIFF—APPELLANT

versus

Syed MOHAMMAD MEHDI—DEFENDANT—RESPONDENT.

Muhammadan Law—Will—Bequest in excess of one-third—Shia Law—Consent of heirs, whether should be obtained after testator's death—Death of legatee before testator's death—Legacy, whether descends to legatee's heirs.

The consent of the heirs required under Shia Law to validate a bequest of more than one-third of the testator's estate may be obtained before the death of the testator. [p. 674, col. 2.]

Fahmida Khanum v. *Jafri Khanum* (1), distinguished.

If a legacy is not adeemed by the testator, the death of the legatee before the death of the testator does not cause a lapse. It descends to the legatee's heirs. [p. 674, col. 2.]

First appeal from a decree of the Subordinate Judge, Bijnor at Moradabad, dated the 18th of September, 1923.

Messrs. *Mukhtar Ahmad* and *Nehal Chand*, for the Appellant.

Mr. *S. N. Sen* and Haji Syed *Mohammad Husain*, for the Respondent.

JUDGMENT.—This is an appeal by a Muhammadan lady, *Musammat* Masiti Begam, against a decree of the Subordinate Judge of Moradabad, who dismissed her suit for possession of the village of Hakimpur Qazi, which she sought to obtain from her nephew Syed Mohammad Mehdi. The case turns entirely on the question whether this property has been validly bequeathed to Mohammad Mehdi by the Will of his maternal grandmother, *Musammat* Murtazai Begam. It is admitted on both sides that if the Will were set aside, the plaintiff, who is the only surviving daughter of *Musammat* Murtazai Begam, would be entitled to the whole of her property by inheritance. As it is, she has obtained the rest of the property left by her mother; but this property has been denied to her, as it was bequeathed by Will to her sister, *Musammat* Husnaini Begam and is now in possession of the latter's son.

In the lower Court the plaintiff actually denied the existence of the Will; but this matter is not now in issue. Undoubtedly, the Will was executed by *Musammat* Murtazai Begam in the year 1897. Apart from this objection, the Will has been challenged in this Court on the ground that it is invalid

under Shia Law, because it purported to transfer more than one-third of the testator's estate. Reliance is placed on a ruling of this High Court reported as *Fahmida Khanum* v. *Jafri Khanum* (1). According to the head-note of that ruling, where a legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of the heirs, given after and not before the death of the testator, has been obtained. In this case, the consent of the other heirs was, undoubtedly, obtained to the Will at the time of its execution, but it is not proved that there was any such consent after the testator's death. The respondent denies that the property bequeathed is more than one-third of the whole estate of *Musammat* Murtazai Begam, and the evidence on the question is not conclusive, but we are of opinion that the ruling cited by the appellant can be distinguished from the case before us, for there one of the heirs of the testator was excluded entirely from inheritance, and in this case a certain portion is left to each of the heirs. We consider that that ruling should be confined to the case which it was designed to meet, and not applied to every case in which a Shia testator bequeaths more than one-third of his estate. The commentators to whom we have access are all of opinion that the consent required under Shia Law may be obtained before the death of the testator, Ameer Ali in the First Volume of the 4th Edition of his book Muhammadan Law, page 592, writes: "According to the Shia Law.....a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs, but where it exceeds one-third, it is not valid without the consent of all the heirs. Such consent may be given either before or after the death of the testator." The same opinion is given by Mr. Tyabji in his book Principles of Muhammadan Law, second Edition, page 784, and we consider that this is the view which we should follow in the present case.

Another question raised is whether the legacy can be valid, as the original legatee, *Musammat* Husnaini Begam, died in the year 1902, many years before her mother. Baillie in his Digest of Muhammadan Law, page 247, writes as follows: "In all cases of bequest, where the legatee happens to die before the testator, some Doctors are of opinion that the legacy is void; but others have maintained that, although if the testator should retract the bequest, it would be null, whether the retraction takes place before or after the death of the legatee, yet if there is no retraction, the legacy descends to the heirs of the legatee. This of the two reports is most authentic and approved." Ameer Ali takes the same view, at page 614 of Vol. I of Muhammadan Law, where he distinguishes between Hanafi and Shia Laws. On this point, he says: "If the legacy is not adeemed by the testator, the death of the legatee does not cause a lapse. It descends to the legatee's heirs".

In the present case the Will was assailed on every possible ground, consequently it is only natural that evidence was adduced to show that the Will was revoked by *Musammat* Murtazai Begam. The story told by the witness Sajjad, who was a son of *Musammat* Murtazai Begam's husband by his first wife, is to the effect that *Musammat* Murtazai Begam, immediately after the death of her daughter Husnaini Begam, fell out with the latter's husband and son, who was at that time a boy of four years of age, over the profits of the property and made an oral revocation of her Will. In order to support this statement, the evidence is produced of Mr. Masih-ul-Hasan, a practising lawyer, who states that he was consulted by *Musammat* Murtazai Begam in the year 1920 as to whether her oral revocation was sufficient or something should be put in writing. Now it hardly appears likely that when a Will is revoked in the year 1902, legal advice should be taken 18 years afterwards in 1920, as to whether the oral revocation was sufficient. The evidence of the witness Sajjad is clearly prejudiced in favour of the plaintiff, and we cannot avoid the suspicion that possibly Mr. Masih-ul-Hasan, who did not see the lady and did not know her before, may have been deceived, and some other may have been substituted for *Musammat* Murtazai Begam. In our opinion the story of the revocation of the Will is improbable, and the reasons assigned for it are insufficient. We consider that the Will is a valid Will that stands unrevoked, and that the plaintiff is not entitled to the property for which he has brought this suit. We dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

(1) 30 A. 153; A. W. N. (1908) 55; 5 A. L. J. 169.

LAHORE HIGH COURT.

REFERENCE CASE No. 24 of 1926.
February 3, 1927.
Present:—Mr. Justice Zafar Ali and Mr. Justice Jai Lal.
In the matter of the ASSESSMENT OF GANESH DAS OF AMRITSAR

Income Tax Act (XI of 1922), ss. 33, 34, 35—Commissioner's powers to review—'Escaped assessment', meaning of—Wrong person assessed—Power to assess right person—Limitation.

Where an income is assessed in the hands of an assessee to whom it is subsequently found not to belong, it must be held that the income 'escaped' assessment within the meaning of s. 34, Income Tax Act, as regards the person to be really assessed.

Income Tax Commissioner's powers of review under s. 33, Income Tax Act, in respect of an assessment proceeding are subject to the limitation imposed by s. 35 of the Act.

Whatever may be the reason for which an Income Tax Officer may fail to assess any income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation.

Case referred under s. 66 (1) of the Income Tax Act (XI of 1922), by the Commissioner of the Income Tax, Punjab, and North West Frontier Province, Lahore, with his letter No. 505 J. M., dated the 3rd/4th June 1926, for the orders of the High Court.

Lala *Fakir Chand* for Lala *Badri Das*, R. B. for the Petitioner.

Mr. *Jagan Nath Aggarwal*, for the Respondent.

ORDER.—This is a Reference under s. 66 (1) of the Income Tax Act. The learned Income Tax Commissioner has propounded the following questions of law:—

(1) Does the Indian Income Tax Act (XI of 1922) impose any period of limitation within which the Commissioner's powers of review under s. 33, in respect of an assessment proceeding must be exercised?

(2) If so, is the Commissioner debarred from reviewing the present case?

We have recently held in Reference No. 20 of 1926 that the Income Tax Commissioner's powers under s. 33 are subject to the limitation imposed by s. 35, and the learned Commissioner has come to the same conclusion with regard to his question No. 1. In respect of question No. 2 he argues thus:

The second question on the other hand, I would answer in the negative as s. 34 applies only to income, profits or gains that 'have escaped assessment' and in this case the income to be assessed did not escape assessment in the year in question. All that has occurred is that it has been assessed in the hands of an assessee to whom it was subsequently found not to belong. It can hardly, I think, have been intended that income would escape assessment simply because an error of this kind was not established till after the period of limitation specified in s. 34 had expired.

This argument does not appear to us to be sound. Whatever may be the reason for which the Income Tax Officer should fail to assess any income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation. So in the present case no action could be taken in 1926 either under ss. 33 or 34 in respect of an income derived during the accounting period of 1921-22. After all, the income Tax Department itself is responsible for this result. The income excaped assessment so far as the person who received it was concerned.

We, therefore, answer the second question in the negative.

K. L.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 365 OF 1926.
December 9, 1926.
Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice and Mr. Justice Banerji.

H. F. MAHONEY—PETITIONER—APPELLANT
versus
MRS. GEORGIANA DOMINICK—OPPOSITE PARTY—RESPONDENT.

Will—Proof of execution—Presumption of due execution from circumstances—'All things must be presumed to have been rightly done.'

Although the recollection of the witnesses is vague or has died away, in view of the familiar principle that all things are to be presumed to have been rightly done unless there is a reasonable ground for doubting it, a Will may be presumed to have been duly executed where it is clear that the testator himself fully appreciated what was required, it is shown that he knew all about the requirements, and the circumstances are all in favour of the due execution of the Will. [p. 676, cols. 1 & 2.]

Woodhouse v. *Balfour* (1) and *Frances* v. *Peveratt* (2), followed.

First appeal from a decree of the District Judge, Meerut, dated the 16th of April, 1926.

Mr. *O. M. Chiene*, for the Appellant.

Mr. *S. N. Gupta*, for the Respondent.

JUDGMENT.—We think this appeal ought to succeed. There is a little difficulty about the evidence of the attesting witnesses. Unfortunately one of them is dead, but it is not disputed that the document is all in one handwriting and that it purports to be in the hand-writing of the deceased. It is not disputed that it was in his possession while he was alive, and that he came over from his bungalow and asked the two witnesses to sign it. That raises a strong presumption that the signatures were required by him for his own purpose. The decument is short, pious and very carefully drawn up, obviously with an attestation clause, which had been supplied to him by a lawyer, or which he had found in a book of the kind which does provide such things for the general public. It is plain that it was something to which he attached importance, and something for which he required two witnesses. It appears from the evidence of the surviving witness that the two witnesses had been got together, or were in fact together on the occasion, and that Mr. Mahoney took advantage of that circumstance for the express purpose of getting them to sign it. They did sign it as witnesses and he had carefully written in the clause: "signed and acknowledged by the said John Frederick Mahoney in the presence of us." Therefore, everything points to Mr. Mahoney having taken special care to do everything according to the prescribed regulations. Eight years afterwards it appears that Mr. Ross had forgotten whether the testator wrote his signature before bringing the document over. There is not the slightest ground for suggesting that Mr. Ross had become deliberately unfriendly, or was dishonest in his evidence. It looks as if he wished to be particularly honest and clear. He says:—"He did not want them to know its contents." English people who make their own wills, and arrange their own witnesses, are notoriously mysterious on the subject. They frequently cover over the document and object to anybody seeing it, and it is a very common thing for English witnesses to be diffident about looking at it. They will sometimes avoid looking at the signature for the simple reason that they might look at some parts of the contents. According to Mr. Ross this gentleman wanted them to sign as witnesses without knowing the contents of the document. He says:—"He covered over the whole matter leaving open only the portion of the paper where the witnesses had to sign." Mr. Chiene has drawn our attention to more than one case in which the witness's recollection is vague or has died away, but where it is clear that the testator himself fully appreciated what was required, and it was shown that he knew all about the requirements. "It is familiar principle that all things are presumed to have been rightly done unless there is a reasonable ground for doubting it. Why should it be doubted merely because the witnesses have forgotten" *Woodhouse* v. *Balfour* (1). In the case of *Frances* v. *Penerett* (2). The principle of assuming everything to have been rightly done was again acted upon where it appeared that the testatrix's name and the name of the two witnesses were put on the document at the same time. In this particular case there is a circumstance much stronger than any which existed in either of the two authorities relied upon by Mr. Chiene, and which has been overlooked by the Judge. Mr. Ross when he was cross-examined stated "the Will was folded into four folds—and I was asked to sign at the bottom." The document is now before us in folds. Mr. Ross did not sign at the bottom because Mr. Gregory signed underneath, but if he folded the document in four folds—and it does not appear to have been folded in any other way—the only thing at the top is the signature of the testator, his description and the date. We think it must be presumed as a matter of fact that the signature and the description and date were already there. Mr. Ross emphasises this by saying that the deceased man covered over the whole matter leaving open the portion of the paper where the witnesses had to sign. That is the same portion as the portion on which the testator's signature appears

We, therefore, allow the appeal and declare that the Will was duly executed and must be admitted to probate. Both parties must have their costs out of the estate. The stay order is discharged.

A. N. A. *Appeal allowed.*

(1) (1888) 13 P. D. 2; 57 L. J. P. 22; 58 L. T. 59 36 W. R. 368; 52 J. P. 7.

(2) (1902) P. 205; 71 L. J. P. 114; 87 L. T. 143.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 605 OF 1926.

January 28, 1927.

Present:—Mr. Justice Tek Chand.

THE FIRM KURA RAM-NEKI RAM—PLAINTIFFS—PETITIONERS

versus

JAIMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 115, O. IX, r. 4—Dismissal of suit in default—Restoration application, summary dismissal of—Material irregularity—Revision.

Dismissal of an application for restoration summarily without recording evidence and going into its merits is a material irregularity justifying interference in revision.

Petition for revision of an order of the Junior Sub-Judge, Hissar, dated the 1st December, 1925.

Mr. *Nanwa Mal*, for the Petitioner.

JUDGMENT.—On the 13th of June, 1925, the plaintiff Firm Neki Ram-Kura Mal instituted a suit against Jaimal defendant-respondent for recovery of Rs. 800 alleged to be due on foot of a book account, for which a balance had been struck by the defendant in the plaintiff's *bahi* on the 10th of December, 1921.

The first hearing of the case was fixed for the 8th of August, 1925, on which date neither party was present. The suit was accordingly dismissed under O. IX, r. 3. On the 13th of August, 1925, the plaintiff filed an application under O. IX, r. 4 stating that he was ill on the 8th of August, 1925, and could not be personally present in Court. He further stated that he had appointed one Mat Ram as a special agent, who held a power-of-attorney from him and was present in Court, but as the power-of-attorney was not properly attested, his presence was not recognised and the suit was dismissed under O. IX, r. 3. He prayed that as his absence was unavoidable and unintentional and as a fresh suit for the amount would be time barred, the suit be restored and tried on the merits. This application was heard by the Sub-Judge on the 1st of December, 1925, on which date without recording the statement of the plaintiff or taking any evidence, he rejected it with the following order.—

"The applicant is present. There is no ground for the restoration of the case. Application is rejected. The applicant can bring a fresh suit, if he so likes."

On the 8th of December, 1925, the plaintiff filed an application for review of the order rejecting the application for restoration dated the 1st of December, 1925, and in this application he stated that the Court had dismissed his application for restoration on the 1st of December, 1925, even though the record had not been received on that date and that it did not record the evidence, which the petitioner had brought on certain hearings in support of his application. He further pointed out that the claim had become time-barred and the Court was under a wrong impression, when on the 1st of December, 1925, it remarked that the applicant could bring a fresh suit. This application for review was also rejected by the Sub-Judge on the 9th of June, 1926. The plaintiff has come up to this Court on the revision side and has attacked the orders of the Sub Judge refusing to restore the case.

I have examined the record and heard Counsel and I am of opinion that the learned Sub-Judge has acted with material irregularity in not deciding on the merits the application on the 13th of August, 1925, filed by the petitioner for restoration of the case. It seems to me that the petitioner did not have a proper hearing of this application. It appears that the Judge had neither the record of the case before him nor did he look carefully into the matter, as he was under the erroneous impression that the plaintiff could bring a fresh suit. But it is obvious that a suit brought in December, 1925, on foot of a balance struck in December, 1921, would be time-barred under the Repealing (Punjab Loans Limitation) Amendment Act of 1925.

I, therefore, accept the revision and setting aside the order of the Sub-Judge dated the 1st of December, 1925, send back the case to him with a direction that the application dated the 13th of August, 1925, made by the plaintiff under O. IX, r. 4 for restoration of his suit be tried on the merits and disposed of according to law. There will be no order as to costs in this Court.

Case sent back.

R. L.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 35 OF 1925.

October 19, 1926.

Present :—Mr. Justice Sundaram Chetty.

Sreemath Raja YARLAGADDA ANKINEEDU PRASAD, BAHADUR, ZEMINDAR GARU—PLAINTIFF—APPELLANT

versus

RAVI BASAVAYYA BEING MINOR BY COURT GUARDIAN, HEAD CLERK, DISTRICT COURT, KISTNA—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 189, 192—Civil Procedure Code (Act V of 1908), ss. 47, 96—Decree in suit under s. 77, Estates Land Act—Execution petition, orders on, whether appealable.

By virtue of s. 192 of the Madras Estates Land Act, the provisions of ss. 2, 47, 96 and 100 of the Civil Procedure Code apply to a petition filed for the execution of a decree given by a Revenue Court in a suit filed under s. 77 of the Madras Estates Land Act, and, therefore, orders passed in execution of such a decree by the Revenue Court are appealable as decrees. [p. 679, col. 1.]

Appeal against the order of the District Court of Kistna at Masulipatam, in A. S. No. 672 of 1923, preferred against that of the Court of the Deputy Collector, Bandar Division, in E. P. No. 218 of 1922 in S. S. No. 26 of 1908.

Mr. *P. Venkataramana Rao*, for the Appellant.

JUDGMENT.—This is a second appeal filed by the plaintiff (decree-holder) against the order passed on his E. P. No. 218 of 1922, in S. S. No. 26 of 1908 on the file of the Deputy Collector of Bandar. There is no appearance for the respondent (judgment-debtor) in this appeal. The facts are briefly as follows: S. S. No. 26 of 1908 was filed for the recovery of arrears of rent, under s. 77 of the Madras Estates Land Act I of 1908, and a decree was passed in plaintiff's favour on 16th September, 1910. The present E. P. No. 218 of 1922 was filed on 12th September, 1922, for the execution of that decree by attachment and sale of the defendant's immoveable property. The petition was dismissed by the Revenue Court on 17th May, 1923, as no fresh petition for the appointment of a guardian for the minor defendant was filed. Against that order of dismissal an appeal was preferred to the District Court. The learned District Judge rightly held that the order of dismissal passed by the executing Court was wrong and could not be upheld. I am in entire agreement with that view for there was no justification for the dismissal of the execution petition, for the non-filing of a fresh petition for the appointment of a guardian when the petition filed for that purpose was still pending and no orders had been passed on it. But the District Judge, however, dismissed the appeal, as he was of opinion that an appeal does not lie.

The correctness of this view is challenged on the appellant's side. It seems to me that the learned District Judge has misconstrued ss. 189 and 192 of the Estates Land Act. Section 189 provides that a Revenue Court (and not a Civil Court) has jurisdiction to try and hear all suits and applications of the nature specified in Parts A and B of the Schedule, and the decrees and orders passed in such suits and applications shall be subject to appeals as provided in the sixth column. Section 192 enacts that subject to the other provisions of this act and subject to the modifications and additions mentioned in that section itself, the provisions of Civil Procedure Code shall apply to all suits, appeal and other proceedings under this Act. The order in question is one passed by a Revenue Court, on a petition but for executing its decree in a suit filed under s. 77 of the Act. It is not an application of the nature specified in Part B of the Schedule, and, therefore, an order passed on it is not subject to an appeal as provided in the sixth column of Part B of the Schedule. What we have to see is, whether the application now in question (E. P. No. 218 of 1922) is governed by the provisions of the Civil Procedure Code. This application is not covered by s. 189 of the Act and consequently is not governed by the provisions of that section. There is no provision in the Act either expressly or impliedly, prohibiting an appeal against an order on an execution application passed by a Revenue Court. Section 192 of the Act makes the provisions of the Civil Procedure Code applicable to all suits, appeals and other proceedings under this Act subject to the restrictions set forth in that section. Section 47 of the new Code (which corresponds to s. 244 of the old Code of 1882) is not one of the sections mentioned in sub cl. (*a*) of s. 192 of the Act. There is no doubt that the order dismissing E. P. No. 218 of 1922 (which was filed under O. XXI, r 11 (2) of the Civil Procedure Code) is an order falling under s. 47 of the Code. Such an order could be a decree as defined

in cl. (2) of s. 2 of the Code, and, therefore, an appeal lies under s 96 as also a second appeal under s. 100 of the Code. It is the District Court which is authorised to hear an appeal against the decree of a Revenue Court in a suit filed under s. 77 of the Act. (*Vide* the sixth column appertaining to Serial No. 8 in Part A of the Schedule). Consequently by virtue of s 96 of the Code the appeal lies to the District Court against an order passed in execution of that decree. The learned District Judge says that it would be inconsistent with the provisions of s 189 of the Estates Land Act, to allow an appeal in the present case. As I have pointed out above, s 189 does not cover the present case at all, and there would be no violation of the provisions of that section if an appeal is allowed in the present case. By virtue of s. 192 of the Estates Land Act, the provisions of ss. 2, 47, 96 and 100 of the Civil Procedure Code apply to a petition filed for the execution of a decree given by a Revenue Court in a suit filed under s. 77 of the Estates Land Act. If the view taken by the learned District Judge should be adopted as correct, the result would be, that no orders passed in execution of such a decree by the Revenue Court would be appealable to any Court, though the decree itself is subject to appeal. I am unable to uphold that view.

The appeal is allowed and E. P. No. 218 of 1922 is remanded to the executing Court for restoration to file and dispose according to law. The costs of the first and second appeals will abide the final result of the petition.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 28 OF 1922.

January 10, 1927.

Present:—Mr. Justice Dalal and Mr. Justice Pullan

Maulvi MUHAMMAD SAID KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu INDARPATI SINGH AND OTHERS—PLAINTIFFS AND RAM DAS KALWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 16, 74—Undue influence, what amounts to—Borrower in need of money effect of—Compound interest, whether penal.

A stipulation as to the payment of compound interest can be held to be penal only when the rate of interest increases in case of default of payment. [p. 680, col. 1.]

To attract the operation of the provisions of s. 16 of the Contract Act, it is necessary to prove that one of the parties to the transaction was in a position to dominate the will of the other. The mere unconscionableness of the bargain is not the first thing to be considered in this connection. The exaction of excessive and usurious interest even though there may be ample security does not by itself raise any presumption of undue influence unless it is first established that the lender was in a position to dominate the will of the borrower. The mere fact that the borrower was in great need of money at the time of taking the loan is not sufficient to give rise to a presumption of undue influence. [p. 680, col. 2.]

First appeal from the decree of the Additional Subordinate Judge, Jaunpur, dated the 29th of July, 1921.

Messrs. *Mukhtar Ahmad* and *Mushtaq Ahmad*, for the Appellants.

Dr. *K. N. Katju*, Messrs. *P. L. Banerji* and *Radha Mohan*, for the Respondents.

JUDGMENT.—The suit in the lower Court was one for sale on foot of a hypothecation bond, dated 20th January, 1913. The suit was instituted on 20th December, 1919, *i e.* after the period of limitation for a money-decree. It is important to state this because defendants Nos. 3 to 6 who have appealed are apprehensive of a money decree being passed against them though they have no interest in the property in suit. They were rightly sued, because their names appear in the village record. As admitted in the lower Court they have no interest in the property, and as no money-decree can be passed on foot of the bond in suit, there is no substance in the sixth ground of appeal. Mr. Mukhtar Ahmad on behalf of defendants Nos. 4 and 5 desired to argue that their interest in the property was independent of the interest of the two executants of the bond, Muhammad Said and Zulfiqar Hasnain. That point, however, does not arise in any of the grounds of appeal, so we did not permit him to proceed with that argument.

The grounds which have been pressed by the learned Counsel for the defendants Nos. 1 and 2 who executed the bond were (1) that the interest charged at 2 per cent. per mensem compoundable with six monthly rests was penal, (2) that consent to this exorbitant interest was obtained by the mortgagee by the exercise of undue influence over the mortgagors and (3) that the mortgage debt had been paid off by the execution of a sale deed of a portion of

the property *Patti* Narendrapur subsequent to the date of the mortgage. We have considered all these pleas, but we find no reason to support them. The interest is certainly not penal, because in default of payment of interest the compound rate is the same. Compound interest is said to be penal when the rate increases in default.

Undue influence was pleaded on the ground that the mortgagee had a prior charge on the property and the mortgagors at that time were in great need of money. One of the defendants Zulfiqar Hasnain has deposed that it was not possible for him to borrow money at that time to pay off the decrees on foot of which the property was to be sold. He had, therefore, to submit to the terms imposed by the mortgagee. He did not state that he was influenced by reason of the mortgagee having a prior charge on the property. In fact such charge could not be of any effect in causing undue influence, because it was not being enforced at the time of the transfer. The circumstance of the executants being in great need of money is not sufficient to presume undue influence. It is true that the plaintiffs stupidly tried to make out that the executants themselves forced such an agreement upon them. It appears that what the mortgagees really meant was that even on such favourable terms they were not disposed to advance the money, and it was only at the entreaty of the mortgagors that they did advance the money. The mortgagees may have taken advantage of the need of the persons borrowing money from them but that by itself cannot support the plea of undue influence. The learned Judge of the lower Court, who has written a judgment of considerable merit, has fully dealt with this question and examined the law on the subject. It is sufficient here to refer again to the Privy Council ruling in the case of *Aziz Khan* v. *Duni Chand* (1) quoted by the lower Court. There is also a ruling of their Lordships of the Privy Council subsequent to the date of the judgment of the lower Court *Raghunath Prasad Sahu* v. *Sarju Prasad Sahu* (2). It was laid down there that "to attract the operation of the provisions of s. 16 of the Indian Contract Act it is necessary, in the first instance, to prove that one of the parties was in a position to dominate the will of the other. Mere unconscionableness of the bargain is not the first thing to be considered. The exaction of excessive and usurious interest even though there may be ample security, does not by itself raise any presumption of undue influence unless it is first established that the lender was in a position to dominate the borrower's will." In that case also the rate of interest allowed by their Lordships was two per cent. per mensem compoundable yearly. In the present case there is no evidence that the mortgagee was in a position to dominate the will of the mortgagors.

The argument that the sale of *Patti* Narendrapur wiped out the mortgage fails completely, because there was a suit for pre-emption subsequently, and in that suit the sale consideration for the transfer was held to be Rs. 2,700. The plea here was that the consideration was in reality Rs. 7,200 but was reduced in order to avoid a large proportion of the stamp duty. Such action on the part of the mortgagee would be so foolish as to be incredible, because the property was subject to pre-emption, and in such a case the price would be inflated and not reduced. The mortgage-bond was not taken back by the mortgagors as would have been the case if the mortgage had been wiped out. The lower Court has also pointed out that the valuation of this property at Rs. 7,200 would be exorbitant and such as no purchaser would pay. We hold that the sale transaction was independent of the mortgage.

In the result we dismiss this appeal with costs which shall include fees here on the higher scale.

Z. K. *Appeal dismissed.*

(1) 48 Ind. Cas 933; 101 P. R. 1918; 23 C. W. N. 130; 165 P. W. R. 1918 (P. C.).

(2) 82 Ind. Cas. 817; 22 A. L. J. 105; A. I. R. 1924 P. C. 60; 5 P. L. T. 72; 2 Pat. L. R. 87; 19 L. W. 470; 34 M. L. T. 57; 46 M. L. J. 610; 3 Pat. 279; 26 Bom. L. R. 595; 28 C. W. N. 834; 11 O. L. J. 122; (1924) M. W. N. 638; 51 I. A. 101; L. R. 5 A. (P. C.) 206; 10 O. & A. L. R. 1395; 1 O. W. N. 210 (P. C.).

MADRAS HIGH COURT.

APPEAL SUIT No. 1 of 1926.

November 25, 1926.

Present:—Justice Sir Kumaraswami Sastri, Kt., and Mr. Justice Reilly.

THE SOUTH INDIA INDUSTRIALS, LTD.—PLAINTIFFS—APPELLANTS

versus

MOTHEY NARASIMHA RAO—DEFENDANT No. 3—RESPONDENT.

Limitation Act (IX of 1908), s. 22—Civil Procedure

Code (Act V of 1908), O. I, r. 10 (5)—Addition of person as party defendant—Limitation—Order relates back to date of application—'Actus curiæ neminem gravabit'.

When a person is added as a party defendant on application under O. I, r. 10 (5) of the Civil Procedure Code the addition takes effect from the date of the application. This principle is applicable whether the order adding as party is made by the trial Court, the Appellate or Revisional Court, since otherwise, though application might be made in time, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred. [p. 682, col. 1.]

Ramkrishna Moreshwar v. *Ramabai* (1), followed.

Ammaya Pillai v. *Narayana Chetti* (3), dissented from.

Haveli Shah v. *Painda Khan* (4), explained and distinguished.

It is contrary to one of the clear principles of the Law of Limitation that a diligent party who has come to Court with his suit or his application within the period prescribed should be defeated because the Court for some reason cannot or does not give him his relief within that period. [p. 682, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Vizagapatam, in O. S 52 of 1922.

Mr. *K. P. Raman Menon*, for the Appellants.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.

Reilly, J.—The question is whether the suit was in time as against defendant No. 3, assuming, what has not yet been decided that time ran from 1st April, 1921. The plaint was presented against defendants Nos 1 and 2 on 3rd November, 1922. The plaintiffs presented their application, I. A. No. 130 of 1923, to bring defendant No. 3 on record on 27th January, 1923, and an order to that effect was made by the Subordinate Judge on 23rd February, 1923. But on 10th October, 1923, the Subordinate Judge granted a review, set his order of 23rd February, 1923, aside and directed that the plaintiffs' application I. A. No. 130 of 1923 should be re-heard. On 26th April, 1924, he dismissed that application. Against that dismissal the plaintiffs preferred C. R. P. No. 752 of 1924 to this Court, and on 12th March, 1925, my learned brother found that the Subordinate Judge's dismissal of the plaintiffs' application was wrong and ordered that defendant No 3 be added as a party to the suit. When the suit came on again for hearing before the Subordinate Judge on 29th October, 1925, he found that, though defendant No. 3 had been added as a party by my learned brother, no summons had been served on him as a defendant in the suit and, therefore, under r. 10 (5) of O. I of the Code of Civil Procedure, proceedings in the suit had not yet begun against him. If that was the correct view, then the suit was already barred as against defendant No. 3, even assuming that time began to run not earlier than 1st April, 1921. The Subordinate Judge, therefore, dismissed the suit as against defendant No. 3, and the present appeal is against that order.

It has not been seriously disputed before us that the reason given by the Subordinate Judge for his order now under appeal is untenable. It is clear that he has overlooked the opening words of r. 10 (5) of O. I, *viz*, "Subject to the provisions of the Indian Limitation Act, 1877, s. 22." Under that section the suit must be deemed to have been instituted against defendant No. 3 when he was made a party. Admittedly he was made a party to the suit by my learned brother's order of 12th March, 1925. But it is contended for the plaintiffs that, though the order was made on that day, the effect of that order is that defendant No. 3 must be deemed to have been made a party at a much earlier date. It is clear, in my opinion, that the order of my learned brother on 12th March, 1925, must be regarded as the order which the Subordinate Judge should have made when he finally disposed of the plaintiffs' application, I. A. No. 130 of 1923, on 26th April, 1924, and must be taken to have had effect at least from that date. But the plaintiffs go further and contend that the order relates back to a still earlier date, *viz.*, the date of their application I A. No. 130 of 1923, that is 27th January, 1923. Undoubtedly, the effect of the Subordinate Judge's order, granting a review was to make that application remain pending on his file from the date of its presentation to its final disposal on 26th April, 1924. It was decided in *Ram Krishna Moreshwar* v. *Ramabai* (1) that when a party is added on application, the addition must be deemed to have effect from the date of the application; and that principle appears to have been recognised *obiter* in *Subbaraya Iyer* v. *Vaithinatha Iyer* (2) It is true that in *Ammaya Pillai* v. *Narayana Chetti* (3),

(1) 17 B. 29; 9 Ind. Dec. (N. s.) 19.
(2) 5 Ind. Cas. 931; 33 M. 115; 7 M. L. T. 185.
(3) 86 Ind. Cas 187 21 L. W. 125; A. I. R. 1925 Mad. 487.

Devadoss, J., refused to adopt that principle in interpreting s. 22 of the Limitation Act. In his judgment he mentioned *Ram Krishna Moreshwar* v. *Ramabai* (1) but said that it had no application to the case with which he was dealing. Why it had no application is not clear from the report If he meant that the principle of *Ram Krishna Moreshwar* v. *Ramabai* (1) was wrong, then with the greatest respect I am unable to follow him. It appears to me to be obviously the right principle to adopt in the matter, as otherwise, though an application might be made in time, as in this case, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court, which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred, and it would be unreasonable to leave the party who had applied in good time at the mercy of such chances. It is contrary to one of the clear principles of the Law of Limitation that a diligent party who has come to Court with his suit or his application within the period prescribed should be defeated because the Court for some reason cannot or does not give him his relief within that period. The heavy penalty for exceeding the arbitrary periods of limitation is to be counter-balanced by the assurance of safety when within time. The order made by my learned brother on 12th March, 1925, must, I think, be deemed to have taken effect not merely on the date when it should have been made by the Subordinate Judge, if he had taken a correct view of the position, *viz.*, 26th April, 1924, but on the date when the plaintiffs' application was presented to him, *viz*, 27th January, 1923.

But Mr. Ramachandra Iyer, for defendant No. 3, has referred us to a recent decision of the Privy Council *Haveli Shah* v. *Painda Khan* (4), which he contends upsets all those calculations. That, as their Lordships found, was a suit for compensation due to the plaintiff on account of one Sundar Doss, deceased, having induced certain third parties to break a contract with the plaintiff and fell within Art. 27 of the Limitation Act. It was instituted in the Court of the District Judge of Quetta, on 23rd November, 1922, against Sundar Doss' two minor sons with their mother as guardian. Their Lordships found that the suit was time-barred as the breach of contract complained of has occurred more than a year before 23rd November, 1922. But their Lordships went on in their judgment to find that there was another defect in the suit which was fatal to it, even if it fell under Art. 49 or Art. 115 of the Limitation Act, and the period of limitation was, therefore, three years from the date of the cause of action, which was in October, 1920. On 12th June, 1923, the Judicial Commissioner in Baluchistan ordered the names of the minor sons to be struck off as defendants and those of the administrators of Sundar Dass' estate to be added; and the plaint was amended in accordance with that order on 10th July, 1923. There was some dispute whether the mother of the sons was the administratrix of the estate. On 21st June, 1924, in the words of their Lordships "as the result of consideration the Judicial Commissioner at Quetta came to the conclusion that his own order of 12th June, 1923, had been wrong and that the two sons should be restored to the record as defendants through their mother and guardian." Their Lordships point out that the suit as against the sons was brought to an end by the Judicial Commissioner's order of the 12th June, 1923, and find that, when after the lapse of a year the names of the sons were restored as defendants on 21st June, 1 24, that was in effect, the institution of a new suit against them, which by that date was unquestionably time-barred. Mr. Ramachandra Iyer contends that following that decision of the Privy Council we must treat the present suit as having been dismissed against defendant No. 3 when the Subordinate Judge on 26th April, 1924, finally refused to make him a party to it. But the present case may clearly be distinguished from the case before their Lordships. In the present case the order of the Subordinate Judge made on 26th April, 1924, has lost its entire effect and became null, as it was wiped out by the order of my learned brother on revision substituting for it the order which the Subordinate Judge himself should have made. The order made on 12th June, 1923, by the Judicial Commissioner, on the other hand, was never wiped out by any superior authority and in their Lordships' view

(4) 96 Ind. Cas. 887; (1926) M. W. N. 592; A. I. R. (1926) P. C. 88; 31 C. W. N. 174 (P. C.).

stands good to the present day. Towards the end of their judgment their Lordships remark that "on 21st June, 1924, the Judicial Commissioner reviewed this order and altered it." But it does not appear probable that they are there using the word "reviewed" in the technical sense of a review under the Civil Procedure Code. It is clear that they regard the Judicial Commissioner's order of 21st June, 1924, as something different from an order legally made on review under the Code. It is probable that there was no application for review, and none is mentioned. If there had been such an application it would almost certainly have been mentioned, as by 21st June, 1924, the time for a review had long passed, and it may be noticed that their Lordships say that the second order was made "only after the lapse of a year." And earlier in their judgment their Lordships, when they first refer to the order of 21st June, 1924, instead of saying, as would be natural if that order was made in consequence of some application by the plaintiff under O. XLVII. Civil Procedure Code, that the Judicial Commissioner made the order on an application for review being granted, merely say that the Judicial Commissioner acted "as the result of consideration." It does not appear to me that this judgment of the Privy Council is of any help or guidance to us in the present case, in which an application to implead defendant No. 3 was made in ample time and remained pending until the Subordinate Judge made his incorrect order of 26th April, 1924, for which the correct order was substituted by my learned brother on 12th March, 1925.

In my opinion, assuming time to run in this suit from 1st April, 1921, or any date not earlier than 27th January, 1920, a question which has still to be determined—defendant No. 3 has been made a party in time. This appeal should, therefore, be allowed and the suit as against defendant No. 3 should proceed. The costs of this appeal and the costs already ordered in the lower Court will abide and be provided for in the Subordinate Judge's decree, the result of which they will follow. The Court-fee on this appeal will be refunded to the plaintiffs.

Kumaraswami Sastri, J.—I agree.

V. N. V. *Appeal allowed.*

ALLAHABAD HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEALS NOS. 381, 382 AND 1544 OF 1925.

January 31, 1927.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, Mr. Justice Dalal, Mr. Justice Banerji, Mr. Justice Kendall and Mr. Justice Pullan.

AULAD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Syed ALI ATHAR—PLAINTIFF AND *Syed* NASIRUDDIN—DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 14, 40 (2)—Exchange—Contract for pre-emption—Liability of legal representatives—Uncertainty of contract—Rule of perpetuities—Contract Act (IX of 1872), ss. 32, 37.

Held by the Full Bench.—An agreement between the parties to a contract of exchange that, if either of them desired or in fact attempted to transfer the properties to a third person, the other party should have the right to pre-empt, is valid in law and enforceable against the legal representatives of the parties. [p. 685, col. 2.]

Balli Singh v. *Raghubar Singh* (4) and *Gopi Ram* v. *Jeot Ram* (5), overruled.

Dinkarrao Ganpatrao v. *Narain Vishnath* (2) and *Kolathu Aiyar* v. *Rangavadhya* (3), dissented from.

Per *Walsh, A. C. J.*—Such an agreement creates an obligation, imposing a restriction on the use of land by each of the parties to the contract; there is no uncertainty about it. [p. 684, col. 2.]

Section 14 of the Transfer of Property Act which codifies the law of perpetuities, is applicable only to transfers of property and does not apply to mutual rights and obligations created by such contracts. [p. 685, col. 1.]

Second appeals from the decrees of the Additional Subordinate Judge, Azamgarh, dated the 10th of November, 1924.

REFERRING ORDER.

Lindsay and Sulaiman, JJ.—We have decided that these cases ought to be referred to a Full Bench for decision. The appeals arise out of three suits for pre emption brought in the following circumstances:—

On the 1st of February, 1908, two persons Muhammad Razi and Shah Nasir-ud-din executed a document of exchange. At the time this document was written, Muhammad Razi was the owner of an 8-annas share in *Mouza* Gurdih Aimma and Shah Nasir ud-din was the owner of the other 8-annas share in the same village.

Muhammad Razi transferred 7-annas and 11-pies out of his 8 annas share in this village to Nasir-ud-din. Muhammad Razi retained a 1-pie share of which he granted a perpetual lease to Nasir-ud-din.

The situation after this transaction,

therefore, was that Muhammad Razi was the owner of a 1-pie share in this village while Nasir-ud-din became the owner of 15-annas and 11-pies.

When the deed of exchange was executed an agreement was entered into between Muhammad Razi and Shah Nasir-ud-din to the following effect, namely, that if either of the parties was desirous of transferring his interest in *Mouza* Gurdih Aimma he should offer it in the first instance to the other party. It was further provided that if either party transferred to a stranger then the other party would be entitled to pre-empt the property, in the case of a sale, at the rate of Rs. 8-5-0 per pie English, and in the case of other transfers at the rate of Rs 4-2-0 per pie English.

What has happened now is as follows:—

Shah Nasir-ud-din has by three separate deeds of sale transferred the 15-annas and 11-pies share, which he owned in this village and three suits have been brought for pre-emption of these sales by one Saiyid Ali Athar who is the legal representative (sister's son) of Muhammad Razi who is now dead. The question which arises for decision in these three cases is whether the contract for pre-emption contained in the agreement of the 1st of February, 1908, is now enforceable. The Court of first instance dismissed the two suits out of which Second Appeals Nos. 381 and 382 of 1925 have arisen. In appeal the judgment of the trial Court was reversed by the lower Appellate Court which decreed the claim for pre-emption in each case. In the third case which gave rise to Second Appeal No. 1544 of 1925 the trial Court had in the first instance dismissed the case but after an order of remand passed by the lower Appellate Court it gave a decree for pre-emption which the lower Appellate Court subsequently affirmed on appeal.

There has been a good deal of discussion in recent years in this Court regarding the enforceability of a contract of this kind and the Judges composing the present Bench are not in agreement upon the question whether a contract of this nature is enforceable as between the representatives of the parties to the contract. We may refer in this connection to the case reported as *Mohammad Jan* v. *Fazal-ud-din* (1). It is not necessary for us to refer to the other cases in which one or other view has been taken in this Court. We have no doubt that when the cases come up before the Full Bench the learned Counsel on both sides will place all the relevant decisions before the Bench. We make this reference accordingly, and in view of the fact that we both stand committed to definite opinion upon the question involved we think it right to say that we do not desire to be members of the Full Bench.

Let this be laid before the Hon'ble Chief Justice for constitution of a Bench.

Messrs. *B. E O'Conor* and *Mukhtar Ahmad*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Walsh, Actg. C. J.—We are of opinion that this is a clear case, and we agree with the judgment of our brother Mr. Justice Lindsay.

I propose to give my reasons as shortly as possible. The question arises out of a contract, which may be compendiously stated as one for exchange by the parties thereto of certain properties belonging respectively to each of them. It relates to a certain *mouza*, in respect of which Mohammad Razi transferred the whole of his interest, except one pie, and the parties entered into a mutual agreement as a fundamental condition of sale, that if either of them should wish to transfer the whole, or part, of his share in that *mouza*, that is to say as regards the transferee Nasir-ud-din, what he was taking under the document, and as regards the transferor Mohammad Razi, the single pie share which he was reserving to himself, they might do so by transferring it from one to the other, but if either of them desired, or in fact attempted to tranfer to a third person, the other party was to have the right to pre-empt. That is a perfectly harmless and natural mutual arrangement, very common in India, quite intelligible, the object being that so long as the parties to the transaction preferred to keep out third persons from the body of co-sharers, they should have a right of veto. In other words, it cannot be described better than creating an obligation, imposing a restriction on the use of the land by each of the parties to the contract respectively. To my mind there is no uncertainty about such a contract. It is as clear and defi-

(1) 85 Ind. Cas. 482; 22 A. L. J. 400; 46 A. 514; A. I. R. 1924 All. 657; L. R. 5 A. 761 Civ.

nite as language can make a contract, and with all respect to my brother Sulaiman's view, it seems to me that that is the fallacy underlying his opinion.

I, therefore, think that s. 32 of the Contract Act, which deals with contingent contracts is a complete answer to the appellants' contentions. The right springs into existence upon the happening of a contingency. There is nothing in the contract which offends against the law upon that subject. I am also clearly of opinion that s. 37 confers the benefit and imposes the obligation upon the representatives of the parties if the parties should die before the contingency occurs, and I do not understand my brother Sulaiman really to have denied that proposition.

Mr. O'Conor quite rightly, having regard to the state of the authorities on the point, relied upon the contention that this contract, and other similar contracts, offended against the rule against perpetuities. Having the advantage in India of having most of our law codified, it is always useful both at the beginning and end of a discussion, to look at what the Code says. The rule against perpetuity is codified in s. 14 of the Transfer of Property Act, which begins in these words "No transfer of property can operate." Documents and mutual rights, and obligations, contained in contracts, such as that with which we are here dealing, are not a transfer of property at all. Therefore, s. 14 clearly has no applicability. That would be a complete answer to the argument, were it not that two experienced Judges of this Court in dealing on two previous occasions with this precise matter, followed a decision of the Bompay High Court in *Dinkarrao Ganpatrao* v. *Narain Vishnath* (2) and of the Madras High Court in *Kolathu Aiyar* v. *Rangavadhya* (3). As the matter has been expressly referred to us for the purpose, it is our duty to express our opinion about those two decisions. They do not appear to have been based on any independent reasoning of the two learned Judges themselves. They adopt the view which had been laid down after a very elaborate consideration and judgment in Bombay. With great respect to the Judges, who decided the Bombay case, it seems to me that they drifted into this fallacy. The learned Chief Judge's judgment complains that difficulty arises in India owing to the distinction that exists between the law in India and the law in England, namely that the law in India does not recognise what is called the creation of equitable interest in land arising from some inchoate transaction short of an actual transfer. Having made that complaint it seems to me that he somewhat illogically proceeded to supply the absence of which he complained by applying the equitable rule of "analogy to the Statute" to pre-emption contracts, which, although no equitable interest was created, he held should, by analogy be treated as offending against the rule of perpetuities, as though they did create an equitable interest, and by analogy to s. 14 of the Transfer of Property Act, must be treated as offending against the mischief prohibited in that section. I am unable to agree with this view. I see nothing, either legal or equitable, offending or purporting in a way to offend against the rule in such contracts as these. I, therefore, am of opinion that the two cases decided in this Court, *Balli Singh* v. *Raghubar Singh* (4) and *Gopi Ram* v. *Jeot Ram* (5) having followed the Bombay case, were wrongly decided, and must be held as no longer binding in this Province.

It is not immaterial to observe that in the *ratio decidendi* of the Bombay judgment, which was quoted by our learned brothers in both the cases they decided, to which I have just referred, the learned Chief Justice expressly stated that he regarded an obligation found in a contract of this kind as one which ran with the land, and also that it was not a mere personal contract which died with the person. If those two views are correct, and I agree with them, and the rule against perpetuities does not apply, the question we have to answer is simple.

I am inclined to think, though it is not necessary for the decision of this case, and not having fully considered the matter, I prefer to say no more about it, that s. 40 of the Transfer of Property Act, which deals with obligations imposing restrictions on the use of land, is also a complete answer to my brother Sulaiman's view.

The result is that we affirm the judg-

(2) 82 Ind. Cas. 628; 47 B. 191; 24 Bom. L. R. 449; A. I. R. 1922 Bom. 84

(3) 18 Ind. Cas. 203; 38 M. 114; 24 M. L. J. 84; 13 M. L. T. 179; (1913) M. W. N. 163.

(4) 82 Ind. Cas. 643; 21 A. L J. 413; 45 A. 492; A. I. R. 1923 All. 511.

(5) 82 Ind. Cas. 646; 21 A. L. J. 430; 45 A. 478; A. I. R. 1923 All. 514.

ment of Mr. Justice Lindsay and dismiss the appeal with costs including fees in this Court on the higher scale.

Dalal, J.—I agree. The view of Mr. Justice Sulaiman also is that a contract like the one before us does not offend against the rule against perpetuities, enacted in s 14 of the Transfer of Property Act: [see observations in *Mohammad Jan* v. *Fazal ud-din* (1)]. His opinion was, in that case, that if a contract was for an unlimited period of time, it might be contended that it was unenforceable against the heirs and representatives as being too vague and uncertain. An agreement, the meaning of which is not certain, or capable of being made certain, is void; and it is difficult to understand how a contract, which is valid at the time it was entered into, would become unenforceable as against the heirs and representatives as being too vague and uncertain. The principles enunciated in s. 40, cl. (2) of the Transfer of Property Act would apply here. *A* contracts to sell Sultanpur to *B*. While the contract is still in force he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*. The short question for decision, therefore, before us is whether the contract of the 1st of February, 1908, was in force or not, at the date of the three sales, objected to by the plaintiff. In my opinion, the contract had not come to an end under any rule of law. The plaintiff was, therefore, entitled to enforce the agreement between Mohammad Razi and Nasir-ud-din.

Banerji, J.—I agree. The rulings referred to by the learned Chief Justice, and reported as *Balli Singh* v. *Raghubar Singh* (4) are really not distinguishable in principle from that decided by a Bench of this Court in the case of *Basdeo Rai* v. *Jhagru Rai* (6). The question in this case is whether the contract entered into between the parties, namely, that one of the parties should have the right to pre-empt in the case of a sale is void on account of uncertainty or not. I am clearly of opinion that a contract, which a party alleges to be a void contract, must be void *ab initio* and such a contract cannot be treated to be valid up to a certain time and then treated as invalid. Such a clause in the sale-deed is a clause which, although not amounting to an interest in the land, entitles the parties to it to the benefit of the obligations arising out of the contract. There is no difference in principle between a case where the parties entered into such a contract, so that it was enforceable for a hundred years, and the case where the contract comes into operation upon the happening of an event which though uncertain in the sense that one does not know when one of the contracting parties will die, is certain, and arises when the property is sold. I am, therefore, of opinion that the agreement is a good agreement in law.

Kendall, J.—I agree.

Pullan, J.—I agree.

By the Court.—The appeal is dismissed with costs, including fees in this Court on the higher scale.

A. N. A. *Appeal dismissed.*

(6) 83 Ind. Cas. 390; 22 A. L. J. 265; 46 A. 333; A. I. R. 1924 All. 400; L. R. 5 A. 161 Civ.

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 47 OF 1926.

January 27, 1927.

Present:—Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice Raza.

JATAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Lala MAHADEO PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Alienation by limited owner—High rate of interest—Burden of proof as to reasonableness of rate of interest.

Those who support a mortgage by a limited owner at a high rate of interest must show not only that there was necessity to borrow, but also that it was not unreasonable to borrow at such rate of interest.

Nawab Nazir Begam v. *Rao Raghunath* (1), applied.

First appeal against the judgment and decree of the Additional Sub-Judge, Fyzabad, in Regular Suit No. 24 of 1925, dated the 19th January, 1926.

Mr. *Hargobind Dayal*, for Mr. *Rameshar Prasad Bhargava*, for the Appellants.

Messrs. *Bisheshar Nath* and *Bishambar Nath*, for the Respondents.

JUDGMENT.—The point urged by the learned Counsel for the appellants in this appeal is that the rate of interest provided by the deed of mortgage is, in the circumstances of the case, a higher rate than was justified by the necessity of the situation and he urges the appeal only upon

the point that the rate of interest should be reduced. The law on the subject has been laid down finally by their Lordships of the Judicial Committee in *Nawab Nazir Begam* v. *Rao Raghunath Singh* (1). The plaintiffs who support the mortgage had to show not only that there was necessity to borrow but that it was not unreasonable to borrow at such rate and upon such terms. But upon the facts it appears to us that the rate was not unreasonable or unnecessarily high in the circumstances of the transaction. The previous history of Jatan Singh and Ratan Singh shows to us that they could reasonably be regarded as bad payers and that in the circumstances a rate of 18 per cent. compound interest was not an unreasonable rate to demand from them. We, therefore, dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

(1) 50 Ind. Cas. 434; 46 I. A. 145; 36 M. L. J. 521; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 41 A. 571 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1857 OF 1924.

December 7, 1926.

Present:— Mr. Justice Duval and Mr. Justice Mitter.

AZIMUDDIN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

ALI HOSAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Diluvion—Reduction of rent—Re-formation of land—Tenant's rights—Relinquishment of tenancy, what constitutes.

A tenant obtaining reduction of rent on the ground of diluvion is not a circumstance which, in the absence of an overt act showing an intention to relinquish those lands, would amount to relinquishment of his rights in the diluviated lands for all times so as to debar him from claiming the lands on re-formation.

Arun Chandra Singh v. *Kamini Kumar* (1), followed.

Appeal against a decree of the District Judge, Additional Court, Chittagong, dated the 5th of May, 1924, affirming that of the Munsif, Cox's Bazar, dated the 21st of August, 1922.

Babu *D. L. Kastgir*, for the Appellants.

Babu *Narendra Kumar Das*, for the Respondents.

JUDGMENT.—The plaintiffs' case was that they held certain land part of which diluviated and that after diluvion a suit was brought to restrain the landlord from realising full rent and a decree was obtained for proportionate reduction of rent. That was in the year 1906. In 1916 the lands reformed and it appears that the landlord subsequently let them out to the defendants. The plaintiffs, however, denied that they had ever relinquished their right to the diluviated lands and brought a suit in 1921. Both the Courts have decreed the suit. There are certain findings of fact with which we are not concerned to prove title to the land and to prove that the suit is not barred.

The only point argued before us in second appeal is that as plaintiffs brought a suit after diluvion and got a decree for proportionate abatement of rent they had lost all rights to them. We do not think that the tenant obtaining reduction of rent is a circumstance which, in the absence of any overt act showing an intention to relinquish those lands, would amount to relinquishment of his rights in the diluviated lands for all times. This view is supported by the decision of the Judicial Committee in the case of *Arun Chandra Singh* v. *Kamini Kumar* (1) where it is held that it is necessary that it should be proved that apart from merely getting reduction of rent the landlords must also show that the tenants never intended to hold the lands again after they had re-formed. There is no evidence in the case to this effect and following that ruling the appeal must stand dismissed with costs.

A. N. A. *Appeal dismissed.*

(1) 22 Ind. Cas. 317; 41 C. 683; 18 C. W. N. 369; (1914) M. W. N. 175; 15 M. L. T. 182; 26 M. L. J. 251; 12 A. L. J. 243; 19 C. L. J. 272; 16 Bom. L. R. 323; 41 I. A. 32 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 22 OF 1925.

October 25, 1926.

Present :—Mr. Justice Dalal and Mr. Justice Pullan.

NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DESRAJ—DEFENDANT—RESPONDENT.

Mutation proceedings, nature of—Title to immove-

able property, whether affected—Adverse entries in revenue papers, effect of.

Adverse entry in revenue papers does not debar a person from setting up his ownership and title in a civil suit. Mutation proceedings in Revenue Courts are not proceedings in which the title to and proprietary rights in immoveable property are determined. [p. 688, col. 2.]

Nirman Singh v. *Lal Rudra Partab Narain Singh* (1), followed.

First appeal from a decree of the Third Additional Subordinate Judge, Aligarh.

Mr. *Panna Lal*, for the Appellants.

Mr. *K. N. Katju*, for the Respondent.

JUDGMENT.—It is necessary to give details of the devolution of the property in suit during different years in order to understand the matters in issue in this appeal. *Mauza* Chintapur Badan was prior to 1911 divided into certain *thoks*, one of which was *Thok* Tursi Ram, in which Khayali Ram ancestor of the plaintiffs had a share. In 1901 Khayali Ram purchased at auction in execution of a decree a share in *thok* Chheda Lal belonging to one Shyam Lal. In 1911 there was a fresh partition of *Mauza* Chintapur Badan, and a separate *mahal* formed of the property owned by Khayali Ram partly in *Thok* Khayali Ram and partly in *Thok* Chheda Lal. A separate *mahal* Khayali Ram was formed at that partition. Subsequently a subsequent mortgagee of the property of Shyam Lal in *Thok* Chheda Lal brought a suit for sale making the purchaser Khayali Ram a party defendant to the suit. A decree was obtained and the decree-money was not paid. The property was put up to auction and was purchased by the subsequent mortgagee, Desraj himself. What he purchased is described in the sale certificate printed at page 25, the last three lines of which are not certainly translated. The property was described as three shares out of the eight divided shares in a 6 *biswa* and odd share entered in *Khewat* No. 2. (Note—This is a reference to the division as existed prior to 1911). At the end it is stated that this property was at that time included in *Khata Khewat* No. 1 under the name of the *Khewat* of Narayan Singh. It is clear, therefore, that what Desraj purchased was not a share in *Khewat* Narayn Singh but one of particular property formerly included in *Khewat* No. 2, and at the time of the sale included in *Khewat* Narayan Singh. At the time of mutation, however, Desraj's share was entered as one-third in the *Khewat* of Narayan Singh. In 1924 Desraj brought the present suit for partition against the successors-in-interest of Khayali Ram deceased. This suit was brought in the Revenue Court, which referred the parties to the Civil Court under s. 111 of the Land Revenue Act, U. P., for decision of the question of title.

The learned Subordinate Judge held that no question of title was raised, but that the dispute related only to the apportionment of property at a revenue partition, and that even if he had jurisdiction, he would refuse to grant the relief :—

(1) because Khayali Ram and Narayan Singh as *Lambardars* had permitted occupancy rights to secure to tenants in the area alleged by them to belong to Desraj, and

(2) because when mutation was effected after notice to the plaintiffs, the entry made was of a one-third share in the *mahal* held by the plaintiffs.

The 4th issue as to what property the plaintiffs were entitled to was not decided.

In this appeal it is argued that the question of proprietary title arises, and that the reasons given by the lower Court for not granting a relief by way of declaration were not valid.

We are in agreement with the contention raised on behalf of the plaintiffs-appellants. The question is certainly one of title because the plaintiffs lay claim to ownership of specific plots of land in a certain *mahal*. The entry in the revenue papers does not debar the plaintiffs from raising the question as to the ownership and title to specific plots of land within that *mahal*.

If Khayali Ram and Narayan Singh have acted as *Lambardars* contrary to the interest of the defendant, such conduct may give rise to a suit for damages or some other relief, but we do not see how the plaintiffs' suit for title can thereby be barred. The mutation proceedings in the Revenue Court were not judicial proceedings as pointed out by their Lordships of the Privy Council in the case of *Nirman Singh* v. *Lal Rudra Partab Narain Singh* (1) where they observed: "They are not proceedings in which the title to and the proprietary rights in immoveable property are determined, as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal inquiries instituted

(1) 98 Ind. Cas. 1013; 3 O. W. N. 623; A. I. R. 1926 P. C. 100; (1926) M. W. N. 716; 48 A. 529; 44 C. L. J. 330; 28 Bom. L. R. 1409; 51 M. L. J. 836; 29 O. C. 316; 25 L. W. 1; 53 I. A. 220; 25 A. L. J. 25 (P. C.).

in the interest of the state for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with the greater confidence that the revenue for it will be paid."

In the result we set aside the decree of the lower Court and remand the suit to it for decision on issue No. 4.

The first three issues have been decided by us in favour of the plaintiffs. Costs here and heretofore shall abide the result.

A. N. A. *Decree set aside.*

OUDH CHIEF COURT.

FIRST CIVIL APPEALS NOS. 42 AND 43 OF 1926.

February 3, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Raza.

THE DEPUTY COMMISSIONER, PARTABGARH, MANAGER, COURT OF WARDS—DEFENDANT—APPELLANT

versus

SHEO NATH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Partition—Separation of one member—Presumption of separation of other members inter se—*No presumption of separation of other members from their sons.*

When it is established that in a joint Hindu family consisting of three brothers, one has separated from the other two, there is a presumption that the remaining two brothers have separated *inter se* but there is no presumption that such a brother has separated from his own sons. On the other hand, the presumption is to the effect that such a brother with his descendants will form the members of a joint Hindu family governed by the Mitakshara Law. [p. 690, col. 1.]

First appeals against the judgment and decree of the Subordinate Judge, Partabgarh, dated the 15th January, 1926.

Mr. *G. H. Thomas*, Government Advocate, for the Appellant.

Mr. *Ali Zaheer*, for the Respondents.

JUDGMENT.—In order to appreciate the points in dispute in Appeals Nos. 42 and 43 of 1926, which this Court is deciding in one judgment it is necessary to state certain facts. The village of Donai is a part of the estate of Orraiya Deh. For some years previous to 1884 the *Taluqdar* of Orraiya Deh had permitted this village to be held by Ram Adhin, Raghubar and Ram Tahal Dubey, the sons of Nankho Dubey, upon favourable terms; and on the 14th April, 1884, Dewan Rudra Partab Singh, their *taluqdar*, granted a perpetual lease Ex. 1 (Appeal No. 42) to these three brothers Ram Adhin, Raghubur and Ram Tahal, by which they became entitled to hold the village Donai for ever upon the payment of *jama* of Rs. 921 a year. This perpetual lease made them under proprietors of the village. At that time, the three brothers were admittedly joint. On the 23rd April, 1918, Raghunath, the son of Ram Adhin deceased, with *Musammat* Ajani, the widow of Hardat, a deceased son of Ram Adhin, and *Musammat* Ori the widow of Jagdat another deceased son of Ram Adhin, Rameshardat, the son of Raghubar deceased, and Ganga Prasad, the son of Ram Tahal deceased, executed a deed of mortgage Ex. 1 (Appeal No. 43) in favour of Phul Chand for Rs. 2,400. The amount was repayable on the 22nd April, 1919. By this deed of mortgage the whole of the 16-annas *ex*-proprietary right in the village of Donai possessed by the holders of the perpetual lease was hypothecated. There were also hypothecated certain shops. It is established upon the evidence that the Rs. 2,400, in question were borrowed from Phul Chand, in order to satisfy a decree which had been passed against Raghunath, *Musammat* Ajani, and *Musammat* Ori in favour of Sukhdeo Singh. The mortgage itself states that the money was taken for this purpose. Not only had the decree been obtained but the share of Raghunath had actually been sold in execution of that decree, and the Rs. 2,400 were borrowed to obtain that share back. It is established that Rameshardat and Ganga Prasad obtained no advantage whatever out of the Rs. 2,400, although they joined in the execution of the mortgage. Phul Chand subsequently transferred his rights under this mortgage-deed to Raja Amarpal Singh, the *taluqdar* of Dalibpur, and on the 27th April, 1925, Raja Amarpal Singh instituted a suit upon this mortgage against the sons of Raghunath (who was then deceased) Rameshardat, Ganga Prasad and *Musammat* Ori. Rameshardat and Ganga Prasad contested their liability under this deed. On the 7th July, 1925, Bishunath Dubey and Sheo Nath Dubey the sons of Rameshardat, and Deo Narain Dubey, Suraj Narain Dubey, Ram Narain Dubey and Jai Narain Dubey,

the sons of Ganga Prasad Dubey, instituted another suit against the Deputy Commissioner of Partabgarh (who had then assumed the management of the estate of Raja Amarpal Singh under the Court of Wards) and others for a declaration that their interests were in no way affected by the mortgage-deed in question. They had previously applied to be joined as parties to the previous suit but their application had been refused.

The learned Subordinate Judge has while decreeing the suit upon the mortgage-deed in favour of Raja Amarpal Singh against the estate of Raghunath and his sons *alone*, dismissed it as against Rameshardat and Ganga Prasad, and has decreed the suit of the sons of Rameshardat and the sons of Ganga Prasad to the effect that their property is in no way affected by the mortgage. It is against this decision that the present appeals are filed.

The first point for decision is whether prior to the date of the execution of the deed of mortgage of 23rd April, 1918, there had been a separation between the branches of Ram Adhin, Raghubar and Ram Tahal. There is evidence upon the record, which the learned Subordinate Judge believed and which we believe, to the effect that there had been such a separation. But apart from that the appellant himself admitted the separation in effect, for he had admitted in several places that $\frac{1}{3}$rd of the under-proprietary rights in Donai and the remaining family property belonged to Raghunath, $\frac{1}{3}$rd to Rameshardat, and $\frac{1}{3}$rd to Ganga Prasad. Now, had Raghunath, Rameshardat and Ganga Prasad been members of a joint Hindu family, not only could there have been no separation of interest in this manner between them, but, even in the event of a partition, they could not have obtained a $\frac{1}{3}$rd share each, for there were also sons and other descendants to be considered, and according to the pedigree before us there would have been more than 12 members of a joint Hindu family, had such a joint Hindu family existed. The first point which we decide in agreement with the learned Subordinate Judge is that sometime between 1884 and 1918 the Ram Adhin, Raghubar and Ram Tahal branches separated. But although those branches separated, it does not follow that the members of each branch also separated. The presumption is to the contrary. The law on the subject presents no difficulty now, for, it has been stated authoritatively in the decision of their Lordships of the Judicial Committee in *Hari Bakhsh* v. *Babu Lal* (1). Although, when it is established, that one brother has separated from two other brothers (the three forming members of a joint Hindu family governed by the Mitakshara Law) there is a presumption that the two remaining brothers have separated *inter se*, there is no presumption that such a brother had separated from his own sons. In fact the presumption is the other way to the effect that such a brother with his descendants will form the members of a joint Hindu family governed by the Mitakshara Law. From this conclusion the conclusion follows that, at the time that the deed of mortgage was executed, Rameshardat and his sons Sheonath and Bishunath formed the members of a joint Hindu family, that Raghunath and his descendants formed the members of another joint Hindu family and that Ganga Prasad and his sons Deo Narain, Suraj Narain, Ram Narain and Jai Narain formed the members of a third joint Hindu family. The case then stands as follows. When Rameshardat and Ganga Prasad purported to execute the mortgage-deed in question they had no authority to alienate the ancestral property of the joint Hindu families, to which they belonged, in absence of necessity or in absence of antecedent debt. On the facts there was no question of necessity or antecedent debts. Rameshardat and Ganga Prasad did not even obtain any benefit for themselves by the execution of this deed and they were not authorised to alienate, provided the property was ancestral property. It appears to us that in the Courts below the real contest was as to whether the property was or was not ancestral property. There can, however, be no contest on that point for, as the learned trial Judge rightly decided, the deed of perpetual lease itself leaves no doubt as to the fact that the under-proprietary rights in Donai were ancestral property; and the evidence is to the same effect. The shops must be considered to fall in the same category. The learned Counsel for the appellant has

(1) 83 Ind. Cas. 418; 51 I. A. 163; 22 A. L. J. 254; 34 M. L. T. 70; A. I. R. 1924 P. C. 126; 5 Lah. 92; 28 C. W. N. 953; 20 L. W. 406; (1924) M. W. N. 650; 26 Bom. L. R. 1108; 47 M. L. J. 938; 51 C. 163; 1 Lah. Cas. 437; L. R. 5 A. (P. C.) 113; 10 O. & A. L. R. 1471; 1 O. W. N. 536 (P. C.).

urged, however, that at any rate his client should be given a simple money decree as against Rameshardat and Ganga Prasad as sureties. Such a relief, however, would be clearly time-barred for the cause of action under the deed arose on the 22nd April, 1919, and the suit was instituted more than six years afterwards on the 27th April, 1925. The appeals, therefore, fail and are dismissed with costs.

G. H. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 111 OF 1922.
December 10, 1926.
Present:—Mr. Justice Dalal and Mr. Justice Pullan.
Syed BAQAR HUSSAIN AND OTHERS—APPLICANTS
versus
TIRPATI GOVIND NATH TEWARI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, rr. 2, 4, O. XVII, r. 3—Failure to pay charges for service of summons on defendant—Dismissal in default—Restoration, legality of.

A suit was dismissed on account of the plaintiff's failure to pay the charges for service of summons on some of the defendants as ordered by the Court. Subsequently, the plaintiff offered to pay the amount and the suit was restored:

Held, that the order of dismissal was one passed under O. IX, r. 2 of the Civil Procedure Code and not one under O. XVII, r. 3 and that, therefore, the Court had jurisdiction to restore the suit under O. IX, r. 4.

Ram Sarup v. *Gaya Prasad* (1), distinguished.

Civil revision from an order of the Additional Subordinate Judge, Basti, dated the 25th of August, 1922.

Dr. *M.L. Agarwala* and Mr. *Sankar Saran*, for the Applicants.

Dr. *S. N. Sen* and Mr. *B. E. O'Conor*, for the Opposite Party.

JUDGMENT.—The plaintiff's suit for redemption was first dismissed according to the lower Appellate Court for default because he failed to pay a certain amount demanded from him by way of damages for his failure to get certain summonses served on some of the 117 defendants to the suit. Subsequently the plaintiff offered to pay the amount of damages and the suit was restored. It is clear that the Court believed all along that it was acting under O. IX, r. 2, as it had some justification in doing so, because the default made by the plaintiff was his failure to pay charges for service on some of the defendants. When an order was made on 8th August, the threat held out to the plaintiff was that the suit would be dismissed in default (*adam pairawi*). Subsequently two hours later when the sum was not deposited, the Court specifically mentioned that the suit was dismissed in default. In revision it is argued that the Court acted under O. XVII, r 3, and that, therefore, the proper remedy of the plaintiff was an appeal and not an application for re-admission under O. IX, r. 4, of the Code of Civil Procedure.

After going through the order-sheet we are satisfied that the Court did act under O. IX, r. 2. Under the circumstances, it had jurisdiction in re-admitting the suit to its original number, under r. 4. Our attention was drawn to a ruling of this Court [*Ram Sarup* v. *Gaya Prasad* (1)]. In that case, however, the Court definitely stated that there was no reason for re-hearing and still accepted the application for re-hearing. This Court, therefore, held that the lower Court had no jurisdiction in the matter. In the present case there is no such statement in the order of the lower Court. It appears from the action taken by the lower Court that in its opinion there was a reason for re-hearing.

We dismiss this application with costs.

A. N. A. *Application dismissed.*

(1) 90 Ind. Cas. 180; 24 A. L. J. 56 at p. 62; A. I. R. 1925 All. 610; L. R. 6 A. 601 Civ.; 48 A. 175.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 211-B OF 1925.
November 18, 1926.
Present:—Mr. Hallifax, A. J. C, and Mr. Prideaux, A. J. C.
NAGAPPA—APPLICANT
versus
BALKISAN DAS—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 71—Execution sale—Default of bidder—Re-sale—Order against defaulting bidder to pay excess to decree-holder, whether appealable—'Decree'.

An order passed under O. XXI, r. 71 of the Code of Civil Procedure that a defaulting bidder at a sale in execution shall pay to the decree-holder the excess of his bid over the highest bid at re-sale falls within s. 47 of the Code and is appealable. [p. 692, cols. 1 & 2.]

Parbat v. *Bindraj* (1), overruled.

Deoki Nandan Rai v. *Tapesri Lal* (2), dissented from.

Kali Kishore Deb Sarkar v. *Guru Prasad Sukul* (3), *Amir Baksh Sahib* v. *Venkatachala Mudali* (4) and *Sita Ram* v. *Janki Ram* (5), followed.

Civil revision against an order of the Special Additional District Judge, Akola, dated the 22nd of September, 1925.

Messrs. *D. T. Mangalmoorti* and *V. R. Dhoke*, for the Applicant.

Mr. *M. B Niyogi*, for the Non-Applicant.

JUDGMENT.—The question referred to the Bench in this case is whether an appeal does or does not lie against an order, passed under r. 71 of O. XXI of the Civil Procedure Code, that a defaulting bidder at a sale in execution shall pay to the decree-holder the excess of his bid over the highest bid at the re-sale. The answer is undoubtedly that an appeal does lie; the reference was made necessary only by the official publication of the judgment in *Parbat* v. *Bindraj* (1). In that case Drake-Brockman, J. C, held that a person against whom such an order had been passed could file a regular suit to set aside the order and to recover the money realized from him; if he can bring a separate suit for the purpose he cannot, of course, appeal against the order.

An order under r. 71 of O. XXI, is not one of those mentioned in O. XLIII as appealable. But its very nature, as compared with the orders there mentioned, makes it highly improbable that it would not have been included among them, unless it were appealable otherwise. And it certainly is appealable otherwise, first because it completely satisfies the definition of a decree given in s. 2 of the Civil Procedure Code, and also because there can be no doubt about its being a determination of a question within s. 47 of the Code.

It has apparently never been suggested that the question decided by such an order does not relate to the execution of the decree. What is held in the judgment already cited and in *Deoki Nandan Rai* v. *Tapesri Lal* (2), decided by the Allahabad High Court in 1892, is that the defaulting bidder is not a representative of the judgment-debtor in the suit. It is hard to see how he can be said not to be representative-in-interest of the judgment-debtor when the liability of the judgment-debtor, to the extent of the amount he is ordered to pay, has been transferred to him and the decree is executed against him; he is not only the representative of the judgment-debtor, but himself the judgment-debtor.

That is the view taken by all the High Courts in India, including that of Allahabad, where the decision in *Deoki Nandan Rai* v. *Tapesri Lal* (2), has been overruled several times. The matter was specificially considered in the Calcutta case of *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukul* (3), and the Madras case of *Amir Baksh Sahib* v. *Venkatachala Mudali* (4), and by a Full Bench of the Allahabad High Court in *Sita Ram* v. *Janki Ram* (5), and in *Ganga Das Dahyabhai* v. *Bai Suraj* (6), the Bombay High Court heard and allowed a second appeal on the point without any question.

The answer to be returned to the Court that made the reference is that an order passed under r. 71 of O. XXI of the Civil Procedure Code is a decree, and also an order passed under s. 47 of the Code, so that an appeal against it does lie.

A. N. A. *Order accordingly.*

(1) 12 Ind. Cas. 360; 7 N. L. R. 134.

(2) 14 A. 201; A. W. N. (1892) 74; 7 Ind. Dec. (N. S.) 499.

(3) 25 C. 99; 2 C. W. N. 408; 13 Ind. Dec. (N. S.) 68.

(4) 18 M. 439; 5 M. L. J. 206; 6 Ind. Dec. (N. S.) 656.

(5) 65 Ind. Cas. 813; 44 A. 266; 20 A. L. J. 105; A. I. R. 1922 All. 200.

(6) 14 Ind. Cas. 777; 36 B. 329; 14 Bom. L. R. 250.

ALLAHABAD HIGH COURT. FULL BENCH.

EXECUTION SECOND APPEAL No. 1575 OF 1924.

November 10, 1926.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, Mr. Justice Lindsay, Mr. Justice Sulaiman, Mr. Justice Mukerji and Mr. Justice Banerji.

CHHATTAR SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

KAMAL SINGH AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), s. 15, Sch. I, Arts. 181, 182—Execution proceedings - 'Striking off' application, legal effect of—Obstruction to proceedings—Application to revive—Limitation—Cause of action—Doctrine of revival, whether swept away by amendment to s. 15.

An order "striking off" an execution application from the pending file and consigning it to the record room, passed without notice to the parties, is not one sanctioned by law and does not finally dispose of the application. [p. 696, col. 2; p. 698, col. 1.]

Where execution of a decree has been suspended

through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been suspended. This doctrine of revival has not been swept away by the amendment to s. 15 of the Limitation Act. [p. 697, col. 1; p. 698, col 1.]

An application for revival is one for which no period of limitation is expressly provided for and, therefore, falls within Art. 181 of Sch. I of the Limitation Act requiring to be made within three years of the date on which the right to make it accrued. [p. 697, cols. 1 & 2.]

The right to make an application for revival of execution proceedings accrues upon the date on which the obstacle to its progress is withdrawn. [p. 697, col. 2.]

Per *Sulaiman, J.*—The principle allowing a right of revival of a previous application is different and distinct from that permitting exclusion of time. The question of exclusion of time can only arise when a fresh application for execution is made, whereas it is only a previous application which has not been properly and finally disposed of which can be revived. An application for revival is not a fresh application for execution. The principle is based on equity and justice, and the decree-holder is merely to request the Court to take up and continue the proceedings which have not finally terminated but which have remained in abeyance for some reason or other beyond his control. [p. 698, col 1.]

Per *Mukerji, J.*—Whether an application is one for revival or not depends upon the substance of the application and not on its form. [p. 700, col. 2.]

Per *Walsh, Ag. C. J.*—An order made by a Judge upon an application which is still pending, that it be "struck off", or "sent to the record room", made either without notice to the decree-holder, or without giving him an opportunity of being heard is a ministerial order, and cannot be regarded, speaking generally as a judicial disposal of the application on the merits, though special circumstances may appear which make it so. Whether an application is in substance a fresh one, or an attempt to revive a former one, is, as a general rule, a question of fact to be decided with reference to all the circumstances of the case. [*ibid*]

A final decree for sale was passed on 7th June, 1913. The decree-holders applied for execution on 4th January, 1916, and on 23rd March, 1916, the execution proceedings were forwarded to the Collector for execution as the property sought to be sold was ancestral. On 13th November, 1916, while proceedings were pending before the Collector a suit was brought to obtain a declaration that the property was not liable to be sold and this suit was finally decided on 6th July, 1920, in favour of the decree-holders? The Collector took up the case on 17th August, 1920, and returned the papers to the Civil Court for want of prosecution. The Civil Court received the records on 31st August, 1920, and 'struck off' the application from the pending list of execution applications without notice to the parties. On 10th January, 1923, the decree-holders again applied for execution:

Held, (1) that the application was one to revive the application of 4th January, 1916, which had not been properly disposed of and was not time-barred; [p. 696, col. 1.]

(2) that the application was one for which no period of limitation was prescribed for by the Limitation Act and, therefore, fell within Art. 181 of Sch. I of the Act; [*ibid.*]

(3) that the right to make the application accrued on 6th July, 1920, when the litigation suspending the sale was finally decided, and that the application in question, being within three years of that date, was not barred by limitation. [*ibid.*]

Execution second appeal from a decree of the District Judge, Aligarh, dated the 16th April, 1924.

REFERRING ORDER.

Mukerji and Banerji, JJ.—This appeal was decided *ex parte* by a Bench of this Court on 8th March, 1926. The respondents subsequently appeared and were successful in obtaining an order for re-hearing. That is how the case is before us.

The appeal arises out of execution proceedings and under the following circumstances:—

A final decree for sale was made on 7th June, 1913. An application for execution of the decree was made on 4th January, 1916. The property being ancestral, papers were sent to the Collector for execution, on the 23rd March, 1916. While the execution was still pending before the Collector, certain persons with whose identity we are not concerned, instituted a certain suit No. 243 of 1916 on 13th November, 1916, to obtain a declaration that the property mortgaged was not liable to be sold in execution of the decree obtained by the decree-holders, the appellants before us. On the same date, an injunction was issued to the decree-holders restraining them from proceeding with the sale. The suit had various results. The first Court dismissed the suit on 30th March, 1917. An appeal was filed by the then plaintiffs, and the Appellate Court again issued an injunction restraining the decree-holders from proceeding with the sale. The appeal was allowed on 20th August, 1917. A second appeal was filed and this Court set aside the decree of the lower Appellate Court and restored that of the first Court. This was on 6th July, 1920. The result was that the bar to the execution of the decree was removed on 6th July, 1920. It appears that the papers for the execution of the decree were still with the Collector. On 17th August, 1920, he recorded an order to the effect that in spite of notice to the decree holder's *son* no proceedings had been taken by the decree-holder and, therefore, the papers should be returned to the Civil Court. On the papers being received in the Civil Court, the first and last order that was passed, was passed on the 31st August, 1920. The learned Subordinate Judge stated that as there was

no prosecution on the part of the decree-holders, the execution case was to be struck off.

Thereupon, on the 10th January, 1923, the present application for execution was made. This application prayed that the decretal amount might be realized by the sale of the property mortgaged. It sought to realize not only the amount which was due when the application of 4th January, 1916, was made, but also an additional sum which had accrued to the decree-holders on account of interest. An exception was taken to this application by the judgment-debtors on the ground that it was barred by time. The objection found favour with both the Courts below, and the application was dismissed. The decree-holders are, therefore, before this Court, and it is contended on their behalf that the application is within time.

The argument of Mr. P. L. Banerji, appearing for the decree-holders, is that on 6th July, 1920, the bar to the execution of his application was removed; and he had, therefore, three years' time, under Art. 181, Sch. I, of the Limitation Act, within which to apply for the execution of his decree. He argued that his present application was, in substance, an application to revive the previous application of 1916 and, therefore, under the authority of several cases decided by this and other Courts, his application was within time.

For the respondents, Dr. Agarwala has argued three points. His first point is that the application of 4th January, 1916, was never struck off on account of the issue of an injunction, that it was still pending on 6th July, 1920, and that, therefore, there was nothing to revive. In other words, his argument is this that the application being alive there was no necessity to revive it by a fresh application. This argument does not appeal to us. The reason is this: The Collector and the Civil Court both thought that it was the duty of the decree-holders to make a fresh application, asking the officers to proceed with the execution that was before them. If an application was necessary, that application would be treated as an application for revival. If any Article of limitation applied to any such application, it would be Art. 181.

The second argument of Dr. Agarwala is this. The application of 10th January, 1923, is not in substance an application to revive the application of 1916, inasmuch as the prayer is for the realization of a much larger amount than was contained in the application of 1916. We are not disposed to entertain seriously this argument. Both the applications were for the sale of the property mortgaged and for the realization of the amount due. In substance, the two applications were of one and the same nature; and it cannot be said that, because some period elapsed on account of litigation of a third party, the decree-holders were not entitled to any further interest on their decree. If they were entitled to further interest, they were entitled to ask for the same.

The third argument of Dr. Agarwala is more formidable and it appears that it has not been considered by any reported case so far brought to our notice. He argued that the fiction of 'revival of a previous application' had been resorted to by the Courts, simply because there was no particular provision in the Limitation Act of 1877, by which a case like the present one could be met. He pointed out that s. 15 of the Limitation Act of 1877, which directed that a period during which an injunction was operative should be deducted, related to suits alone, and did not relate to execution of the decrees. The new Act of 1908, sub s. (1), s. 15, relates to both the suits and the execution of the decrees. He argues, therefore, that if the Legislature definitely provided a rule for a case like the present one, it was not open to Courts to resort to a fiction in order to give relief. According to Dr. Agarwala's argument, the period of limitation would begin to run, in this case, from 4th January, 1916, the date of the previous application; and to the usual period of 3 years, there should be added a period of 3 years, 9 months and 5 days, during which the injunctions were in force. This would mean that the decree-holders were entitled to make an application for execution up to, and inclusive of, 8th November, 1922. Dr. Agarwala further argued that after all the so called application for revival is an application for execution of the decree. Article 181 can apply, only if there is no provision whatsoever, for an application to execute a decree in Sch. I of the Limitation Act.

We are of opinion that Dr. Agarwala's last contention is worthy of much consideration, and it ought to succeed. But so far this argument has not been put forward in any

of the reported cases. The Courts below computed limitation in the same way in which Dr. Agarwala would ask us to compute it. On the other hand, when the case came before two learned Judges of this Court and an *ex parte* decree was made, no attention was paid to the provisions of s. 15, cl. (1), of the Limitation Act. This was possibly because the attention of the learned Judges was not drawn to the provisions of that section, as no body appeared for the respondents. The fact remains that there are numerous cases in which, even after the passing of the Act (IX of 1908), the old rule of 'revival' has been applied. It is necessary that such an important point of law should be settled once for all. In view of the foregoing considerations, we direct that the case be laid before the Hon'ble the Chief Justice for the formation, if he thinks fit, of a larger Bench to consider the case, so that an authoritative pronouncement may be made on such an important point.

Messrs. *P. L. Banerji* and *Benod Behari Lal*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Lindsay, J.—The question referred to this Full Bench for decision is one of limitation, namely, whether an application made by the decree-holders on the 10th January, 1923, was liable to be dismissed as being beyond time. The Courts below treated it as time barred; in second appeal the decree-holders contend that it was made within time.

The facts are fully set out in the Referring Order; it will be sufficient to state here such of them only as bear immediately upon the question now before us.

The appellants, who are the decree-holders, obtained a final decree for sale on the 7th June, 1913. They made an application for execution on the 4th January, 1916, and on the 23rd March, 1916, the execution proceedings were transferred to the Collector for execution as the property sought to be sold was ancestral.

On the 13th November, 1916, while the proceedings were still pending before the Collector a suit was brought, to obtain a declaration that the property was not liable to be sold in execution. The litigation thus commenced went on till the 6th July, 1920, when this Court decided that the property was liable to be sold and dismissed the suit.

It is admitted before us that by reason of injunctions issued in the course of the litigation just referred to, the execution proceedings in the Collector's Court were stayed, and that the bar to the progress of those proceedings was eventually withdrawn by the judgment of this Court dated the 6th July, 1920.

It is important to consider now what happened after the date just mentioned. The Collector took up the case on the 17th August, 1920, and recorded an order in which it was recited that in spite of notice given to the son of one of the decree-holders no steps were being taken to prosecute the case in his Court. Being of opinion that there was default in prosecution (*adam pairawi*) he directed that the papers should be returned to the Court of the Subordinate Judge.

The record reached the office of the Subordinate Judge and was placed before him on the 31st August, 1920, whereupon without issuing notice to either of the parties he ordered that the application for execution should be struck off the list of pending applications, that a note to this effect should be recorded in the appropriate register and that an entry should further be made in the register of decided cases. These orders were clearly based upon the statement or opinion of the Collector in his order of the 17th August to the effect that the decree-holders were taking no steps to prosecute the execution proceedings.

Nothing more was done by the decree-holders till the 10th of January, 1923, when they presented the application which forms the subject-matter of the present appeal. In form this application is one for execution of the decree drawn up in accordance with the rules prescribed for such applications. It refers to previous applications made for execution but, strangely enough makes no mention of the application made on the 4th January, 1916.

Attached to the application was a statement setting out the history of the suit concerning the property sought to be sold and reciting that this suit had been finally disposed of by the High Court in second appeal on the 6th July, 1920. The narrative concluded as follows:—

"The appeal was decided in favour of the decree-holders by the Hon'ble High Court. The application for execution is, therefore, within time."

It is apparent, therefore, that while the decree-holders were styling their application as one for execution they were claim-

ing that the starting point of limitation for it was the 6th July, 1920, the date of the High Court's decision.

The Courts below treating the application as one for execution of the decree have applied limitation as provided in Art. 182 of the First Sch. to the Limitation Act; and it is conceded that if the application is, in reality, an application for execution the Courts below were right.

For the decree-holders, however, it is argued that the application, though in form an application for execution, is in substance one of a different character, namely, an application to revive or continue execution proceedings which had been stayed by injunction. It is contended that the proceedings in execution which began with the application of the 4th January, 1916, were never brought to an end by a judicial order which had the effect of disposing finally of the application so as to make it follow that the decree-holders could not thereafter move for execution except by presenting a new and independent application.

It is said that the law does not contemplate the simultaneous prosecution of two identical applications for execution; accordingly if, for the reason given above, the earlier application of the 4th January, 1916, was still pending the later application of the 10th January, 1923, cannot be treated as an independent application for execution to which the rule of limitation contained in Art. 182 applies.

On these grounds then, it is urged that the application of the 10th January, 1923, must be governed by Art. 181 inasmuch as it is an application for which no period of limitation is provided elsewhere in the First Sch. or by s. 48 of the Code of Civil Procedure and as the right to make the application accrued only on the 6th of July, 1920, when the decree of this Court removed the obstacle to the execution proceedings, the present application, made within three years of that date, is within time.

That was the view taken by the Bench which allowed this appeal *ex parte* on the 8th March, 1926.

As opposed to this we have the argument that the application of the 10th January 1923, was as it purported to be an application for execution—a distinct and independent application to which the provisions of Art. 182 necessarily apply. Dr Agarwala in support of this contention has to rely upon the order of the Subordinate Judge dated the 31st August, 1920, in order to show that the proceedings in execution had been definitely brought to a close so that there could be no occasion for their revival.

In our opinion the order of the Subordinate Judge did not produce this effect.

In the first place it was an improper order—one passed behind the backs of the parties. It is clear that no notice was given to either party.

And in the second place the order in its terms was not one justified by any law of procedure. It has been repeatedly observed in judgments of this Court that an order "striking off" a pending application for execution is not recognized by the law. This view was again expressed in a recent judgment of a Bench of this Court where it was said that an order directing an execution application to be "struck off" was not an order sanctioned by any rule [*Sat Narain Lal* v. *Ganga Jal* (1).]

If this be so it follows that the order of the Subordinate Judge of the 31st August, 1920, was intended in law for the purpose of concluding the execution proceedings initiated by the application of the 4th January, 1916. The only result it could have was that of leaving the proceedings still pending.

In this view the application of the 10th January, 1923, was one made during the pendency of execution proceedings and is not to be treated, therefore, as a fresh application for execution. It is, in substance, merely an application asking the Court to continue the earlier proceedings. As such it is outside the purview of Art. 182.

Dr. Agarwala has argued earnestly that applications for revival of previous execution proceedings though they have for a long time been countenanced by the Court are, as a matter of law, no longer competent, regard being had to an amendment of the law introduced in s. 15 of the Limitation Act (Act IX of 1908). This section lays down a rule for the computation of the period of limitation according to which the time of the continuance of any injunction or order staying the institution of a suit or the execution of a decree is to be excluded in determining whether the suit, or an application for execution of the decree is brought within time. It is point-

(1) 94 Ind. Cas. 1005; A. I. R. 1926 All. 409.

ed out that under the previous Limitation Act (Act XV of 1877) the rule applied only to suits; under the new Act it has been extended to application for execution of decree. The result is, it is said, that there is now a definite provision which in the case of application for execution forbids any extension of time beyond the limit arrived at by deduction of the period during which the injunction or order has continued.

But s. 15 even as it now stands refers to applications for execution of decree, and does not affect to deal with applications which, in substance are not applications for execution but merely applications to move a Court to continue proceedings which had come under suspension by reason of an injunction or order.

We are unable, therefore, to hold that the law as amended prohibits either expressly or by necessary implication the making of these applications for revival which the Courts both before and since the commencement of the Limitation Act (Act IX of 1908) have treated as competent. We need only refer in this connexion to the judgment of the Privy Council in *Qamar-ud din Ahmad* v. *Jawahir Lal* (2) and to the interpretation put upon that judgment in the case of *Madho Prasad* v. *Draupadi Bibi* (3). At page 385* of the latter report Piggott, J., observes:

"The case of *Qamar-ud-din Ahmad* v. *Jawahir Lal* (2) is good authority for the proposition that in a case of this sort, where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been suspended."

The only other question then is as to the period within which the right of the decree-holder to so apply must be exercised. As to this we think that the law is laid down correctly in a further passage of the judgment of Piggott, J, in the above case which reads as follows:—

"He, (*i.e.*, the decree holder) can, however, only do this by means of a proper application to that effect..... The application in question would be one for which no period of limitation is expressly provided by the Schedule to the Limitation Act and would, therefore, fall under Art. 181 of the Schedule requiring to be made within three years of the date on which the right to make it accrued."

Obviously, the right would accrue upon the date on which the obstacle to the progress of the execution proceedings was withdrawn.

Applying these principles to the case now before us we find that the obstacle was removed on the 6th July, 1920, when the order of this Court dismissed the suit which led to the suspension of the execution proceedings commenced by the application of the 4th January, 1916.

The application of the 10th January, 1923, which we hold to have been, in substance an application for revival was made within three years from the 6th July, 1920, and so was within time under Art. 181.

For these reasons we allow the appeal, reverse the orders of the Courts below and send the case back for disposal to the Execution Court. The appellants to get their costs here and in the lower Appellate Court. In this Court costs to be allowed on the higher scale.

Banerji, J.—I agree with Mr. Justice Lindsay and have nothing to add.

Sulaiman, J.—I have come to the same conclusion. The application out of which this appeal arises is certainly defective in form. The respondents' contention has been that having regard to its language and the prayer asked for, it must be deemed to be a fresh application for execution and not one for revival. This is a matter not only of interpretation but of inference from all the circumstances. As my learned brethren consider that this can be treated as in substance an application for revival of the proceedings in execution, I am not disposed to differ. This interference will be strengthened if it be held that the previous application has really not yet been finally disposed of.

The main contention of Dr. Agarwala is that the doctrine of revival which was resorted to by the Courts under the old Limitation Act of 1877 is no longer applicable in cases where stay orders or injunctions have been issued. The Bench which heard the appeal *ex parte* held that the proceedings should be revived. But the Bench which has referred the case to the Full Bench was inclined to hold that the contention was worthy of much consideration and ought to succeed. The

(2) 27 A. 334; 32 I. A. 102; 2 A. L. J. 397; 8 Sar. P. C. J. 810; 1 C. L. J. 381; 9 C. W. N. 601; 15 M. L. J. 258; 7 Bom. L. R 433 (P. C)

(3) 61 Ind. Cas. 417; 43 A. 383; 19 A. L. J. 174.

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learned Counsel for the respondents argues that this doctrine was invented by the Court to help the decree-holder at a time when the law contained no provision to safeguard his interest. Section 15 of the Limitation Act (IX of 1908) is in terms made expressly applicable to cases where execution has been stayed by injunction. He, therefore, contends that the only concession which can be made to the decree-holder is to exclude the time during which the injunctions were in force.

This argument ignores that the principle allowing a right of revival of a previous application is different and distinct from that permitting exclusion of time. The question of the exclusion of time can only arise when a fresh application for execution is made, whereas it is only a previous application which has not been properly and finally disposed of which can be revived. The application for revival is not a fresh application for execution. The principle is based on equity and justice, and the decree-holder is merely to request the Court to take up and continue the proceedings which have not finally terminated but which have remained in abeyance for some reason or other beyond his control.

It is not correct to say that the amendment of s. 15 was intended to sweep away and re-place the old doctrine of revival. The two principles are not co-extensive or identical. In cases where there has been no previous application for execution, but proceedings in execution have been stayed, s. 15 may be of help, whereas the doctrine of revival would have no application. Similarly, there may be cases where after the removal of the bar a previous application has been properly and finally disposed of. In such cases also no question of revival can arise, but the decree-holder will be entitled to deduct the period of suspension in consequence of the stay order or injunction. On the other hand, there may be cases to which s. 15 cannot apply and yet the doctrine of revival may be of utility. For instance, execution proceedings may be postponed by agreement between the parties under some arrangement for payment during a definite period after which the decree-holder may request the Court to revive it or proceedings might have been stayed long after an application for execution has been pending for three years in which case a mere exclusion of the time of suspension would never save a second application from limitation. That the amendment of the new section has not killed the doctrine of revival is shown by numerous cases decided under the new Act in which the old doctrine has been unhesitatingly applied.

The application for revival not being a fresh application for execution cannot be governed by Art. 182. There is not, however, any special Article which would apply except the omnibus Art. 181. It has been held in several cases that this Article applies to such applications. I may refer to the case of *Balwant Singh* v. *Budh Singh* (4) which was a case under the new Act and in which the same principle was followed. When Art. 181 applies, the period of limitation is three years from the date when the bar to the execution was removed. In the present case the bar was certainly not removed till the High Court, on the 6th of July, 1920, allowed the appeal and dismissed the suit. The decree-holder, therefore, had three years from this last mentioned date to go to the Court and request it to take up the pending application and continue the proceedings. The mere fact that he did not turn up within a month or two of this date cannot deprive him of his right to move the Court within three years. The papers were returned by the Collector merely because no steps were taken by the decree-holder within two months. The Subordinate Judge, without even issuing any notice to the decree-holder, struck the case off from the pending file and consigned the record to the record room. That order cannot be deemed to be a final disposal of the application. The Court could not penalize the decree-holder for not appearing promptly when no notice had been issued to him. The Court could not cut down the period of three years which the decree-holder had under Art. 181 to take steps for revival. The order striking off the proceedings, therefore, is no bar to the present application which, in my opinion, is within time.

Mukerji, J.—The point for the decision of which this case has been referred to a Full Bench, briefly stated is whether s. 15 of the Limitation Act of 1908 has made it incompetent to a decree-holder

(4) 56 Ind. Cas. 1006; 42 A. 564; 18 A. L. J. 642.

to apply for the revival of a previous execution application made by him and whether any application that he makes, for the continuance of execution proceedings, must be treated as a fresh application.

The facts of the case will make the point clear and are referred to in the Order of Reference to which I was a party.

Briefly they are as follows. A final decree for sale was made on the 7th of June, 1913. After some unsuccessful application an application for execution was made on the 4th of January, 1916. As the result of this application, the decree was sent to the Collector for execution, as the property to be sold happened to be the ancestral property of the judgment-debtor. While the execution was still pending before the Collector certain people filed a suit, on the 13th of November, 1916 to obtain a declaration that the property ordered to be sold was liable to be sold in execution of the decree-holder's decree. On the same date, the Court seised of the suit, enjoined the decree-holder from proceeding with the sale. The suit was dismissed. An appeal was filed and the Appellate Court again issued an injunction restraining the sale. The appeal succeeded with the result that the decree was declared to be inexecutable. On a second appeal, however, the decree of the Court of first instance was restored, the suit having been dismissed *in toto* by the High Court. This happened on the 6th of July, 1920. It was, therefore, on this date that the obstacle to the execution of the decree was removed

On the 17th of August, 1920, the Collector recorded an order to the effect that the decree-holder's son had been intimated to, but the decree-holder had taken no steps to proceed with the execution and that, therefore, the papers should be sent back to the Civil Court. The papers were received in the Subordinate Judge's Court on the 31st of August, 1920, and on that day, the learned Judge "struck off" the execution proceedings recording it, as the reason for his action, that the decree-holders were not prosecuting the case.

On the 10th of January, 1923, the decree-holders made the application which we have now to consider.

The application, if it be treated as a fresh application for execution of the decree, would be time-barred under the provisions of Art. 182 of Sch. I of the Limitation Act, in spite of excluding the period of three years and odd during which the injunctions were in force against the decree-holders. But if the application of the 10th of January, 1923, could be regarded as an application made for reviving the application that was made on the 4th of January, 1916, and if three years' time be computed from the 6th of July, 1920, the date of the disposal of the second appeal by the High Court, the application would be in time. The argument on behalf of the judgment-debtors-respondents is that after the enactment of s. 15 of the Limitation Act of 1908, the application of the 10th of January, 1923, cannot be regarded as anything but a *fresh* application for execution. We have to see whether this argument is sound.

It may be at once pointed out that under the Limitation Act of 1877, s. 15, as it then stood, did not cover the case of an execution application, the proceedings under which had been stayed by injunctions issued by Courts. It is argued on this ground that whenever an application is made by the decree-holder asking the Court to proceed with the execution of his decree, that application must be treated as an application for execution and limitation must be computed having regard to the provisions of Art. 182 and s. 15 of the Limitation Act.

This argument has, on the face of it, the merit of some plausibility but it is not really correct. There is an essential difference between an application for execution of a decree and an application to a Court asking it simply to revive a previous application made for the execution of the decree. It is really a question of fact, a question of the intention of the decree-holder as to what he wants. It is not a question of pure law. If, in the case before us, on the 31st of August, 1920, before the order was recorded by the Subordinate Judge, the decree-holders had gone to him and asked him, by an application, not drawn up in the usual 10 column form for execution, to send back the case to the Collector for execution, it could hardly have been said that they were applying for an execution of the decree, within the meaning of Art. 182 of the Limitation Act. In that case, the application would have been simply to the effect that the bar to the execution had been removed, that the Collector had wrongly returned the papers to the Civil Court and that the Civil Court should re-transfer the case to the Collector and ask

him to proceed with the execution. Thus, it seems clear to me, that there is a difference between a fresh or independent application for execution and an application (to the Court executing the decree) which does not amount to an "application for execution." It is to an application of the former class that s. 15 of the Limitation Act would apply and not to an application of the latter class.

To make the point clearer, I will give an illustration. Suppose the decree passed and sought to be executed is a simple money-decree. The decree-holder seeks the execution of the decree by the arrest of the judgment-debtor. The judgment-debtor institutes a suit to obtain a declaration that the decree was obtained by fraud and he obtains an injunction staying the execution of the decree. If after the dismissal of the suit, the decree-holder does not ask the Executing Court to proceed with his application for the arrest of the judgment-debtor, but makes an application to it to attach the property of the judgment-debtor and to execute the decree in that way, this application would be a fresh application and would be governed by Art. 182 read with s. 15 of the Limitation Act. If, on the other hand, the decree-holder should apply to the Court executing the decree to proceed with the arrest of the judgment-debtor he would be simply asking for a revival of the proceedings which were still pending and his application would not be governed by the rule contained in s. 15 of the Limitation Act.

Such being my view of the law, let us consider the present case. As already stated, on the 31st of August, 1920, the learned Subordinate Judge "struck off" the execution application without giving the decree-holder an opportunity to make an application before him to proceed with the execution and without intimating to the decree-holder that the Court was prepared to proceed with the execution. The order striking off the execution amounts simply to an order sending the papers to the record room. The order did not amount to an adjudication of the case. In the circumstances, the previous execution application of the 4th of January, 1916, was still pending and had not been substantially or judicially disposed of. The decree-holders, in making their application of the 10th of January, 1923, referred to the fact that the High Court had disposed of the second appeal on the 6th of July, 1920, and relying on that date, stated that their application was within time. It is true that the application was made in the form of an ordinary application for execution with the several columns shown as usual. But it has been repeatedly said that we have to look to the substance of the application and not to the form of it. If it were otherwise it would entirely depend on the skill of the draftsman whether a certain Article of the Limitation Act should apply or any other. This cannot be permitted. We have already shown in our Referring Order that the plaintiffs' application should be treated as an application asking the Court to proceed with the previous application. To that opinion I still adhere.

In this view of the case the appeal ought to succeed and I would, therefore, set aside the decrees of the Courts below and remand the execution case to the Court of first instance and direct it to proceed with the execution in accordance with law.

Walsh, Actg. C. J.—I have read the judgments delivered by the other members of the Bench, and agree with them generally. I desire to make only two observations. In my opinion, an order made by a Judge upon an application which is still pending, that it be "struck off," or "sent to the record room," made either without notice to the decree-holder, or without giving him an opportunity of being heard is a ministerial order, and cannot be regarded, speaking generally, as a judicial disposal of the application on the merits, though special circumstances may appear which make it so. Secondly, whether an application is in substance a fresh one, or an attempt to revive a former one, is, as a general rule, a question of fact to be decided with reference to all the circumstances of the case.

By the Court.—For the reasons given above the appeal is allowed and the orders of the Court below reversed, and the case must be sent back to the Execution Court for disposal according to law. The appellants will get their costs here and in the lower Court, including in this Court fees on the higher scale.

A. N. A. *Appeal allowed.*

PATNA HIGH COURT.

CUTTACK CIRCUIT COURT.
SECOND CIVIL APPEAL No. 39 OF 1925.
December 21, 1926.
Present:—Mr. Justice Kulwant Sahay and Mr. Justice Macpherson.

ABHIRAM BEDANTA—PLAINTIFF—APPELLANT
versus
CHINTAMANI BEDANTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103—Conflicting entries in two Records of Rights—Presumption of correctness, whether rebutted—Orissa Tenancy Act (II of 1913), s. 117.

The absence of a specific provision in the Bengal Tenancy Act corresponding to s. 117 of the Orissa Tenancy Act does not in any way affect the provisions contained in s. 103 of the Bengal Tenancy Act. [p. 701, col. 2]

When there are two Records of Rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made. There is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. [*ibid.*]

Raghunath Misra v. *Ram Behera* (1), distinguished.

Appeal against a decision of the Additional Subordinate Judge, Cuttack, dated the 7th March, 1925, confirming that of the Munsif, Kendrapara, dated the 19th March, 1924.

Messrs. *J. N. Bose* and *Suba Rao*, for the Appellant.

Messrs. *B. N. Das* and *L. Mahanti*, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—The dispute in this case relates to ·010 acres of land recorded in the Revisional Survey in plot No. 96-709. In the Provincial Settlement the plaintiff was recorded in respect of ·143 acres of land including the land in dispute in plot No. 96. His case is that the entry in the Revisional Settlement as regards ·010 acres of land in the name of the defendant in plot No. 96-709 was wrong and the suit was instituted for declaration of the plaintiff's title and recovery of possession. Both the Courts below have held that the plaintiff had failed to prove his title and possession within twelve years.

In second appeal it has been contended that the presumption of correctness attached to the entry in the Provincial Settlement is not rebutted by the entry in the Revisional Settlement inasmuch as the settlements in the present case were made under the provisions of the Bengal Tenancy Act and there is, in the Bengal Tenancy Act, no provision similar to the provision contained in s. 117 of the Orissa Tenancy Act. Section 117 of the Orissa Tenancy Act provides that if any entry in a Record of Rights is altered in subsequent Record of Rights, the latter entry shall be presumed to be correct until it is proved by evidence to be incorrect, but the previous entry shall be admissible as evidence of the facts existing at the time such entry was made. It is true that there is no such specific provision in the Bengal Tenancy Act, but this provision in the Orissa Tenancy Act does not in any way affect the provisions contained in the Bengal Tenancy Act. Section 103-B of the Bengal Tenancy Act gives a statutory presumption of correctness to the entries in the Record of Rights. When there are two Records of Rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made. There is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. Reliance has been placed upon a decision of this Court in *Raghunath Misra* v. *Ram Behera* (1). It is not clear as to whether their Lordships were considering the provisions of the Bengal Tenancy Act or of the Orissa Tenancy Act. Reference has been made to s. 103-B of the Bengal Tenancy Act and it has been held that where the plaintiffs were recorded as *rafa tankidars* in the Provincial Settlement Records and as *tankidars* in the Records of the Revisional Settlement, the entry in the Provincial Settlement Records was sufficient to rebut the presumption arising from the entry in the Records of the Revisional Settlement inasmuch as there was no procedure by which the status of the plaintiff could have been changed from that of a *rafa tankidar* to that of a *tankidar* in the interval between the two Settlements.

This decision, however, does not affect the question now before us. There is no question as regards an alternation of status between the time of the entry in the Provincial Settlement and that in the Revisional Settlement. The question is as to who was in occupation of and in possession of the land as tenant at the time of the Provincial Settlement and

(1) 75 Ind. Cas. 427; 5 P. L. T. 140; 1 Pat. 167; A. I. R. 1922 Pat. 548.

at the time of the Revisional Settlement. There was no question of status involved in the case and, therefore, the only question is as regards possession and I, therefore, hold that the entry in the Revisional Settlement Record cannot be considered to have been rebutted by the entry in the Provincial Settlement Record.

The next point argued is that as both parties challenge the correctness of the entry in the Revisional Settlement the presumption of correctness is rebutted. As regards the defendant, what he alleged was that there were certain trees standing on plot No. 96-709 which was entered in his name, but those trees were not shown in the Revisional Settlement. From this it is argued that the defendant does not admit the correctness of the entry in the Revisional Settlement. The presumption raised by the entry in the Record of Rights is a statutory presumption and the fact that both parties alleged that, the entry was incorrect in certain respects, will not take away the statutory presumption attached to it. In *Murali Dhar Aditya* v. *Thakur Das Mondal* (2) an observation was made by the learned Judges of the Calcutta High Court to the effect that where both the plaintiff and the defendant in a suit repudiate an entry in the Record of Rights, the presumption arising from the Record of Rights may be held to have been rebutted. This would depend on the circumstances of each case and no hard and fast rule can be laid down. The presumption attached to the entry under the law must stand and the question as to whether the presumption had been rebutted by evidence adduced in the case must depend upon facts and circumstances in each case. We have, moreover, got the finding in the judgment of the learned Subordinate Judge to the effect that the entry in the Revisional Settlement was made on the admission of the plaintiff. There is also a finding upon the evidence that the plaintiff had failed to prove possession within twelve years of the suit. On these findings this second appeal must be dismissed with costs.

Macpherson, J.—I agree. The findings of the first Court were that on all the evidence, oral and documentary, the plaintiff had failed to rebut the presumption attaching to the entry in the Revisional Record of Rights in favour of the defendant, which indeed had been made with the assent of the plaintiff and that the plaintiff had not been in possession within twelve years of the institution of the suit. These findings were affirmed on appeal. On each of these findings the suit must fail. As regards the plea advanced before us that the entry in the Revisional Record of Rights is rebutted by the entry in the Provincial Record of Rights, the position is that these were by no means the only items of evidence in favour of the defendant on which the Courts had to determine the facts and the appreciation of the facts by the lower Appellate Court on materials proper for its consideration is binding in second appeal. But even if there had been nothing more before it than the two competing entries in the Provincial and Revisional Records of Rights with presumption attaching to each of correctness at the date which it was finally published, it cannot be said as a matter of law that the earlier entry is to be preferred to the later entry. The decision in *Raghunath Misra* v. *Ram Behera* (1), appears to me, with all respect, not to be correct. In the first place, the question is not one of law and in the second place, it cannot, in the absence of other considerations (which in the ruling cited do not appear to have existed), be said to be even reasonable to prefer the earlier entry, since the presumption is that it would not have been altered by the officer revising the Record of Rights unless for good reason. Such might be either that the position had changed or that the former entry was, in spite of the presumption of correctness attaching to it, proved to his satisfaction to be erroneous.

To my mind the statutory presumption of correctness attaching to an entry in the Record of Rights is certainly not rebutted and generally is hardly even weakened by the fact that it is challenged or repudiated wholly or in part by both parties to a litigation. In law that presumption can under the amendment of 1907 only be rebutted by *evidence* that it is incorrect. And the result of experience is that an entry, which both parties assail, generally represents with substantial accuracy the actual facts as an unprejudiced observer has found them on the spot.

A. N. A. *Appeal dismissed.*

(4) 51 Ind. Cas. 50.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 156 OF 1926.
January 7, 1927.
Present:—Mr. Justice Ashworth.
L. MADAN LAL—PLAINTIFF—APPLICANT
versus
LAL CHAND—DEFENDANT—OPPOSITE PARTY

Negotiable Instruments Act (XXVI of 1881), ss. 8, 78—Provincial Small Cause Courts Act (IX of 1887), s. 25—Promissory note—Payment to real lender, plea of, whether can be entertained—Mistake of law—Revision—Interference by High Court.

There should be no interference under s. 25 of the Provincial Small Cause Courts Act unless it clearly appears that some substantial injustice to a party has directly resulted from a material mis-application or mis-apprehension of law or material error in procedure committed by the lower Court. Any decree passed on a wrong view of law must cause substantial injury to some party in the suit but every such injury is not necessarily an injustice inviting interference under s. 25.

The effect of s. 78 of the Negotiable Instruments Act read with s. 8 of the Act is that a promissory note can only be discharged by payment made to the holder of the note and, therefore, in a suit upon such note evidence cannot be allowed to be given to show that the note was not really executed in the plaintiff's favour or that it had been discharged by payment to the person who was the real payee of the note. Where, however, such evidence is admitted by a Small Cause Court and the suit is dismissed on the finding that the defendant took nothing from the plaintiff and has paid off the amount of the note to the real lender, the High Court will not interfere with the decree in revision under s. 25 of the Provincial Small Cause Courts Act, inasmuch as no substantial injustice is caused to the plaintiff by reason of the erroneous view of law adopted by the trial Court.

Civil revision from an order of the Small Cause Court Judge, Kasganj, dated the 18th of June, 1926.

Mr. *S. N. Seth*, for the Applicant.

JUDGMENT.—This is an application in revision under s. 25 of the Provincial Small Cause Courts Act against a decree of the Small Cause Court Judge of Kasganj dismissing the plaintiff-appellant's suit against the defendant-respondent on the basis of a promissory note.

The plaintiff was admittedly the holder of the promissory note and s. 78 read with s. 8 of the Negotiable Instruments Act XXVI of 1881 enacts that such a note can only be discharged by payment made to the holder of the instrument. There can be no doubt that the lower Court should not have allowed evidence to show that the promissory note was not really executed in the plaintiff's favour or evidence that the note had been discharged by payment to the person really interested. This was held in the Full Bench decision of the Madras High Court *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* (1). There can be no doubt, therefore, that the decision of the suit by the lower Court was not according to law.

The question, however, arises whether the mere fact of the decision not having been according to law will justify interference in revision. The power to revise conferred by s. 25 of the Provincial Small Cause Courts Act is a discretionary power and it has been ruled by a Full Bench decision of this Court, *Muhammad Bakar* v. *Bahal Singh* (2), that there should be no interference under s. 25 of the Small Cause Courts Act "unless it clearly appears that some substantial injustice to a party to the litigation has directly resulted from a material mis-application or mis apprehension of law or material error in procedure in the Court of Small Causes." Now, any decree passed on a wrong view of law must cause a substantial injury to a party whose suit is dismissed by reason of that mistake. But this injury is not necessarily an injustice. In the present case the lower Court found that the plaintiff was not entitled in justice to recover the money as he made no payment to the debtor and as the debtor had paid the real person in consideration of whose loan the promissory note was executed. In these circumstances I am unable to hold that the dismissal of the suit caused a substantial injustice to the applicant. I am bound by the decision of the Full Bench of this Court referred to above to hold that s. 25 of the Act must not be invoked in the absence of such substantial injustice.

Accordingly this application is dismissed but as no one appears for the opposite party I make no order as to costs.

Z. K. *Application dismissed.*

(1) 30 M. 88; 1 M. L. T. 377; 16 M. L. J. 508 (F. B.).
(2) 13 A. 277; A. W. N. (1891) 80; 7 Ind. Dec. (N. S.) 173 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1440 OF 1925.

January 27, 1927.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Musammat YASRAB BANO—PLAINTIFF—APPELLANT

versus

Syed ZAHUR HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

*Agra Pre-emption Act (XI of 1922), s. 12 (1)—Pre-emption—Plot becoming 'petty proprietary interest'—Right of pre-emption, whether lost—*Wajib-ul-arz—*Custom of pre-emption, whether extends to petty proprietary interests.*

A co-sharer in a *patti* is entitled to enforce his right of pre-emption regarding a plot forming part of the *patti* so long as it has not been execluded from the *patti* even though it has become a 'petty proprietary interest'.

If there is a record of custom in a *wajib-ul-arz* providing for pre-emption, whatever the extent of the custom may be and in whatever way it may be expressed there is a right of pre-emption under the Agra Pre-emption Act which can be exercised in respect of a petty proprietary interest.

Second appeal from a decree of the Second Additional Subordinate Judge, Allahabad, dated the 17th of March, 1925.

Messrs. *P. L. Banerji* and *Haider Mehdi*, for the Appellant.

Dr. *K. N. Katju* and Mr. *Majid Ali*, for the Respondents.

JUDGMENT.—In our opinion this appeal must be allowed, the decree of the lower Appellate Court set aside, and the decree of the Court of first instance restored.

The suit was a suit for pre-emption of an area of 18 *biswas* comprised on a plot No. 94. It is clear on all hands that at one time, at any rate, this plot No. 94, formed a portion of a *patti* called "*Patti* Haider Husain" in which the plaintiff-pre-emptor is a co-sharer and in which the vendee is not.

It is stated that in consequence of some litigation which took place in the year 1918 this area of 18 *biswas* came to one Nawab Husain, and it is further stated that by reason of a compromise which was arrived at between the persons who were owners of this *patti*, Nawab Husain was given a proprietary interest in these 18 *biswas* of land. It was also stated by Counsel in the trial Court that revenue had been assessed on these 18 *biswas* but it was not known whether the revenue had been paid or not.

The lower Appellate Court seems to have thought that by reason of these proceedings in the year 1918 this area of 18 *biswas* had become what is known as *haqiat mutafarriqa* or, to adopt the expression used in the Agra Pre-emption Act, a petty proprietary interest.

We are prepared to assume that this area of 18 *biswas* had become a petty proprietary interest, but we fail to see why for that reason it ceased to be part and parcel of *Patti* Haider Husain. There is nothing to show that the judicial proceedings of the year 1918 had the effect of excluding this parcel of land from *Patti* Haider Husain and we must, therefore, take it that the plot still remains in *Patti* Haider Husain, although it may have become a petty proprietary interest.

If, therefore, there is a right of pre-emption in respect of this property, it is clear that the plaintiff has the right to pre-empt. It is not made to appear that there was any co-parcener in this petty proprietary interest, and that being so the right to pre-empt accrues to persons who are mentioned in Class II of s. 12, sub-s. (1) of the Act. The plaintiff is a co-sharer in *Patti* Haider Husain and the vendee is not.

It was sought to be argued that no custom of pre-emption ought to be presumed to exist here because it is said in the *wajib ul-arz* "the record is only a Record of Right to pre-empt proprietary interests." In our opinion if there is a record of custom in the *wajib-ul-arz* providing for pre-emption, whatever the extent of custom may be and in whatever way it may be expressed, there is a right of pre-emption under the Act which can be exercised in respect of a petty proprietary interest.

We allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance. The respondents will pay the costs of the plaintiff-appellant both in the lower Court and in this Court. Costs in this Court will include fees on the higher scale.

A. N. A. *Appeal allowed.*

OUDH CHIEF COURT.

CRIMINAL APPLICATION No. 155 OF 1925.
November 5, 1925.
Present :—Sir Louis Stuart, KT., Chief Judge.
Syed ALI ABBAS *alias* BANNEY SAHEB AND OTHERS—ACCUSED—APPLICANTS
versus
EMPEROR—COMPLAINANT—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), ss. 53, 63—Search without warrant—Officer's duty to record reasons—Omission to record—Mere irregularity—Procedure relating to search—Code of Criminal Procedure, how far applicable—Irregularity of search, effect of, on conviction.

It is the duty of a Police Officer before proceeding to make a search without a search warrant, under s. 53 of the U. P. Excise Act, to record his grounds for believing that the obtaining of a search warrant might afford the offender an opportunity of escaping or of concealing the evidence of the offence. But the omission to record such grounds is not an illegality but a mere irregularity, especially where the officer has clearly recorded his intention to make the search before proceeding to search. [p. 705, col. 2.]

In making a search without a search warrant under the U. P. Excise Act a Police Officer is not confined to the strict provisions of the Code of Criminal Procedure relating to searches but only to those provisions, in so far as they are applicable under the Act. As the procedure for making searches under the Code relates to making searches under a search warrant it cannot be applied in entirety to searches which are made without a search warrant. [p. 706, cols. 1 & 2.]

Entering a house to be searched, by a ladder, is not an act explicitly forbidden by law, although it is not advisable to make an entry in such manner. [p. 706, col. 2.]

A man proved to have been in possession of an article against the law cannot plead as a defence that the search was irregular. [*ibid.*]

Emperor v. *Allahdad Khan* (1) and *Ali Ahmad Khan* v. *Emperor* (2), followed.

Courts should pass very severe sentences upon persons who pander to the unhealthy cravings of men by supplying them with intoxicating drugs. [*ibid.*]

Criminal application against an order of the Sessions Judge, Lucknow, dated the 5th September, 1925, modifying that of the Magistrate First Class, Lucknow, dated the 11th July, 1925.

Mr. *H. C. Dutt*, for the Applicants.
Mr. *N. N. Ghoshal*, for the Government Advocate, for the Crown.

JUDGMENT.—The applications in revision of four persons Saiyed Ali Abbas *alias* Banney, Nadir Agha, Mustafa Hussain and Tassadduq Husain arise out of their convictions in connection with a raid made by the officer in charge of the Lucknow Kotwali on the 23rd of May, 1925. It appears from the evidence of that officer that he received information to the effect that there was a traffic in cocaine proceeding in a certain house in the city. In order to check the accuracy of this information he sent a man unnamed (who was clearly an informer) with three marked currency notes to purchase cocaine. When the man came back with cocaine the officer proceeded to collect a large party of Police and others to make a raid upon the premises. He had under s. 53 of Local Act IV of 1910 authority to search the premises without a search warrant, if he was satisfied that the obtaining of a search warrant might well afford the offender an opportunity of escaping or of concealing evidence of the offence. It was, however, his duty before he proceeded to make a search without a search warrant, to record the grounds of his belief that the offender was likely to escape or conceal the evidence of his offence before he made the search. I cannot find that this officer did record the grounds of his belief in accordance with the procedure, although he clearly recorded in the Police diary the fact that he was proceeding on his way to search the house. His omission to record the grounds of his belief, in view of the fact that he clearly stated his intention of making the search, would hardly amount to illegality, although it was certainly an irregularity. When the premises were approached the Police Officer put a ladder against the wall and sent up certain constables to get into the premises and open the front door. Before the door was opened two men, the applicants Mustafa Husain, and Tassadduq Husain, were seized by the Police outside the premises and were found to be in possession of cocaine. After the front door had been opened Saiyed Ali Abbas *alias* Banney and Nadir Agha were found lying on two beds. Inside the pillow which was under the head of Saiyed Ali Abbas was cocaine and under the pillow of the bed occupied by Nadir Agha was cocaine. Upon these facts the applicants were convicted in separate trials by a First Class Magistrate in Lucknow under the provisions of s. 60 of the Local Act to which I have referred. There was one other conviction which has been set aside by the Sessions Judge. The Sessions Judge has made a modification in the sentences. The appli-

cants stand convicted of offences under the Act. They were released by the learned Judicial Commissioner on bail and are on bail at present. This is not a case in which any cause has been shown why I should depart from the usual practice of accepting findings of fact without demur. There are very occasional instances in which in a criminal revision the revising Court is justified in examining the findings of fact and varying them, but this is not such a case. The evidence which was perfectly straightforward was believed by the Magistrate and believed by the Sessions Judge and I do not propose to dismiss their finding as to its credibility, and it must be taken that cocaine was found on the persons of Mustafa Hussain and Tassadduq Hussain, was found in a pillow on the bed on which Syed Ali Abbas was lying and under a pillow on the bed on which Nadir Agha was lying. These men have thus clearly committed an offence under s. 60 of the Act. But it is argued that the search of the house was illegal and irregular, and that the irregularities and illegalities were such as to vitiate the convictions. I can decide these points very briefly. There was no illegality. There was an irregularity on the part of the officer in not recording the grounds of his belief as to the necessity of making a search without warrant but this omission was of a very trivial nature in so far as an omission to follow the procedure contemplated by the law can be of a trivial nature. The officer has stated in his evidence his reasons for making the search without a warrant. They were that having satisfied himself—and satisfied himself correctly—that there was cocaine on the premises he was afraid that it might be made away with if a search warrant was applied for in the ordinary course of law. His omission to record the reasons which he undoubtedly had could in no way prejudice any of the applicants. Nevertheless the omission was an irregularity. In making the search without a search warrant the officer was not confined to the strict provisions of the Code of Criminal Procedure relating to searches but only to those provisions, in so far as they are applicable under the Act. As the procedure for making searches under the Code of Criminal Procedure relates to the making of searches under a search warrant the procedure could not be applied in entirety to searches which were made without a search warrant. Therefore, the entrance by the ladder was not an act explicitly forbidden by the law. I should not advise an entry to be made in this manner in all cases but in this particular case it did no harm. Granting, however, that the use of the ladder constituted another irregularity, the fact remains that in a case of this kind when a man is proved to have been in possession of an article against the law he cannot plead as a defence that the search was irregular. In following this view I am adopting in the main the principles laid down by a Bench of the Allahabad High Court in *Emperor* v. *Allahdad Khan* (1) and by a Single Judge of the same Court in *Ali Ahmad Khan* v. *Emperor* (2). In this particular case it is no hardship to the applicants to be unable to plead that the irregularity vitiated the search for the irregularity was of such a trivial kind that it could not possibly prejudice them. I consider that the applicants, therefore, were rightly convicted.

In regard to the question of sentence I wish to put forward my views of the nature of the offence. I do not think that it is always recognised in this country what are the enormities of the traffic in cocaine. Many people are under the impression that cocaine is no more harmful than opium. This impression is based on an absolute ignorance of the results of cocaine upon those unhappy persons who consume it. It is sufficient to say that cocaine when taken as it is taken by the victims of the drug will ruin the recipients mentally and physically. In the interest of the community it behoves the Courts to pass very severe sentences upon persons who pander to the unhealthy cravings of their fellow creatures by supplying them with this drug. Their motives for supplying it are as low motives as can actuate a human being. They supply the drug because a very large profit is made by poisoning the public in this manner. For these reasons I refuse to reduce the sentences upon any one of these persons. I direct that they surrender at once to their bail and serve out the unexpired portions of their sentences.

A. N. A. *Order accordingly.*

(1) 19 Ind. Cas. 332; 35 A. 358; 11 A. L. J. 442; 14 Cr. L. J. 236.

(2) 81 Ind. Cas. 615; 46 A. 86; 21 A. L. J. 858; A. I. R. 1924 All. 214; 25 Cr. L. J. 967.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION NO. 1758 OF 1926.

February 1, 1927.

Present:—Mr. Justice Campbell.

BEHARI LAL—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 25—Recovery list signed by accused, admissibility of, to prove accused's possession of premises.

If the putting of signature to the recovery list by the accused is evidence that the house searched belongs to him, this would be an incriminating statement of the nature of a confession and would not be admissible against him under s. 25, Evidence Act.

Petition, under s. 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Gujranwala, dated the 4th October, 1926, affirming that of the Magistrate, First Class, Gujranwala, dated the 12th July, 1926.

Mr. *Niamat Rai*, for the Petitioner.

Mr. *R. C. Soni*, for the Respondent.

JUDGMENT.—The petitioner has been convicted of offences under s. 61 of the Excise Act, and the Magistrate's decision was endorsed on appeal by the Sessions Judge. He has come to this Court on revision, the contention being that there is no evidence to support the finding that the house in which the incriminating articles are alleged to have been found belonged to, or was in possession of, the petitioner.

The final conclusion of the learned Sessions Judge is that the prosecution evidence coupled with the fact that the accused put his signatures on the list of recovery conclusively proves that the accused was in possession of the house from which the articles were recovered. I consider it very doubtful whether the fact of the accused putting his signature on the recovery list is admissible in evidence against him in this case. If it is evidence that the premises searched belonged to him, this would be an incriminating statement of the nature of a confession to a Police Officer and could not be proved by reason of the prohibition contained in s. 25 of the Indian Evidence Act. The rest of the prosecution evidence conists of the statements of Sub-Inspector, Ram Rang, Dayal Singh and Suchet Singh. All three describe the search of the building where the excisable articles were discovered and speak generally of the place as the accused's house. None of them, however, is resident of the village, and no reasons are given for calling it the accused's house. The Sub-Inspector has stated that on arriving in the village with a raiding party he saw the accused running through the bazar in a suspicious manner and that he pursued the accused and found him about to unlock the house in question. He was prevented by the Sub-Inspector and the key was taken from him and the house was guarded. In due course, after the search of other houses, this place was searched and *lahan* and other articles were found in it.

The fact that the accused was trying to unlock the house does not prove conclusively that it was his house. He clearly denied when he was examined in Court, that the house was his and he produced a number of defence witnesses to prove that he did not live in the village. One of the witnesses was the *Patwari* who stated that the house belonged to Multani Ram, a cousin of the petitioner. This, at any rate, would be one explanation for the accused's alleged behaviour in trying to get into the house when he saw an excise raiding party in the village.

It appears to me that it would have been perfectly possible for the prosecution to prove positively who occupied this particular house. The failure to do so creates a flaw in the case which must be fatal to it.

I accept the petition and acquit the petitioner who will be released and his fine, if paid, will be refunded.

R. L. *Petition accepted.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 702 OF 1926.

January 17, 1927.

Present:—Mr. Justice Dalal.

JANKI RAI—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 199—Written statement of party, whether 'a declaration which any Court of Justice is bound or authorised to receive'—False statement in written statement—Offence.

A written statemant filed by a party under O. VIII, r. 1, of the Civil Procedure Code, is not a declaration which any Court of Justice is bound or authorised by law to receive within the meaning of s. 199 of the Penal Code, and a person who makes

false declaration in a written statement does not, therefore, commit an offence under the section.

Criminal revision from an order of the Sessions Judge, Azamgarh, dated the 20th October, 1926.

Dr. *M. L. Agarwala*, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application in revision from the judgment of a learned Sessions Judge upholding the applicant's conviction under s. 199 of the Indian Penal Code. The facts are admitted as they must be here by the applicant's learned Counsel, Dr. Agarwala. He raised a point of law that on those facts no offence was committed under s. 199.

In a suit for sale against a Hindu father and his sons the father filed a written statement to the effect that the money was borrowed for the benefit of the plaintiff's father, who was a brother of the applicant. The written statement was verified as required by the provisions of O. VI, r. 15, but the Court had not ordered proof of the statements made therein by affidavit as it had power to do under O. XIX, r. 1. Under the circumstances, the question before this Court is whether the written statement falls within the terms of s. 199 which makes punishable any declaration which any Court of Justice is bound or authorised by law to receive as evidence of any fact. A written statement is a pleading under O. VI, which describes how pleadings are to be prepared. Order VIII, r. 1, lays down that a defendant may present a written statement of his defence. After the written statement is filed, the Court ascertains from each party or his Pleader admission or denial of allegations of fact made in the plaint or written statement. This is provided for in O. X, r. 1. These admissions or denials are the basis of issues to be framed by the Court. The Civil Procedure Code does not provide that statements in written statements are to be received as evidence. The pleadings lay down the points of difference between the parties which have to be decided by the Court on evidence to be recorded subsequently. It is for this reason that the importance of recording the evidence of parties is constantly pointed out to Civil Courts. In the present case as in the majority of cases the Court did not proceed to record the statement of the applicant. If the applicant had repeated on oath the statements of the written statement which have been found to be false, he would have rendered himself liable to prosecution under s. 193. Under s. 21 of the Evidence Act, a Court is bound to receive in evidence admissions of a party, but no such rule applies to denials. In my opinion an allegation in a written statement is not evidence of any fact, which a Court is bound or authorised by law to receive. Dr. Agarwala referred the Court to a ruling of the Calcutta High Court, *Chandi Pershad* v. *Abdul Rahman* (1). The accused person made a declaration to a Municipality as prescribed by Statute in order to obtain a license for horses and conveyances. In that case the learned Judges held that a prosecution under s. 199 would not be tenable on the ground that the statement made by the accused in that case was no evidence at all against any one but himself and could only be evidence against himself as proving an admission by him and no more.

I set aside the conviction and sentence, and order the applicant to be released at once if he is in Jail and direct the fine, if recovered, to be refunded. If he has given a bond, it shall be cancelled.

A. N. A. *Conviction set aside.*

(1) 22 C. 131; 11 Ind. Dec. (N. S.) 89.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 447 OF 1926.

December 22, 1926.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

NAZIR AHMED—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—False charge to Police—Committal of accused—Sessions Court whether competent to complain for false charge—Offence committed 'in relation to' proceedings, meaning of.

The words 'in relation to' in s. 476 of the Criminal Procedure Code are sufficiently wide to cover a case where the offence complained of is actually committed before the proceedings began in the complaining Court. [p. 709, col. 1.]

A person making a false charge to the Police commits an offence 'in relation to' the proceedings in the Sessions Court to which the accused is subsequently committed for trial and the Sessions Court

is, therefore, competent to make a complaint in respect of such offence under s. 476 of the Criminal Procedure Code.

Daroga Gope v. *King-Emperor* (1), applied.

Babus *Jatindra Kumar Sen Gupta* and *Raj Kumar Chakravarti*, for the Appellant.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal by one Nazir Ahmed against the order of the learned Sessions Judge of Noakhali who has complained against him in that he brought a false charge of theft against one Nawab Ali. The case of theft was instituted by Nazir Ahmad by giving information to the Police. The Police enquired into the case and sent up Nawab Ali who was committed to the Sessions. The learned Sessions Judge found the case false and complained against Nazir Ahmad under s. 476, Criminal Procedure Code. The first point urged by the learned Vakil for the appellant is that the alleged offence was not committed in a proceeding or in relation to a proceeding before the Sessions Judge. The learned Vakil contends that the offence, if any, was committed by the institution of the case before the Police, and further that s. 476 refers to offences which are committed after the proceedings have begun before the Court.

We think, however, that the words "in relation to" are sufficiently wide to cover a case where the offence was actually committed before the proceedings began in the complaining Court. In the present case the proceeding was the trial of Nawab Ali for theft by the Sessions Court and that Court found that the charge was false and hence that the charge made to the Police was false. The false charge to the Police was obviously a matter related to the proceedings in the Sessions Court for it was the basis of the proceedings. Had there been no charge to the Police there would have been no proceedings in the Sessions Court.

So far as this Court is concerned the question may be considered as one of first impression. Our attention has not been drawn to any decision of this Court since s. 476 was amended. We are, however, fortified in the view that we take of the meaning of the expression 'in relation to' by a recent decision of the Patna High Court in the case of *Daroga Gope* v. *Emperor* (1). Mr. Justice Mullick held that if two offences are even remotely connected by the relationship of cause and effect then the first may be said to be committed in relation to the second. If we consider the institution of the false case to the Police as the cause of the proceedings before the Sessions Judge and this we think no doubt it was, then it may be held that the false case instituted before the Police was in relation to the proceedings in the Sessions Court.

That being so the present case falls within s. 476 and the Sessions Judge had jurisdiction to make the complaint. Mr. Sen Gupta would then seem to argue that the evidence which is relied on is not worthy of belief, that if we examine the evidence we shall not find it worthy of credit.

That is a question for the trial Court to decide in the first instance and not for us. It might obviously be very unfair to the appellant that we should express any opinion whatever on the point at this stage and we purposely refrain from so doing.

The Magistrate who hears the case will decide it and it is not for us to do the work of the Magistrate.

The appeal is dismissed.

A. N. A. *Appeal dismissed.*

(1) 88 Ind. Cas. 1045; 5 Pat. 33; 6 P. L. T. 515; A. I. R. 1925 Pat. 747; 26 Cr. L. J. 1269; (1926) Pat. 106.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 911 OF 1926.
CRIMINAL REVISION PETITION No. 789 OF 1926.
December 9, 1926.

Present :—Mr. Justice Wallace.

GADDAM VENKATASUBBA REDDI —PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144—Duty of Magistrates to protect civil rights of parties—Section 144, when to be resorted to.

It is the obvious duty of the executive to uphold the civil rights declared by its own Civil Court. Although the interests of the public peace are paramount, where a Magistrate must be aware that there will probably be a disturbance of a person's civil rights it is his duty to exhaust every measure at his disposal to uphold declared civil rights before he abandons the attempt, and he should resort to s. 144 of the Code of Criminal Procedure only if there is no time or opportunity for any other course.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying

the High Court to revise an order of the District Magistrate, Nellore, dated the 4th October, 1926, in D. Dis. No. 5587 of 1926.

Mr. V. L. *Ethiraj*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—It is the obvious duty of the executive to uphold the civil rights declared by its own Civil Courts. Any omission to do that is a confession of failure in duty. No doubt, the interests of the public peace are paramount, but, where, as in this case, the District Magistrate must be aware that there will probably be a disturbance of the petitioner's civil rights at recurring seasons every year, it is his duty to exhaust every measure at his disposal to uphold declared civil rights before he abandons the attempt, and he should resort to s. 144 of the Code of Criminal Procedure only if there is no time or opportunity for any other course. I am not satisfied in this case, that all such other measures were used. The District Magistrate, for example, by taking thought-in-time—it is part of his duty to take thought-in-time—could have those who threaten to interfere with the petitioner's civil rights bound over to keep the peace, or might have got down sufficient force to meet the crisis, or could perhaps have arranged, even at the petitioner's cost for sufficient protection. It is not a proper course to do nothing to meet the crisis and then call in s. 144, Code of Criminal Procedure, to tide him over it. The District Magistrate must in future consider in time, whether other measures, less incompatible with petitioner's civil rights are not available which will enable him to secure that petitioner's civil rights are upheld without any real danger to the public peace, and, if they are available, adopt them in time.

With these remarks this petition is dismissed.

V. N. V. *Petition dismissed.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1681 OF 1926.

January 28, 1927.

Present:—Sir Shadi Lal, KT., Chief Justice.

MR. P. F. LINTON—ACCUSED—PETITIONER

versus

EMPEROR THROUGH *Sheikh* MUHAMMAD ALI—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 344—Stay of criminal proceedings pending civil suit.

Where the facts on which a criminal prosecution is based are in issue in a civil suit filed previously by the complainant himself, and the decision in the civil suit is likely to throw considerable light upon the dispute in the criminal case, the criminal proceedings should be stayed till the decision of the civil suit. [p. 711, col. 2.]

Case reported by the District Magistrate, Gujrat, with his No. 1614 of 8th November, 1926.

REPORT.—FACTS.—On the 29th June, 1926, Muhammad Ali, the complainant in the present s. 420, Indian Penal Code, case, filed a civil suit in the Court of the Junior Sub-Judge, Gujrat, against Mr. P. F. Linton, a resident of Calcutta, to recover a sum of Rs. 3,000 (principal Rs. 2,064-4-0 interest Rs. 935-12-0) on the ground that in the year 1922 defendant had showed himself to be the Managing Director of the Firm of Linton Brothers, Calcutta, and in this capacity had agreed to supply 2000 tons of coal to plaintiff at the rate of Rs. 6 per ton. That Rs. 2,400 had been paid by plaintiff in advance to Mr. Linton for which plaintiff had obtained a receipt dated 23rd October, 1922. That only 18 tons of coal valued at Rs. 108 had been supplied by defendant. Subsequently Linton Brothers had transferred the working of the Company as well as its accounts to another Company, N. M. Alexandar & Co., to whom plaintiff had applied for the fulfilment of the contract. Messrs. Alexander & Co., had replied that there was no account of Sheikh Muhammad Ali plaintiff in the books of the Company. Plaintiff had thereupon asked Mr. Linton defendant to recoup the balance with interest but had received no reply from him; hence the suit for recovery of Rs. 3,000 was preferred. Defendant Mr. Linton represented by Mr. Des Raj, Advocate, admitted the receipt of Rs. 2,400 and the agreement to supply the coal but stated that he was not personally responsible for any money, but the firm which had been dissolved was responsible. The following issues were framed:—

1. Whether Mr. P. F. Linton is personally liable? .....On plaintiff.
2. Whether Kendnadih Coal Company and P. Datt and Company were necessary parties?.....On defendant.
3. Whether plaintiff's suit is within time?
4. Whether this Court has jurisdiction?
5. Whether plaintiff is entitled to interest by way of damages and at what rate?

GROUNDS.—Now I find from the perusal of the files that these issues were framed on 6th October, 1926, and the present complaint under s. 420, Indian Penal Code, was lodged by Sheikh Muhammad Ali, the plaintiff in the civil suit, against Mr. Linton, defendant in the civil suit on 28th October, 1926, on the grounds that accused had received the money fraudulently and did not incorporate the receipt of Rs. 2,400 in the accounts of the firm. The Magistrate issued the warrant against the accused after examining the complainant only and without seeing the file of the civil case. Now I consider that the Magistrate has abused his discretion in issuing a warrant to compel the attendance in Gujrat of a person resident in Calcutta to answer a charge which is in issue and *sub-judice* in civil proceedings in Gujrat which were instituted by the complainant himself four months previously to the criminal complaint and upon the same facts. Further, I consider that the Magistrate has acted unjudicially in refusing the application of accused's Counsel to stay the proceedings till the decision of the civil suit which the Magistrate was empowered to do under s. 344, Criminal Procedure Code. Further, the Magistrate seems to have wrongly interpreted the discretion allowed him under s. 75 (2), Criminal Procedure Code, which contains no provisions that its operations are restricted to benefit *pardanashin* ladies. I consider that the Magistrate should not have refused to examine the civil file or to hear the arguments of defence-Counsel for the stay of proceedings which were based on the facts of the civil file. I do not consider that an order by me transferring the case to another Court under s. 528, Criminal Procedure Code, would materially benefit the accused as apparently under s. 75 (2), Criminal Procedure Code, a warrant can only be cancelled by the Court issuing it, I consider that the facts on which the criminal prosecution is based are completely in issue in Issues Nos. (1) and (2) framed by the Civil Court previous to the institution of the prosecution. With regard to the Magistrate's refusal to consider the objection of the accused's Counsel it seems that the Magistrate does either not understand the scope of his powers under s. 202, Criminal Procedure Code, or else is biassed against the accused.

For these reasons I consider that the proceedings of the Criminal Court should be stayed until the decision of the civil suit. However, since I do not find that I have the power as a District Magistrate to do this, I forward the file of the criminal case together with the file of the civil suit to the High Court at Lahore for favour of orders. On receipt of orders I propose, unless directed to the contrary, to transfer the file to another Court on account of the suspicion of bias noticed above.

Mr. *Mukand Lal Puri*, for the Petitioner.

Sheikh *Abdul Qadir*, K. B., for the Complainant.

The Government Advocate, for the Crown.

ORDER.—On the facts which are correctly stated by the learned District Magistrate, I am not prepared to accede to the contention urged by Mr. Mukand Lal Puri for the accused that the proceedings in the criminal case should be quashed. It is true that the trial Magistrate made several orders which were wholly unjustified, and that he fully deserves the strictures passed upon him by the District Magistrate. But I do not think that on the record, incomplete as it is, I should exercise my extraordinary jurisdiction as a Court of revision and quash the proceedings.

I am, however, of opinion that the decision of the civil suit, which was instituted by the complainant himself about three months before he brought the criminal case, is likely to throw considerable light upon the dispute in the criminal case; and that the proceedings of the criminal Court should be stayed pending the decision of the civil suit.

I accept the recommendation made by the District Magistrate and order accordingly.

K. L. *Order accordingly.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 782 OF 1926.

November 18, 1926.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

BENODINI HOWLADAR AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Hindu Law—Guardianship — Marriage — Bride, whether must be given away by guardian personally.

Under the Hindu Law it is not absolutely necessary that the bride should be given away by the legal guardian; what is necessary is that the giving away should be with the knowledge and consent of the guardian. Where, therefore, the bride's father

is unavoidably absent from the marriage and the bride is given away by the mother with the knowledge and consent of the father, the marriage is perfectly valid.

Rule against the order of the District Magistrate, Backergunj.

Mr. *Surita* and Babu *Sures Chandra Talukdar*, for the Petitioners.

JUDGMENT.—This was a Rule granted by my learned brothers Mr. Justice Chakravarti and Mr. Justice Roy on the District Magistrate of Backergunj to show cause why the conviction of and the sentences passed on the petitioners under s. 494, and s. 494 read with s. 114, Indian Penal Code, should not be set aside on the grounds set forth in the petition.

It would appear that Peary, petitioner No. 2, has been convicted of bigamy in marrying on Benodini Howladar petitioner No. 1 on the ground that she had already been married to one Jogeswar Kirtonia who was still alive.

The only ground which has been urged in support of this Rule is that the mother cannot make a gift of the bride to the bridegroom. It would appear that at the time when the first marriage took place the father of the bride for some reason or other was in Jail and was unable to be present and personally to give away the bride. It is, however, admitted that what was necessary was that the giving away of the bride should be with the knowledge and consent of the legal guardian and the evidence of the mother of the bride would go to show that the giving away of the bride was with the knowledge and consent of the bride's father; she apparently had seen the father of the bride in Jail and had discussed the matter with him. She also gave her own consent to the marriage.

We see no reason to interfere with the conviction and sentence. The Rule is accordingly discharged.

Z. K. *Rule discharged.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1510 OF 1926.

January 21, 1927.

Present:—Mr. Justice Campbell.

AMIR HASSAN—COMPLAINANT—PETITIONER

versus

QADAR BAKHSH *alias* RAPPAR—OPPOSITE PARTY—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 145—Scope of enquiry—Question of possession—Breach of peace—Final order, validity of.

In proceedings under s. 145, Criminal Procedure Code, a Magistrate should not go into the question of title; his function is merely to go into the question of possession. A final order under s. 145, Criminal Procedure Code, should explain how a breach of peace is to be apprehended between the parties and contain a decision as to who was in possession of property on the date of the first order. [p. 713, col. 1]

Petition for revision of an order of the District Magistrate, Karnal, dated the 28th July, 1926, modifying that of the Magistrate, First Class, Karnal, dated the 10th March, 1926.

Mr. *S. A. Nasir*, for the Petitioner.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—This case was commenced by the Magistrate, First Class, Karnal, being moved under s. 145, Code of Criminal Procedure, by one Amir Hassan in respect of a shrine or tomb in the town of Shahabad. The respondent was one Qadar Bakhsh. The Magistrate first made an order under s. 145 (1) and when the parties attended the Court took evidence. He then recorded a finding that the place in dispute was the property of the Muslim community and directed that it should remain so until the community was ousted by due course of law and any disturbance of their possession in the meantime was forbidden. The body of the order, however, is mainly occupied with the discussion as to the title in the place, and there is no clear finding whether any and which of the parties was at the date of the order under s. 145 (1) in possession. Qadar Bakhsh presented what he called a petition of appeal to the District Magistrate, and although the District Magistrate's order shows that the petition was registered as a revision petition, nevertheless he has decided it as if it was an appeal. The learned District Magistrate in his order took some exception to the Magistrate having gone so fully into the question of ownership and observed rightly that the Magistrate's function was merely to go into the question of possession. He then expressed doubt whether it was a case where there was likely to be a breach of the peace. But he continued that since the place had been attached and as there was scarcely any evidence to establish the possession of any particular party, he refused to interfere with the attachment and further directed that one Kazi Abdul Latif be appointed receiver and the place made over to him.

Amir Hassan has come to this Court on revision, contending that the District Magistrate had no jurisdiction to pass the order which he did and that he was only entitled to report the case to this Court recommending any alteration of the Magistrate's order which he considered should be made. Qadar Bakhsh has also presented a fresh revision petition to this Court attacking the Magistrate's action. His learned Counsel admits that the District Magistrate's order must be set aside, but submits that, in the circumstances the Magistrate's order should also be cancelled since the Police had reported that there was no apprehension of a breach of the peace and since neither the complainant nor the Muslim community had been proved to be in possession.

It is pretty clear that if the learned District Magistrate had realised (*a*) that no appeal lay to him and (*b*) that the Magistrate had not in fact attached the property under s. 146, he would have reported the case for cancellation of the Magistrate's order. That order is unsatisfactory, in that it does not explain how a breach of the peace is to be apprehended between these two parties and does not contain any decision about possession on the date of the first order.

In my opinion the Magistrate's order must be set aside and I order accordingly. If the authorities consider any breach of the peace to be likely to occur fresh proceedings can be taken. The result is that both revision applications Nos. 1590 and 1813 are accepted.

R. L. *Applications accepted.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 495 OF 1926.
August 24, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Roy

Rani SHASHI MUKHI DEBI CHAUDHURANI AND OTHERS—PETITIONERS

versus

SARAT CHANDRA CHAKRAVERTY AND OTHERS—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), ss. 144, 145—Police report and sketch, evidentiary value of—Order under s. 144, how far evidence of possession—Evidence—Admission of documents without objection—Evidentiary value, whether may be challenged subsequently.

An order under s. 144 of the Criminal Procedure Code could only refer to a point of time when it was passed and cannot show who was in possession when the statutory period during which that order remained operative was at an end. [p. 715, col. 1.]

A judgment of a Criminal Court in which a person was acquitted and in which it was incidentally found that he was in possession can only be evidence of the fact that there was such a case and that it ended in such acquittal; the finding on the question of possession which is a ground of such acquittal can hardly be any evidence in subsequent proceedings between the parties with regard to the property in dispute. [*ibid.*]

The only legitimate use to which a Police report and sketch prepared in connection with proceedings under s. 145 of the Criminal Procedure Code could be put to is to treat them as the basis of the proceedings and as affording materials for determining the likelihood of breach of the peace and of the identity of the subject-matter of the dispute and of the disputing parties. The fact evidenced thereby, of the Sub-Inspector having seen the parties in possession of certain plots cannot be treated as evidence of possession. [p. 715, col. 2; p. 716, col. 1.]

The fact that such documents were admitted without objection does not prevent their admissibility as evidence of possession being challenged subsequently, the question being not a mere question of mode of proof but a question of the evidentiary value of their contents. [*ibid.*]

Rule against an order of the Deputy Magistrate, Faridpur, passed under s. 145, Criminal Procedure Code, against which an application was made to the Sessions Judge, Faridpur.

Mr. *N. K. Bose* and Babu *Debendra Narain Bhattacharjee*, for the Petitioners.

Mr. *K. N. Chowdhury* and Babu *Birendra Kumar De*, for the 1st Party Mr. *Amaendra Nath Bose* and Babu *Dwijendra Krishna Dutt*, for the 3rd Party Opposite Party.

JUDGMENT.

Mukerji, J.—This Rule relates to an order passed under s. 145, Criminal Procedure Code, by a Deputy Magistrate of Faridpur. The proceedings were in respect of a *chur* about 2,500 *bighas* in area in the river Padma, near the Goalundo Ghat Railway Station. There were three parties to the proceedings. The area has been divided into three portions, marked as Blocks A, B and C in the same map. Block A has been declared to be in possession of the first party, Block C of the second party and Block B of the third party. The second party have moved this Court and obtained this Rule.

In order to deal with the contentions urged in support of this Rule it is necessary to state a few facts. The dispute relating to this *chur* has a long history at its back.

For our present purposes it is not necessary to go beyond the 29th January, 1925, when the Sub-Inspector of Goalundo Ghat Thana visited the *chur* on information received about an apprehended breach of the peace. On that occasion the said Sub-Inspector prepared a sketch (Ex. 6) dividing the *chur* into three portions marked thereon as Blocks A, B and C as representing the lands of which he found the three parties, namely, the first, third and second parties respectively in possession. This sketch (Ex.6) he submitted along with a report, dated the 8th February, 1925. To prevent a breach of the peace he posted constables and also an armed guard on the *chur*. On the basis of the aforesaid Police report proceedings under s. 145, Criminal Procedure Code, were started on or about the 12th February 1925, but eventually on the 27th March, 1925, the said proceedings were dropped and an order under s. 144, Criminal Procedure Code, was passed, confining the possession of the three parties to the three blocks aforesaid. On the 9th April, 1925, the said blocks were demarcated by the posting of pegs. The armed guard was withdrawn and only a few constables were left on the *chur*. With this relaxation of watch on the part of the Police, certain disturbances took place on the 13th April, 1925. These led to the institution of two criminal cases against the men of the second party. One of these cases ended in the acquittal of the men concerned therein, before the order complained of in the present Rule was passed. It is said that the other case also had the same fate, though at the date of the said order it was yet pending. The Sub-Inspector of Goalundo Ghat Thana then submitted a further report in continuation of the report of the 8th February, 1925, on the 26th April, 1925, and thereupon on the 28th April, 1925, the present proceedings under s. 145, Criminal Procedure Code, were started. These proceedings terminated in the order, dated the 16th April, 1926, against which this Rule is directed.

The Rule has been issued upon four grounds, being grounds Nos. 2, 4, 5 and 8 of the petition of motion. The contentions involved in these grounds have to be grouped in a somewhat different way for the sake of convenience.

The first contention relates to the admissibility or rather the evidentiary value of three maps, Exs. L, B and 8. Exhibit L is the map of the *chur* prepared by a Pleader Commissioner Babu Hem Chandra Majumdar under the orders of the Magistrate for use in these proceedings. It was considered necessary to have an accurate map prepared by a trained surveyor showing the whole *chur* as well as the blocks which appeared in the sketch Ex 6, and that is why this map was prepared. It does not appear that it has been used in evidence in respect of any matter which it purports to depict and the only use that has been made of it is to refer to it for identifying the blocks in respect of which the final order has been made. Exhibit 8 is the map prepared in August, 1924, by an *Amin* Gopal Chandra Das in connection with certain demarcation proceedings under the Survey Act that took place at the time. This map is explanatory of Ex. 9 the order passed in these proceedings and is, therefore, relevant. As regards Ex. B which is a map prepared by a *Kanungoo* at the instance of two of the parties, *viz.*, the first and the second parties, it only shows the *thak* and the survey lines relaid on the Commissioner's map, Ex. L, and it is difficult to imagine how it is irrelevant and in any case no reliance appears to have been placed on it in the order which is complained against in this Rule. This contention, therefore, is of no substance.

The next contention is to the effect that certain pieces of documentary evidence which are very material on the question of possession and are in favour of the second party have not been duly considered by the Magistrate. This contention relates to the documents marked Exs. 7, P, Z6, T and X. Exhibit 7 is an order in the order-sheet of a previous case under s. 144, Criminal Procedure Code, dated 31st April, 1924, in which the then Sub-Divisional Magistrate on a visit to the locality expressed the opinion that the present second party or rather the principal members of it were in possession of the *chur* and issued an injunction on the first party in those proceedings restraining them under s. 144, Criminal Procedure Code, from entering on the lands of the *chur*. Exhibit P is the order of the High Court, dated 18th March, 1924, refusing to interfere with the injunction, Ex. 7, and the learned Judges who passed that order were of opinion that the view as to possession which the Sub-Divisional Magistrate had taken was right. Exhibit Z6 is the order-sheet of certain proceedings under s. 145, Criminal Procedure Code, which

were drawn up on the 23rd December, 1925, but were dropped on the same day, and which on the submission of the Police report of the 8th February, 1925, were revived but were again dropped on the 27th March, 1925, an order under s. 144, Criminal Procedure Code, being passed instead as has been already stated. This last mentioned order under s. 144, Criminal Code, has been referred to in the Magistrate's judgment. Exhibits X and T are judgments, dated 29th June, 1925 and, 31st August, 1925, in certain criminal cases of rioting and mischief (one of these relating to one of the two cases which arose out of the occurrences of the 13th April, 1925), which ended in the acquittal of men of the second party and in which there are some observations showing that the accused concerned therein were in possession of the lands involved in those occurrences. Apart from the fact that some of these documents are not *inter partes*, the evidentiary value of the findings on the question of possession such as they are contained in these documents, at the date with which we are concerned, is practically *nil*. The orders under s. 144 could only refer to a point of time when they were passed and assuming that what was stated therein on the question of possession was anything more than the opinion of the Courts which passed those orders, these orders cannot show who came to be in possession when the statutory period during which these orders remained operative was at an end. The judgments of the Criminal Courts, in which the men of the second party were acquitted and in which it was incidentally found that they were in possession, can only be evidence of the fact that there were those cases and that they ended in such acquittal, but the finding on the question of possession which is a ground of such acquittal can hardly be any evidence in the present proceedings.

The third contention urged in support of the Rule is to the effect that the Police report, dated the 8th February, 1925, and the sketch Ex. 6 have been wrongly used as evidence on the question of possession. Along with this contention it will be convenient to deal with the fourth one, namely, that as because of the prohibitory order passed on the 27th March, 1925, the parties were precluded from giving evidence of their possession in the entire *chur*, the Magistrate should have directed his enquiry on the question of possession not as at the date of the proceedings but as on 27th March, 1925.

The process of reasoning by which the learned Magistrate has arrived at his conclusion is as follows :—To quote his own words he was of opinion that "the oral evidence of the tenants and other witnesses as regards facts of actual possession by the respective parties is not only of a partisan kind but lacks definiteness on most essential points." He found, however, that there were certain "landmarks" in the evidence which were practically admitted by the parties and on which he could safely rely. He found that the sketch prepared by the Sub-Inspector of Goalundo Ghat Thana showed the possession of three parties in different portions of the *chur* which he depicted in the Blocks A, B and C. This possession in his opinion remained intact till the 9th April, 1925, when pegs were posted demarcating the blocks, as already stated. He was further of opinion that there could not have been any change in the possession of the parties during this period because the armed guard remained on the spot from the beginning of February to the first part of April, 1925. Accordingly he held that the possession of the parties at the date of the proceedings—unless there was a forcible and wrongful change on the 13th April, 1925, which for the purpose of s. 145 is of no avail as being within two months from the date of the proceedings—was the same as it was on the 29th January, 1925, and as shown by the Sub-Inspector in his report, dated 8th February, 1925, and the sketch Ex. 6. Despite the very ingenious arguments advanced on behalf of the first and the third parties this is what seems to me to be substance of the reasoning of the learned Magistrate. This reasoning to my mind is perfectly sound, but for the assumption which it makes, namely, that the sketch Ex. 6 and the statement in the Police report of the 8th February, 1925, correctly represent the state of affairs as they stood at the time. If this assumption is correct, then no objection can be taken to the Magistrate having found possession at the date of the proceedings and not on the 27th March, 1925, for in that case there was no change of possession from the 29th February, 1925, at any time forward. The only legitimate use to which the sketch and the re-

port could be put is to treat them as the basis of the proceedings and as affording materials for determining the question of likelihood of a breach of the peace and of the identity of the subject-matter of the dispute and of the disputing parties. The use that has been made of these documents is to treat the fact, evidenced thereby, of the Sub-Inspector having seen the parties in possession of the respective blocks as a "land-mark"—the word being used figuratively—which serves as a guide leading to the conclusions at which the learned Magistrate has arrived. The other evidence on the record has been only treated as corroborative of this map and Ex. 6 so far as this matter is concerned. I am, therefore, clearly of opinion that the use that has been made of these two documents is not a proper one, and that they should be excluded from consideration as evidence of possession. I am unable to accept as well-founded the arguments of the first and the third parties that when these documents were admitted without objection their admissibility cannot be challenged now, because the question here is not a mere question of mode of proof but a question of the evidentiary value of their contents on the question of possession.

The learned Sessions Judge in his order refusing to make a reference to this Court against the order appears to have taken the same view of this matter He has, however, observed in his order that there are other materials on the record sufficient to justify the learned Magistrate in arriving at the conclusion that the three parties are entitled to retain possession of the three blocks shown in the map Ex. 6. This also is the argument that has been addressed to us by the first and the third parties in this Rule. We have accordingly examined the evidence, that is on the record and we note below our conclusions on that evidence.

The observations of the learned Magistrate as to the character of the oral evidence which have been quoted above are, in our opinion, too general and while they are correct in so far as the question of possession in respect of particular plots of the different tenants is concerned, there is a body of evidence which is clear, definite and unambiguous. That evidence establishes the following facts: (*a*) That the blocks lie within certain defined boundaries, (*b*) that the possession of the different tenants who hold lands on the border between two contiguous blocks does not extend beyond the line separating one block from another, (*c*) that there is definite evidence showing that the blocks were in the possession of one or other of the parties at the date of the Sub-Inspector's visit to the *chur* on the 29th January, 1925, and (*d*) that it is more than improbable that there could have been any change of possession in respect of these blocks so long as the armed guard remained on the spot, that is to say, until well within two months before the date of the proceedings. It is reasonable to suppose that if after the removal of the armed guard there was any change of possession it must have been by wrongful and forcible dispossession, of which no notice need be taken for our present purposes. The evidence referred to above appears also to have been relied upon by the learned Magistrate and we see no reason why we should not accept it.

We are, therefore, of opinion that there is no reason to interfere with the order complained of in this Rule and the Rule must accordingly be discharged.

Roy, J.—I agree.

A. N. A. *Rule discharged.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1394 OF 1926.

January 31, 1927.

Present:—Mr. Justice Broadway.

MISRI LAL—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Public Gambling Act (III of 1867), ss. 4, 5—Forfeiture of money found on person—Construction of penal Statutes—Benefit of doubt.

Section 5 of the Gambling Act does not authorise the seizing and forfeiting of money found on the person of a man arrested in a gaming house. [p. 718, col. 2.]

[Case-law discussed.]

A penal Act should be construed strictly and where there is any doubt the benefit of the same should be given to the subject. [*ibid.*]

Petition, for revision of an order of the Sessions Judge, Delhi, dated the 23rd July, 1926, affirming that of the Magistrate, First Class, Delhi, dated the 15th May, 1926.

Mr. *Raj Krishna*, for the Petitioner.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—This and the two connected petitions Nos. 1483 and 1526 of 1926 arise out of certain proceedings taken under the Gambling Act III of 1867 in the Court of Mr. Muhammad Ariff Magistrate, First Class. It appears that a raid was made by the Delhi Police on the 16th October, 1925, on certain premises with the result that thirty-six persons were arrested and sent up for trial under ss. 3 and 4 of the Gambling Act III of 1867. The result of the prosecution that followed was that the majority of the persons charged were convicted and sentenced to various punishments. One of the persons so arrested was Misri Lal who was found guilty under s. 4 and sentenced to pay a fine of Rs. 100. He is the petitioner in Criminal Revision No. 1394 of 1926. Baij Nath, Mannu Lal, Ganga Parshed and Tota the petitioners in Criminal Revision No. 1526 of 1926 were also sentenced under s. 4 of Act III of 1867 to various fines and Hem Chand the petitioner in Criminal Revision No. 1483 of 1926 was sentenced to a fine of Rs. 100 and a note for Rs. 100 found on his person was ordered to be confiscated. On appeal the sentences were upheld in the case of all the petitioners with the exception of Hem Chand and Baij Nath whose sentences of fines were reduced owing to the fact that monies found on their persons had been confiscated.

So far as the conviction of these petitioners are concerned I see no reason to interfere. It has been urged that the evidence of Kabal Singh shows that when the Police entered the premises they were followed if not accompanied, by a certain number of spectators and that the present petitioners were amongst those spectators. Having regard to the provisions of s. 4 in my judgment it was for them to establish conclusively that they were spectators and the evidence on the record lamentably fails in this respect. It must, therefore, be held that they have been rightly convicted of being present in this gaming house for the purpose of gaming. For Misri Lal Mr. Raj Krishna urged that his youth was in his favour inasmuch as he is only 16½ years of age. I am unable to see that this is any excuse. If a youth of that age attempts to see life in this manner steps must be taken to prevent him and he has not been sentenced for any term of imprisonment so long as his fine is paid up. Mr. Bishan Narain Mathur for Hem Chand has also pleaded the youth of his client. But here again I am unable to see that the fact that he is young and a student and a son of a respectable gentleman is any excuse for his presence in a gaming house for the purpose of gaming.

The only question that requires consideration is whether the order forfeiting the money found on the persons of two of these petitioners was warranted in law. It has been urged by the learned Assistant Legal Remembrancer that having regard to the provisions of ss. 4, 5 and 8 the order was legal and should not be interfered with in revision. He has also urged that owing to the fact that the learned Sessions Judge has taken into consideration these confiscation orders and has reduced the fine imposed on these petitioners because of their monies having been forfeited whether the order of forfeiture is strictly legal or not this Court should not in its revisional jurisdiction interfere. Various authorities have been cited and of these two only are of this Court. One is *Jiwan* v. *Queen-Empress* (1) a decision by Mr. Justice Chatterji, which, however, does not touch the point. What was decided in that case was that an order of confisaction could only be passed after a conviction had been had. It was not decided whether money found on the person could be confiscated. The second case was *Khair Din* v. *Emperor* (2) in which Mr. Justice Harrison held that money found in such circumstances was not liable to be forfeited. This decision is based upon certain authorities which have also been referred to by the learned Counsel in *Tulla* v. *Emperor* (3). Lindsay, J., held that the law does not contemplate the confiscation of the money found on the person of the accused and a reference was made to *Maturwa* v. *Emperor* (4). This last case, however, was one under s. 13 of the Gambling Act and, therefore, does not appear to have any value. Lindsay, J., apparently did not have brought to his notice a decision of the Allahabad High Court by Mr. Justice Rafique to be found at page 272* of the same voulme, *Emperor*

(1) 5 P. R. 1898 Cr.

(2) 96 Ind. Cas. 503; A. I. R. 1926 Lah. 290; 27 Cr. L. J. 951.

(3) 54 Ind. Cas. 250; 41 A. 366; 17 A. L. J. 368; 1 U. P. L. R. (A.) 161; 21 Cr. L. J. 42.

(4) 46 Ind. Cas. 156; 40 A. 517; 16 A. L. J. 428; 19 Cr. L. J. 700.

*Page of 4 I. A.—[*Ed.*]

v. *Kifayat* (5). It would appear that Mr. Justice Rafique's view was not in accord with that expressed by Mr. Justice Lindsay. In *Mahadaya* v. *Emperor* (6) Knox, J., differentiated between convictions under s. 4 and s. 13 of the Act and came to the conclusion that in cases under s. 4 it was legal to forfeit monies found on the persons as in the present case. In most of these cases reference has been made to *Emperor* v. *Walli Mussaji* (7) where it was held that the power of seizing money found in a gaming house under s. 8 of Bombay Act IV of 1887 does not extend to money found on the persons of those who may at the time be in such gaming house. To the same effect is a decision in *Sadashiv Bab Habbu* v. *Emperor* (8). Now s. 8 of Bombay Act IV of 1887 is in very similar terms to s. 8 of Act III of 1867 and the views expressed by Judges of the Bombay High Court, therefore, afford a very good guide for construing s. 8 of the Act now under consideration. Finally reference was made to *Lachmi Narain Marwari* v. *Emperor* (9) where Bucknill, J., considered the provisions of Act III of 1867 and came to the conclusion that the private property of an individual who is found gaming in a gaming house could not be seized and forfeited unless it was quite clear that there was attached to such private property the taint that it was reasonably suspected to have been used or intended to be used for the purpose of gaming. Now s. 5 authorises the seizure of all instruments of gaming and all money and securities for money and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein.

It has been urged by Mr. Ram Lal that the word 'therein' does not mean merely within a gaming house but includes the private property found on the person of an accused while he was in the gaming house. No doubt, strictly speaking, Mr. Ram Lal's contention is correct but after a consideration of the authorities referred to it seems to me that a stricter interpretation must be given to the word 'therein' as used in s. 5. This is emphasized by Stuart, J., in *Ram Sakhi Ram* v. *Emperor* (10). He says: "This section justifies the seizing and forfeiting of money found on the table or on the floor or other places in the house but not on the persons of the men arrested therein. The reason for this distinction is tolerably obvious. A man found in common gaming house is liable to have certain money confiscated, but is not liable to have everything found upon his person confiscated. A man might have currency notes for Rs. 10,000 in his pockets and he might be gambling with two anna bits. The law does not contemplate confiscating Rs. 10,000 when the Rs. 10,000 is not being used for the purpose of gaming."

I am aware that the view I am taking is open to a certain amount of criticism but the general principle is to construe an Act strictly and where there is any doubt such doubts should be given in favour of the subject. Here it seems to me that it would be unsafe in a case of this nature to direct confiscations of all monies or valuables such as gold, watches and ornaments found on the person of a man arrested in a gaming house and I would, therefore, accept the revision petitions of Baij Nath and Hem Chand to this extent that I would direct the return to them of the monies found on their persons. In all other respects all the three petitions are dismissed.

R. L. *Order accordingly.*

(5) 49 Ind. Cas. 165; 41 A. 272; 17 A. L. J. 64; 20 Cr. L. J. 133.

(6) 6 Ind. Cas. 586; 7 A. L. J. 404; 11 Cr. L. J. 373.

(7) 26 B. 641; 4 Bom. L. R. 427.

(8) 55 Ind. Cas. 864; 44 B. 686; 22 Bom. L. R. 197; 21 Cr. L. J. 384.

(9) 77 Ind. Cas. 177; A. I. R. 1924 Pat. 42; (1923) Pat. 220; 4 P. L. T. 622; 1 Pat. L. R. 229 Cr.; 25 Cr. L. J. 321.

(10) 63 Ind Cas. 408; 19 A. L. J. 765; 3 U. P. L. R. (A.) 127; 22 Cr. L. J. 648.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 427 OF 1926.

December 20, 1926.

Present:—Mr. Jusice Cuming and Mr. Justice Gregory.

ADAM ALI TALUQDAR AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 35, 96, 304—Section 34, whether applies to s. 304, Part II—Offence under s. 304, Part II, essentials of—Right of private defence, accused's duty to plead—Charge to Jury.

Although to constitute an offence under s. 304, Part II of the Penal Code there must be no intention of causing death or such injury as the offender knew was likely to

cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. [p. 719, col. 2.]

Section 34 of the Penal Code can be applied to a case under the second part of s. 304 of the Code. [*ibid.*]

A Judge is not bound to explain to the Jury the law of the right of private defence, where the accused themselves have never pleaded that they acted in the exercise of the right of private defence. [p. 720, col. 2.]

If a person raises the defence that he acted in the exercise of the right of private defence he must prove it. He must set forth the exact circumstances in which he acted to show that he was justified in what he did. [*ibid.*]

Appeal against the decision of the Sessions Judge, Barisal, dated the 8th of May, 1926.

Babus *Sures Chandra Taluqdar* and *Mohendra Kumar Ghose*, for the Appellants.

Mr. *Khondkar*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This is an appeal by two persons Adam Ali Taluqdar and Sher Gazi, who have been sentenced by the Sessions Judge of Barisal, agreeing with the unanimous verdict of the Jury to 7 years' rigorous imprisonment under the second part of s. 304, Indian Penal Code.

The facts are as follows:—There are two persons Ekram Ali and Akkel Ali who own a piece of land each having an eight-annas share in it. By arrangement Ekram Ali possessed the northern half and Akkel Ali the southern half. Akkel Ali is the husband of the sister of Ekram Ali. Ekram Ali mortgaged the land to Adam Ali Taluqdar, one of the appellants now before us and Adam Ali was in possession. Then Akkel Ali sold the land to Ekram Ali. Ekram Ali wanted to redeem the mortgage and tendered the money to Adam Ali. There were some disputes about the payment of the money but Ekram Ali cultivated the land. On the 25th December, 1925, Adam Ali, Sher Gazi and Abdul Gafur who is the appellant in a connected appeal and one Tahir Khan brought a number of reapers and proceeded to cut the coarse paddy grown on the northern half of the land by Ekram Ali and began to cut the paddy. Ekram Ali and his two brothers Adam Ali, Monta Ali and his cousin Mahammad came to the spot. The two parties faced each other and Mahammad flung a spear at Tahir Ali which missed him. Abdul Gafur called out to the party to kill some one. Tahir Mahammad then struck Mahammad with his spear in the stomach and Sher Ali and Adam Ali also stabbed him. He fell down and died on the spot.

The defence was that of innocence and enmity.

Mr. Taluqdar has argued that s. 34 of the Indian Penal Code can have no application to the second part of s. 304 under which the appellants have been convicted. His argument is this:—

The second part of s. 304 runs as follows:—"Or with imprisonment of either description for a term which may extend to ten years, or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause the death." Mr. Taluqdar argues that to apply s. 34 there must be a common intention and that as there was no common intention to cause death or such bodily injury as is likely to cause death because the definition of s. 304, Part II, excludes such intention, s. 34 cannot apply. The simple answer to this contention is this that although to constitute an offence under s. 304, Part II, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act. No one will dispute that such an act is a criminal act. Clearly s. 34 can apply to a case under s. 304, Part II.

Our attention has been drawn to a decision of Mr. Justice Walmsley and Mr. Justice Mukerjee (Appeal No. 248 of 1924, decided on 19th August, 1924) [*Anirudha Mana* v. *Emperor* (1)]. In that case there are the following remarks of Walmsley, J.:—"There is yet another objection to the charges and the verdict. It is that s. 34 which is based on a common intention cannot possibly be used with the second part of s. 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However, the point is that the Jury

(1) 86 Ind. Cas. 475; 26 Cr. L. J. 827; A. I. R. 1925 Cal. 913.

have found the accused guilty of committing culpable homicide by doing an act with the knowledge that they were likely to cause death, but without any such intention, in furtherance of a common intention. It is the badly framed charges and the defecting summing up that have led the Jury to this illogical verdict."

With great respect to the learned Judge I am not quite able to discover whether he did or did not decide the point. He certainly does not discuss it or give any reason for his decision. But it is clear from a perusal of the judgment that the learned Judge decided the case upon other considerations and that the decision of that case did not depend on the interpretation of s. 34. The learned Judge's remarks, therefore, on the applicability of s. 34 to s. 304, Part II, may, therefore, be considered as *obiter dicta*.

Mr. Taluqdar next contends that s. 35 is the section that really applies. Section 35, Indian Penal Code, simply makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention each person is liable for the act to the extent of his knowledge or intention, in other words, that the Court or Jury have to consider what is the knowledge or intention with which each person joined in the act, *i e.*, *A* and *B* beat *C* who dies. *A* intended to murder him and knew that the act would cause death. *B* only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. *A* is guilty of murder and *B* of causing grievous hurt. This is no doubt correct and it was no doubt incumbent on the Judge to charge the Jury that they must consider with what knowledge or intention each person joined in the act. The learned Judge's summing up is a long and careful one. The law is dealt with by him carefully and at length. In dealing with s. 34 he points out that the act must be done with the common intention of all which must be gathered from the circumstances of the case. He also explains s. 304 very carefully and points out that to find them guilty under s. 304, Part II, there must be the knowledge that the injury is likely to cause death, and although it is not put in so many words, I think it is to be inferred from the charge as a whole that it was put to the Jury that they had to consider the knowledge with which each person acted. Mr. Taluqdar next contends that the learned Judge never explained to the Jury the law on the subject of the right of private defence. Now it is not for the Judge to explain to the Jury questions of law which do not arise on the facts or pleadings of the party. In this case the appellants themselves never pleaded that they acted in the exercise of the right of private defence. Their plea was a simple denial. It was presumably argued by their Counsel that they were acting in the right of private defence. They themselves, however, so far as can be seen never raised it and it cannot, therefore, be said to have ever been their case. If a person raises the defence that he acted in the exercise of the right of private defence, he must prove it. He must set forth the exact circumstances in which he acted to show that he was justified in what he did. It has, no doubt, been held that he may plead he was not there and at the same time make out from the evidence of the prosecution witnesses that what he did was in the exercise of the right of private defence. But it seems to me that if there is absolutely nothing in the prosecution evidence to suggest that he was so acting, there is nothing to go to the Jury. It is very difficult for the Judge to put to the Jury what is really a hypothetical and nobody's substantial case. There are so many factors and circumstances which require to be proved to establish a right of private defence that it is difficult to see how it can be successful unless specifically pleaded. The Judge has always this difficulty that he never knows what in each case he has to put and it is very difficult for an Appellate Court to discover what case he was asked to put to the Jury on behalf of the accused when they themselves say nothing, or for an Appellate Court to say that the accused's case of the right of private defence was or was not properly put for the simple reason that the Appellate Court does not know what that case was. In the present case, however, the Judge does seem to have explained the right of private defence to the Jury and I am not prepared to find on the facts proved or alleged that this explanation was not sufficient. The result is that this appeal must be dismissed and the accused, if on bail, must surrender to serve out the remainder of their sentence.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 433 OF 1923.

May 13, 1926.

Present :—Mr. Justice Fforde and Mr. Justice Campbell.

HARI SINGH—DEFENDANT—APPELLANT

versus

FIRM KARAM CHAND-KANSHI RAM—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XIII, r. 4, O. XXX, r. 4—Suit by surviving partner in his own name for partnership debt—Maintainability of suit—Contract Act (IX of 1872), s. 45—Joint promisees—Right to sue—Practice—Admission of documents—Duty to comply with O. XIII, r. 4.

Order XXX, r. 4 of the Code of Civil Procedure which permits a partner to sue in the firm name even though some of his co-partners may have died before the suit was instituted and permits it to be continued without the joinder of the legal representatives of a partner who may have died during its pendency applies only when suits are brought in the name of the firm. It does not enable one of several partners to sue alone in his own individual name for a partnership debt. [p. 724, col. 2.]

Monmohan Panday v. *Bidhu Bhusan Roy Chowdhury* (1), followed.

Mool Chand v. *Mool Chand* (2), explained.

In admitting documents in evidence, a Court should strictly comply with the provisions of O. XIII, r. 4 of the Civil Procedure Code. [p. 725, col 2; p. 726, col. 1.]

First appeal from the decree of the Senior Subordinate Judge, Sargodha, dated the 13th January, 1923.

Messrs. *M. S. Bhagat* and *Gobind Ram Khanna*, for Mr. *Dev Raj Sawhney*, for the Appellant.

Dr. *Gokal Chand Narang* and Mr. *Jiwan Lal Kapur*, for the Respondents.

JUDGMENT.

Fforde, J.—This appeal arises out of a suit brought by a firm known as Karam Chand-Kanshi Ram against one Hari Singh for damages for breach of contract. The contract in question is a document in writing, dated the 11th May, 1918, and purports to have been entered into between Jairam Das and Dhari Ram on the one side and Hari Singh, who is the appellant in this appeal, on the other.

Mr. Bhagat, who appears for the appellant has raised the objection that the respondent firm are not parties to that contract, and, therefore, have no right to sue on foot of it.

Dr. G. C. Narang, on the other hand, contends that the contract, although purporting to have been entered into by Dhari Ram and Jai Ram, was, in fact, executed by these persons on behalf of the Firm Karam Chand-Kanshi Ram, of which firm he alleges Jai Ram Das and Dhari Ram were partners at the date of the contract. Dr. Narang further contends that even if it be found that the respondent firm was not a party to this contract, one of the contracting parties, Dhari Ram, is a plaintiff in the present suit, and, accordingly, the suit is maintainable by him alone. His third contention is that assuming that the Firm Karam Chand-Kanshi Ram were not originally parties to the contract sued upon, the contract was subsequently varied by the introduction of this firm as a party.

So far as the first contention is concerned, it is obvious from a perusal of the contract itself and the conduct of the parties, that the agreement of the 11th May, 1918, was entered into by Jai Ram Das and Dhari Ram on the one hand and Hari Singh on the other, and the only other person contemplated as having any interest whatsoever in this agreement is a certain Sawan Mal, who is described as a co-partner of Jai Ram Das and Dhari Ram and for whose liability on foot of the contract these two persons hold themselves responsible. The agreement opens as follows:—" We, Jai Ram Das, son of Lala Jhanda Mal, caste *Sikka*, and Dhari Ram, son of Lala Kanshi Ram, caste *Magga*, residents of Sargodha, first party, along with Sawan Mal, third partner, have taken the factory Sheikh Ilam Din-Ahmad Din, situate at Sargodha, on lease for the current year. We the first party lessees of the said factory and the second party, contractor of Grass Farm, Second Rawalpindi Division, have entered into an agreement as to getting white and *missa* chaff pressed in the factory on the undermentioned conditions and voluntarily make the following agreement:—

* * * *

Jai Ram Das and Dhari Ram partners are responsible on behalf of Sawan Mal, their co-partner, who is..." The remainder of this sentence is missing, the document being stated to have been torn.

Now it is quite obvious that the parties to this agreement did not purport to act on behalf of any persons save those whose names appear in the document. The intention of the parties, and the surrounding circumstances clearly show that Dhari Ram and Jai Ram Das contracted personally, and if any further evidence was required on this point it is provided in a letter, dated the 19th June, 1918, written by Mehta Bahadur Chand, who is a

partner in the Firm Karam Chand-Kanshi Ram, and the moving spirit in this litigation. This letter was written about a month after the work of the contract had started. The letter is as follows :—

"Perhaps you know that I am a partner in the lease of the Cotton Press and Ginning Factory of Messrs. Ilam Din-Ahmad Din at Sargodha. My man, Hoshnak Rai, has just gone there and informs me that you have made a contract with Jai Ram Das-Dhari Ram for getting *bhusa* bales pressed for you. He has sent me a copy of the agreement you have entered into with them. I am surprised to see that contract is made without my knowledge and of other partners. Jai Ram Das is, no doubt, one of the partners but he has got no authority to enter into any agreement without the consent of other partners. Dhari Ram and Sawan Ram are no real partners in that lease though Kanshi Ram, father of Dhari Ram, and Bhai Karam Chand, father of Sawan Mal, are partners. Dhari Ram is only a minor still. The contract entered into by you has no force against other partners except Jai Ram Das.

"The partners are unwilling to be bound by this agreement and refuse to press *bhusa* bales on the terms you want them to do, you are free to take any action you can against Jai Ram Das as to your damages, but you cannot enforce specific performance of the unfair terms entered into the agreement. You have played upon the minority of Dhari Ram and ignorance of Jai Ram Das secretly and hurriedly got the agreement, dated 11th May, 1918, out of them with the express object of securing undue advantage for yourself and causing heavy loss to the other party. The result has been that rupture has taken place at the very commencement. You have already served them with a notice by a telegram and a letter through Lala Mansa Ram, Pleader, and they are preparing to give you a counter-notice. If you may be fair in your dealings and be prepared to work for mutual good we shall be prepared to come to such terms that you may be enabled to perform your contract with the Government and we may not be put to any extraordinary loss. It is no good fighting on small things and thus to harm each other.

"You complain that the press is not worked and bales of *bhusa* are not properly stacked and wrapped, and while, on the other hand, it is said that all this complaint is caused and there appears to be no reason why press be not worked because if it is not worked there is loss of salaries paid to servants and lease money paid to the proprietors of the factory.

"Jai Ram Das says that by contract you must supply all materials to keep the press going and if you do not and thus the press remains stopped, you are liable for damages. The press is stopped since 10th June, 1918, for want of wiring. There is much truth in this contention. He estimates the damages at Rs. 100 a day and is giving you notice to that effect. Both of you may go on litigating on these matters in Courts and we shall be doing our own work in the factory. If you may, however, settle between yourselves the other partners may also perhaps come to terms and let your work be done on the press. If you are prepared to get your work done amicably please correspond with me or better meet me so that we may find some way to do this work to the good of all parties." Following this letter persistent attempts were made by the writer to induce the appellant to accept him as a party to the contract subject to various alterations in its terms. The appellant, however, was equally persistent in refusing to recognise Mehta Bahadur Chand, or any other person, as having any right to interfere with the agreement in question, save and except Jai Ram Das and Dhari Ram. Dr. Narang has referred us to passages in the judgment of the Court below wherein the learned Judge expressed himself as satisfied that the contract was, in fact, entered into by Jai Ram Das and Dhari Ram as agents for the respondent firm. The passages referred to appear at page 137 of the record under issue No. 1 and are tabulated as follows :—

"1. Admittedly the contractors were Jai Ram Das, Dhari Ram and Sawan Mal. Dhari Ram's name is even now on the plaint, it is through him that the plaint is instituted. Jai Ram Das and Sawan Mal both have since died,—*vide* application and affidavit of Dhari Ram, dated 10th January, 1923. Karam Chand is the son of Sawan Mal and his name appears on the plaint.

"2. From the statement of Mehta Bahadur Chand, Pleader, as P. W. No. 3, I

gather that the real firm on behalf of which the contract was made by the contractors as agents was that of the plaintiffs, of which Jai Ram Das and Dhari Ram were partners. I have absolutely no reasons to doubt this statement.

"3. Hari Singh in his statement, dated 13th January, 1922, as P. W. No. 12, admitted that it was the plaintiffs' firm which got on lease the factory of Ilam Din and Ajudhia Parshad, the admitted agent of the defendant, also made entries in the plaintiffs' register, see Ex. P-83 which shows the firm name to be Karam Chand-Kanshi Ram.

"4. All notices to the defendant and his Counsel from time to time were given in the name of plaintiffs' firm and were never objected to, as for instance see Ex. P-93."

So far as No. 1 is concerned the only inaccuracy which appears there is in the statement that Karam Chand is the son of Sawan Mal. In point of fact Karam Chand is Sawan Mal's father.

As to No. 2, on referring to the evidence of Bahadur Chand I find that there is not one word in that evidence to support the view of the learned Judge as to its purport. Nowhere in the evidence is it even suggested that the agreement which he produced as Ex. P-1 was entered into on behalf of his firm.

As to No. 3, the learned Judge is equally inaccurate. The passage upon which he has come to his conclusion that Hari Singh admitted in his statement that it was the respondent firm which had the lease of the factory Ilam Din-Ahmad Din, is as follows:—"The factory in which pressing was to be done by (*sic*) owned by Ilam Din and had been taken by plaintiff on lease." By plaintiff it is presumed he there means Dhari Ram. But whatever the witness may have intended to mean by his statement, it certainly cannot be taken as an admission that he had entered into the contract with the signatories thereto as agents of the respondent firm.

As to the further statement by the learned Judge that Ajudhia Parshad, the admitted agent of the appellant made entries in the plaintiffs' register which shows the firm's name to be Karam Chand-Kanshi Ram, this also is quite unwarranted. The register, referred to as Ex. P-83 was excluded from evidence by the Judge who tried the case, and the Judge who wrote the judgment had no right to refer to it for the purpose of arriving at his conclusion. As to the admission of this and other documents I will deal later.

As to No. 4, this statement is entirely incorrect. There is no evidence of any notice in the name of the respondent firm having ever reached the appellant. In every case in which the latter wrote any letter or sent any notice in regard to the subject-matter of the contract he invariably addressed the same to "Jai Ram Das-Dhari Ram." The only document addressed on behalf of the appellant to the respondent firm which could give any colour at all to the learned Judge's view is a letter, dated the 19th September, 1918, which is addressed to Karam Chand-Kanshi Ram and is signed "Jai Singh for Jai Singh-Hari Singh." This letter starts by acknowledging a notice received from the respondent firm and points out that Sardar Hari Singh is away at Bombay and that the agreement will be gone through on his return. To suggest that this amounts to an admission on behalf of the appellant that he was in fact dealing throughout with the Firm Karam Chand-Kanshi Ram is obviously absurd. This letter, I may add—as has been the case with every document referred to in the judgment—has not been proved or properly admitted in evidence.

In my opinion, the respondent firm has entirely failed to show that they were in any way privy to the contract upon the foot of which they now sue.

The suggestion that there was some sort of novation of this contract in their favour is equally unsupported by any evidence. No witness has been produced in support of this aspect of the case. Not one word to that effect was uttered by Mr. Bahadur Chand in his evidence in Court, and the only document relid upon by Dr. Narang in support of this proposition is a document referred to as Ex. P-82, which purports to be a copy of an extract from a register kept by the Firm Karam Chand Kanshi Ram, which extract purports to be signed by Ajudhia Parshad as agent of the appellant. This document has not been proved. The register itself, as I have already stated, has been excluded from evidence by the Trial Judge, and it is hard to see how under these circumstances an alleged extract can be used as evidence of an agreement by the appellant to accept the respondent firm as parties to the contract in addition to or

substitution for the original parties. Ajudhia Parshad in giving evidence as a witness for the respondents stated "I was never in-charge of *bhusa* transactions. Harnam Singh was in-charge but I used to supervise his work twice a week and I used to sign the plaintiffs' registers from time to time."

This reference to the register was objected to by Counsel for the appellant as the document itself had been excluded. The witness, however, was allowed to be examined in regard to this document, and he added "On pages 4, 7, 8 and 9 the signatures of mine appear in Urdu and English. The number of bundles is correct. I was not responsible for writing by the plaintiff." In other words, his evidence amounts to this: that when a document showing the numbers of bundles brought to the factory was put before him he signed his name as admitting the correctness of the number, and added that the entry in the column of remarks on page 9 in this register was not in his hand. Even assuming that this document is properly before us, it is wholly insufficient to prove that the appellant agreed to accept the respondent firm as a contracting party either in addition to or substitution for Messrs. Jai Ram and Dhari Ram.

Dr. Narang's remaining argument is that even if the respondent firm is not entitled to sue on foot of the contract in question, Dhari Ram one of the parties to it, being also a party to the suit, is entitled to sue, and that the action is maintainable by him alone. As against this, s. 45 of the Indian Contract Act provides that one of two joint promisees cannot claim a right of performance of a contract without joining his co-promisee, or, upon the latter's death, his representative. This section has been modified by the provisions of O. XXX of the Code of Civil Procedure (Act V of 1908), r. 1 of which provides that partners may sue or be sued in the names of the firm of which they were partners at the time of the accruing of the action. Rule 4 of the same Order provides that, notwithstanding anything contained in s. 45 of the Indian Contract Act, where two or more persons may sue or be sued in the name of a firm and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit. Dr. Narang urges in his alternative argument that even if the respondent firm are not entitled to sue, Dhari Ram can bring his action as a partner in the firm of Jai Ram Das Dhari Ram. The first objection to this is that it has not been shown that there ever was such a firm as Jai Ram Das Dhari Ram. But, even assuming that the contract was with these individuals as such a firm, the suit has not been brought in that firm's name, and, accordingly, the provisions of r. 4 of O. XXX are not applicable. Order XXX of the Civil Procedure Code enables a firm's name to be used instead of the names of the partners composing that firm, as a convenient method for denoting the persons who comprise the firm at the time when the name is used, and, therefore, when a suit is brought in the name of a firm it is precisely as though it were brought in the name of all the partners. By using the name of the firm the effect is to bring all the partners before the Court, and when that is done O. XXX, r. 4, permits a partner to sue in this character even though some of his co-partners may have died before the suit was instituted, and, if the suit has been instituted, permits it to be continued without the joinder of the legal representatives of a partner who may have died during its pendency. But these rules only apply when suits are brought in a firm's name. The rules do not enable one of several co-contractors to sue in his own individual name. Prior to the Civil Procedure Code of 1908 there was much conflict of authority in the Courts in India as to the effect of s. 45 of the Indian Contract Act. Some of the Courts held that it had not the effect of preventing one partner suing alone on foot of a contract made with a partnership firm, whilst other Courts, notably the High Court of Calcutta, took the contrary view. In *Monmohan Panday* v. *Bidhu Bhusan Roy Chowdhury* (1) a Division Bench of the High Court of Calcutta held that where a suit was brought by six plaintiffs jointly and not in the name of their firm, and one of the plaintiffs had died and his legal representatives had not been substituted for him within the time allowed by law, the suit must fail. Chatterjee, J, in the course of his judgment observed:— "Order XXX, r. 4, does not help the appellants, as that rule applies only to a case where the suit is brought in the name of

(1) 48 Ind. Cas. 309; 28 C. L. J. 268.

the firm." We have, however, been referred to a Division Bench judgment of this Court in *Mool Chand* v. *Mool Chand* (2) in the course of which appear the following observations which are strongly relied upon by Dr. Narang:—

"The rule of law now seems to be firmly established that debts due to trading partnerships stand on a different footing from debts due under ordinary contracts and that when one of the partners in a firm dies the surviving partners can sue for the recovery of the debts due to the firm without making the legal representatives of the deceased partner parties to the suit."

These observations, however, are qualified by the previous paragraph which is as follows:—

"The view of the majority of the High Courts has now been adopted in O. XXX, r. 4, Civil Procedure Code, 1908, which declares that the legal representatives of the deceased partner are not necessary parties to suits *brought in the name of the firm*."

I am unable to accept the view that the clear effect of s. 45 of the Indian Contract Act has been modified by the Civil Procedure Code, save as appears in O. XXX, which is confined to cases where suits are brought not by individuals but in the name of the firm under which they are trading. Accordingly as the firm of Karam Chand-Kanshi Ram is not a party to the contract sued upon, Dhari Ram can at the best only be regarded as suing on his own behalf, and as his co promisee has not joined in the action, and it is too late to add his personal representative at this stage as a suit by such person would now be barred by limitation, Dhari Ram's suit, if otherwise maintainable in the present form, must fail.

Before concluding I feel bound to refer to the manner in which the documentary evidence was dealt with by the trial Judge. In no instance does he appear to have complied with the provisions of O. XIII, r. 4, Civil Procedure Code, or to have observed the ordinary rules applicable to the admission of secondary evidence. The respondents attempted to prove their case by producing a great number of letters written by themselves to third persons, mostly their own employees. They also produced their own registers Many of these letters were copies, some bearing no signature. A typical example appears in the evidence of Mehta Bahadur Chand, a member of the respondents' firm, who states:—"I file the whole correspondence in this case P-1 to P-82. All these are genuine documents." These documents comprise telegrams, postcards, copies of notices, copies of letters written to third persons, and include a whole mass of matter which could not possibly be evidence against the appellant. No attempt was made to prove these documents individually, but the stamp of the Court was affixed, with one or two exceptions to each one, the stamp purporting to be the endorsement required by O. XIII, r 4. The date of the endorsement, however, is in each case the 1st of May, 1920, which is the date when the plaint was filed. The date when the witness who purports to prove these documents was called was the 6th of June, 1921. It is obvious, therefore, that the endorsement upon all these documents was affixed at the time when they were filed in Court with the plaint. Order XIII, r. 4, requires that the endorsement should, amongst other requirements, bear the name of the person producing the document and the date on which it is produced which means the name of the person tendering the document in evidence and the date on which it was so tendered. The trial Judge appears to have thought that provided documents were stamped with the date on which they were filed in Court, they *ipso facto* became evidence in the case without any formal proof. The Judge who wrote the judgment in this case is not the person who tried it and apparently he was under the impression that all documents which appeared on the file, whether proved or not, were available as material upon which he could base his judgment, and his judgment has been based mainly upon such material. As I have pointed out, even documents which have been excluded by the trial Judge as inadmissible in evidence have been relied upon by his successor as a basis for his conclusion. In view of the conclusion I have arrived at upon the competency of this suit it is unnecessary to discuss the merits of the case or to refer in any further detail to the evidence. This Court has in *Secretary of State for India* v. *Sarla Devi Chaudhrani* (3) referred to the observations of their Lordships

(2) 71 Ind. Cas. 951; A. I. R. 1923 Lah. 197; 4 Lah. 142.

(3) 79 Ind. Cas. 79; 5 Lah. 227.

of the Privy Council as to the necessity of a strict compliance with the provisions of O. XIII, r. 4, Civil Procedure Code. Had it been necessary for us to deal with the evidence it would have been impossible to do so upon the present record, as hardly a single document has been admitted in accordance with the provisions of the Civil Procedure Code.

For the reasons I have given I am of opinion that the respondents' suit is not sustainable and that this appeal must be accepted, the decree of the trial Court reversed and the suit dismissed. I would allow the appellant his costs throughout.

Campbell, J.—I agree.

A. N. A. *Appeal accepted.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 86 OF 1926.

January 7, 1927.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

BISHWANATH SINGH—APPLICANT

versus

DASRATH DUBE—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Execution of decree—Sale of non-ancestral property by Collector—Application to set aside sale on payment—Court, proper.

The Court mentioned in r. 89 of O. XXI of the Civil Procedure Code is the execution Court and not the Court of the Collector or the Sale Officer where the sale proceedings take place. In the case of non-ancestral property, therefore, an application under r. 89 must be made to the execution Court and not to the Collector who has held the sale.

Civil revision against an order of the Subordinate Judge, Ghazipur, dated the 6th of April, 1926.

Mr. *U. S. Bajpai*, for the Applicant.

Mr. *S. N. Verma*, for the Opposite Party.

JUDGMENT.—The matter is covered by authority of a Bench of this Court, *Fazal Rab* v. *Manzur Ahmad* (1). The judgment-debtor's property, which was non-ancestral, was auctioned by the Collector on a reference by the Civil Court, because it was revenue paying property. Within thirty days of the sale the judgment-debtor deposited the decretal amount with the necessary additions in the Collector's Court in order to get the sale set aside. The Collector had no authority in the matter. The money was deposited in the treasury and the Collector sent an intimation to the Civil Court. The money was not deposited in the Civil Court till more than a month after the sale. The executing Court held that this was not a sufficient deposit under r. 89 of O. XXI, and this finding was upheld in appeal. Both the Courts exercised jurisdiction vested in them. They decided that the Court mentioned in r. 89 of O. XXI was a Civil Court and not the Court of the Collector or the Sale Officer where sale proceedings took place. Both the Courts had jurisdiction to arrive at such a decision. We cannot, therefore, interfere under s. 115 of the Civil Procedure Code.

It is true that if the property had been ancestral, the matter would have been different, because in that case the deposit in the Collector's Court would have been a proper deposit under r. 30 of the rules framed by Government under ss. 68 and 70 of the Code of Civil Procedure.

Our attention was drawn to a Bench ruling in the case of *Abdul Nasar Rashiduddin Ahmad Khan* v. *Lalta Prasad* (2). The facts of that case were peculiar, and in that case the ruling in the case of *Fazal Rab* v. *Manzur Ahmad* (1) was distinguished and not dissented from.

We dismiss the revision application but make no order as to costs.

Z. K. *Application dismissed.*

(1) 45 Ind. Cas. 773; 40 A. 425; 16 A. L. J. 433.

(2) 71 Ind. Cas. 1018; 21 A. L. J. 162; A. I. R. 1923 All. 315.

CALCUTTA HIGH COURT.

CIVIL RULE No. 903 OF 1926.

December 6, 1926.

Present:—Mr. Justice Mukerji and Mr. Justice Graham.

NONI KRISHNA BOSAK—DEFENDANT—PETITIONER

versus

NABAMONJURI DASSI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 6, 7—Application for leave to sue as pauper—Inquiry into pauperism—No objection from Government—Duty of Court to take evidence adduced by opposite Party.

Having regard to the provisions of rr. 6 and 7 of O. XXXIII of the Civil Procedure Code, a Court inquiring into the pauperism of an applicant for leave to sue as a pauper, is bound to receive the evidence which the opposite party may adduce in disproof of pauperism even though the application is not opposed by the Government. [p. 727, col. 1.]

Rule against an order of the Munsif, Second Court, Sealdah, (24-Perganas) in Pauper Suit No. 1 of 1926.

Babu *Krishna Lal Banerjee*, for the Petitioner.

Babu *Phanindra Nath Das*, for the Opposite Party.

JUDGMENT.—The petitioner alleges in para. 3 of his petition that on the 10th July, 1926, the day on which the order complained of was passed his witnesses were in attendance and his Vakil, though not called on, insisted on the evidence of those witnesses being taken, but that the Court refused to take that evidence and disposed of the application of the opposite party for leave to sue as a pauper upon the basis that there was no opposition by the Government to such application. This statement is supported by an affidavit and is not contradicted before us. On the other hand, there is on the record a list of witnesses present which was filed on that day and in which the names of three witnesses appeared as having been present on the occasion. It is clear, therefore, that the Munsif disposed of the matter without taking such evidence as the petitioner had offered before the Court. Having regard to r. 6 and r. 7 of O. XXXIII the former of which requires a notice to be given to the opposite party and the Government for receiving any evidence which may be adduced in proof of the pauperism and for hearing any evidence which may be adduced in disproof thereof and the latter provides that the Court should examine the witnesses, if any, produced by either party, there can be no doubt that the learned Munsif acted without jurisdiction is dealing with the case in the way that he did.

We accordingly set aside the order passed by him on the 10th July, 1926, the order complained of in this Rule, and direct that an enquiry into the question of pauperism or otherwise of the opposite party will be held afresh and in the presence of the petitioner giving the petitioner such opportunity as may be reasonable for adducing evidence in support of his contention.

The Rule is thus made absolute but we make no order as to costs.

A. N. A. *Order set aside.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 147 OF 1926.

January 5, 1927.

Present:—Mr. Justice Ashworth.

HARI LAL—APPLICANT

versus

PARMESHARI DAS AND ANOTHER—OPPOSITE PARTIES.

Limitation Act (IX of 1908), s. 5, Sch. I, Art. 173—Civil Procedure Code (Act V of 1908), s. 115—Review, application for—Extension of time—Delay, effect of—Review applied for on basis of recent decision of superior Tribunal—Failure to exercise discretion—Revision, whether lies.

The discretion allowed by s. 5 of the Limitation Act to extend the period within which an application for review must be made, should only be exercised where an application although made after the period of limitation prescribed in the Schedule is made without delay, having regard to the circumstances of the case. [p. 728, col. 1.]

Where review of a judgment is applied for on the ground that in view of a decision of a superior Court the judgment sought to be reviewed cannot stand, an application for review made two months after the publication of the judgment of the superior Court cannot be said to have been made after an unreasonable delay. [*ibid.*]

Where a Court fails to exercise its discretion upon an insufficient ground, the failure falls within the purview of s. 115 of the Civil Procedure Code. [*ibid.*]

Civil revision from an order of the District Judge, Bareilly, dated the 12th of July, 1926

Mr. *S. N. Chaube*, for the Applicant.

Mr. *B Malik*, for the Opposite Parties.

JUDGMENT.—This is an application in revision against an order of Mr. Plowden, District Judge of Bareilly, refusing to review a judgment of his predecessor. The facts of the case are follows. The present applicant owed money to the opposite party who brought a suit and obtained a decree. Some property of the applicant was attached and put up for sale and knocked down to the opposite party *i. e*, the decree-holder. Before the sale was confirmed the judgment-debtor got some money from a third party by agreeing to sell that property to that third party. He then applied to the Court to set aside the sale on deposit of the whole amount *plus* 5 per cent. under O. XXI, r 89. That application was rejected by the Munsif on the ground that the Allahabad High Court decisions were against allowing a judgment-debtor to make a deposit under O. XXI, r. 89. An appeal was filed before the then District Judge Mr. Neave who dismissed the appeal on the same ground on the 14th August, 1925. An application in revision was made

to this Court. That application was dismissed by this Court on the ground that the District Judge had applied the view of law by which he was bound at the time and that his decision in consequence gave no cause for revision. The applicant was, however, advised by this Court to apply to the District Judge to review the appellate decision of Mr. Neave of the 14th August, 1925. This was done on the 25th March, 1926. This application was also rejected by Mr. Neave's successor Mr. P. C. Plowden. The application for review was beyond the 90 days allowed by Art. 173 of the Limitation Act but Mr. Plowden recognised the discretion possessed by him to admit the application after time under s. 5 of the Limitation Act. He rightly held, however, that the discretion allowed by s. 5 should only be exercised when an application, made after the period of limitation prescribed in the Schedule, is made without delay. He found that the decision of this High Court which altered the view of law which it was incumbent for the District Judge to follow was published in January, 1926 and held that the applicant should have applied earlier than the 25th March.

There is an affidavit on the file, filed by the present applicant in this Court that the reason why he did not apply until the 25th March was that he only heard of the dismissal of his application for revision by the High Court and of the High Court's advice to him to apply in review to the District Judge on the 23rd March. It is urged by Counsel for the opposite party that this affidavit is based on a postcard on the file but that the applicant when applying to Mr. Plowden did not take the trouble to prove the postcard or to put in an affidavit in respect of it.

It appears to me that as the decision referred to by Mr. Plowden was only published in January the applicant cannot be said to have unduly delayed in making his application for review. Even if the affidavit and the postcard are not taken into consideration, two months is no long time for a *mofussil* client becoming acquainted with the result of a decision of this Court on a point of law. It appears to me, therefore, that Mr. Plowden failed to exercise the discretion of admitting the application for review after time, upon an insufficient ground, and, in my opinion, such a failure falls under s. 115.

The application for review is, therefore, granted and it is ordered that the District Judge re consider the judgment of his predecessor. Costs will abide the result.

Z. K. *Application granted.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 108 OF 1926.

February 1, 1927.

Present:—Mr. Justice Hasan and Mr. Justice King.

BANK OF UPPER INDIA LTD., (IN LIQUIDATION) THROUGH MR. HENRY HUNTER, LIQUIDATOR—PLAINTIFF—APPELLANT

versus

JAGGAN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 120—Mortgage—Perpetual lease by mortgagor—Suit by mortgagee to set aside lease—Limitation—Cause of action—Transfer of Property Act (IV of 1882), s. 68—Act causing permanent injury.

Where a mortgagor in possession of the mortgaged property executes a perpetual lease in favour of a third party, a suit by the mortgagee to avoid the lease on the ground that it has the effect of diminishing the security offered for the loan advanced by him under the mortgage, is governed by Art. 120 of the First Schedule of the Indian Limitation Act and the right to sue accrues on the date of the lease. [p. 729, col. 1.]

Where a mortgagor grants a permanent lease of the mortgaged property, his act would amount to 'permanent injury' within the meaning of s. 68 of the Transfer of Property Act, if the security is rendered insufficient by the act. [*ibid.*]

Second appeal against the judgment and decree passed by the Subordinate Judge, Bahraich, dated the 15th December, 1925, upholding the judgment and decree passed by the Munsif, Qaisar Ganj, District Bahraich dated the 6th December, 1924.

Mr. *H. Husain*, for the Appellant.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—This is the plaintiff's appeal from the decree of the First Subordinate Judge of Bahraich, dated the 12th of December, 1925, confirming the decree of the Munsif of the same place, dated the 6th of December, 1924.

The plaintiff's suit has been dismissed as barred by limitation. We are of opinion that it has rightly been dismissed as such. The facts are these. The plaintiff held two mortgages, simple in their nature, in respect of seven or eight villages. The mortgages

were effected by one Syed Hyder Mehdi in the year 1903. He was the owner of the mortgaged property. A suit for sale of the mortgaged property was instituted by the plaintiff on the basis of the mortgages, and a final decree for sale was obtained on the 25th of May, 1912. The sale in pursuance of the decree took place on the 21st of December, 1921, and at that sale, the plaintiff purchased the mortgaged property. While the mortgagor was in possession and before the suit for sale was instituted, he executed a perpetual lease in favour of the respondent on the 20th of December, 1909. The lease was registered on the 17th of March, 1910 The object of the suit, out of which this appeal arises, is to avoid the lease of the 20th of December, 1909, on the ground that it had the effect of diminishing the security, which was offered to the plaintiff for the loan of money made by him under the mortgages of the year 1903. As already stated, the Courts below have dismissed the suit as barred by limitation. It appears to us that, having regard to the relief prayed for, the suit is clearly governed by Art. 120 of the First Schedule of the Indian Limitation Act.

The substance of the plaintiff's case is that he wants to protect his rights as a mortgagee and, as such, he would certainly have a cause of action to obtain a declaration of the nature which he wants to obtain in the present suit, if the act of leasing has caused any permanent injury to his rights as a mortgagee. Whether they have caused such injury or not must be determined with reference to the rule of law enacted in s. 68 of the Transfer of Property Act (1882). According to that rule, the act of leasing will amount to permanent injury if the security is rendered insufficient by that act. Now if the plaintiff's case is, as we think it is, that the lease did render the security insufficient, then the insufficiency was rendered on the date when the act was done and that is the date of the lease. Therefore, it follows that the right to sue accrued on the date of the lease. But, even if the right to sue accrued only from the date when the plaintiff acquired knowledge of the lease in question, there is a finding of the Court below, and that finding is supported by substantial evidence, that the plaintiff acquired knowledge of it at the latest on the 27th of November, 1913. Taking the last mentioned date, therefore, as the starting point of limitation under Art. 120, the suit is again barred by that Article.

We, therefore, dismiss this appeal with costs.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1076 OF 1924.

December 3, 1926.

Present:—Mr. Justice Ashworth.

TILAK SINGH—PLAINTIFF—APPELLANT

versus

RAM TAHAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), s. 119—Grove—Partition—Trees, separate award of, whether necessary.

Section 119 of the U. P. Land Revenue Act does not contemplate that the partition officer should award the trees as distinct from the land of groves, though it may well be that co-sharers may remove certain trees from certain plots before the partition takes effect. [p. 730, col. 1]

Niamat-Ullah v. *Safutunnissa Bibi* (1), distinguished.

Second appeal against the decree of the Additional Subordinate Judge, Azamgarh.

Mr. *S. D. Sinha*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiff-appellant against the defendants-respondent in respect of grove No. 341-6 in the village of Firozabad. The plaint sets forth that at a partition of the village between the co-sharers grove No. 341 was divided into six *pattis* and that *patti* No. 6 was awarded to the plaintiff along with the trees therein but that the defendants who were the co sharers had claimed the trees therein and interfered with the plaintiff's possession of them. Accordingly the relief asked was perpetual injunction and damages.

Both the lower Courts have found that no removal of trees was proved against the defendants and against this finding of fact there is not and could not be any second appeal. The lower Courts also decided that the defendants were right in their plea that at the partition although the land occupied by the grove was sub-divided, yet the trees on the grove were assigned separately from the land on which they stood. It is the appellant's contention

that this finding of the lower Courts was based on an incorrect interpretation of the partition proceedings.

The plaintiff-appellant relies upon a map prepared at the partition showing plot No. 341 as divided into six portions, and showing particular trees on each portion. There is a schedule also at the side of the map on this partition map showing the names of the co-sharers to which the *pattis* were respectively awarded along with the trees on those *pattis*. Apart from this the *fard taqsim* or partition proceeding declares in para. 6 that the *baghs* will be divided along with their trees, and in para. 9 it provides that it is only spontaneous or unclaimed trees that will be divided according to their value among the co-sharers. The lower Court, however, held that this evidence was rebutted by the fact of a certain paper called the *khasra darakhtan* which contained the names of the co-sharers, the original numbers and certain trees. They interpreted this document to be a *khasra* allotting individual trees to the co-sharers. This document is accompanied by another *khasra* not qualified by the word *darakhtan* in which the *bagh* in dispute is clearly divided into six *pattis*. The explanation of the appellant's Counsel as to the paper headed *khasra darakhtan* is that it merely shows the owners of the trees at the time of the partition and was merely used as a basis for sub-division of the groves. It purports to be a *khatauni* of the year 1317 *F.*, which it is said corresponds to 1910 whereas the partition took place in 1911. It appears to me that this explanation of the paper called *khasra darakhtan* is the only one consistent with the map, the partition proceeding and the settlement *khasra* just mentioned. Again it is the only explanation which explains the difference of the year on this *khasra darakhtan* to the year of the partition. It may be also mentioned that under s. 119 of the Land Revenue Act, it does not appear to be contemplated by the Act that the partition officer should award trees as distinct from land of groves though it may well be that co sharers may remove certain trees from certain plots before the partition shall take effect and it has been held that in such a case even if the trees are not removed before the partition comes into effect the party to whom some trees are awarded may sue within 12 years to remove them. This decision which is unreported elsewhere is to be found in *Niamat Ullah* v. *Safutunnissa Bibi* (1) Whether this decision is correct or not it is not applicable to the present case. I find that there is no evidence to show that the co-sharers were allotted trees which fell in the portion of a *bagh* allotted to another co-sharer. On the contrary, the evidence appears to me to show that these groves were divided among the co-sharers along with the trees on the respective portion allotted to each co-sharer. Both the lower Courts have commented on the fact that when the *amin* visited the place he found that the trees on the plot in respect of which this suit was brought did not correspond with the trees shown on that plot in the partition proceedings. They have argued from this fact along with the admission of the plaintiff that he has not cut any trees, that the trees were cut by the defendants and that this shows that the partition proceedings were not understood by the parties as allotting the trees along with the grove land. We are not concerned in this case, however, with deciding how the parties understood the partition proceedings. The question is what was the legal result of the partition proceedings. The plaintiff bases his title on them and, in my opinion, he has proved his case. Accordingly I set aside the finding of the lower Courts on this matter and decree the plaintiff's suit so far as it asks for an injunction. The appellant will get his costs in this Court and half costs in the lower Courts.

A. N. A. *Order set aside.*

(1) 74 Ind. Cas. 768; A. I. R. 1924 All. 160.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 197 OF 1926.

February 3, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

SECRETARY OF STATE FOR INDIA IN COUNCIL, NAZUL DEPARTMENT, LUCKNOW—PLAINTIFFS—APPELLANTS

versus

NABI BAKHSH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 20—Compromise of doubtful rights—Mistake as to fact not essential to agreement—Contract not void.

Certain lands in the City of Lucknow were held by the defendants as tenants under the Secretary of State.

The latter sued for possession of the lands. The defendants denied his title, but the suit was compromised by the defendants who acknowledged the Secretary of State's title and executed a *kabuliyat* to him. It was subsequently decided by the Privy Council, in a suit not *inter partes* that the title to lands occupied by houses in the City of Lucknow rested in the occupants of the houses and not in the Crown. In a suit for rent by the Secretary of State the defendants contended that the compromise was void as it was vitiated by a mistake of fact as to the title of the Crown:

Held, that the essence of the compromise was the recognition of the antecedent title independently of whether it actually existed or not and the matter that the title lay actually in the Secretary of State, not being a fact essential to the agreement, the compromise was not void under s. 20 of the Contract Act. [p. 732, col. 1.]

Second appeal against the decree of the Second Additional Subordinate Judge, Lucknow, dated the 15th March, 1926, confirming that of the Munsif, South Lucknow, dated the 29th November, 1924.

Mr. *G. H. Thomas*, for the Appellant.

Mr. *Haider Husain*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Second Additional Subordinate Judge, Lucknow, dated the 15th of March, 1926, reversing that of the Munsif, South Lucknow, dated the 29th of November, 1924.

The appeal arises out of a suit brought by the Secretary of State for India in Council for the recovery of rent in respect of two plots of lands Nos. 1280 and 1281 situate in *Mohalla* Qutubpur, City Lucknow, from the defendants-respondents.

The facts are as follows:—

On the 29th of November, 1915, the plaintiff had instituted a suit against the defendants for recovery of possession of the plots in suits. The defendants denied the plaintiff's title and claimed title in themselves. Eventually the controversy so raised as to the question of title was amicably settled and the suit terminated with a compromise between the parties. In terms of the compromise the defendants abandoned the issue as to title and agreed to hold the lands in suit on payment of an annual rent of Rs. 20. The Court made a decree in pursuance of the compromise. The terms of the compromise were further ratified by the Secretary of State executing a lease in respect of the lands in suit in favour of the defendants and the defendants executing a *kabuliyat* in favour of the Secretary of State in relation to the same.

The defence in the present suit, which has prevailed in the lower Appellate Court, is that the compromise and *kabuliyat* are void by reason of the mutual mistake of the parties as to the title of the Secretary of State to the lands in suit, *vide* s. 20 of the Indian Contract Act, 1872.

In proof of the above defence the defendants rely upon a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Barati* v. *Secretary of State for India* (1). In the judgment delivered in that case, which was not *inter partes*, the Court had come to the conclusion that the title to lands occupied by houses in the City of Lucknow rested in the occupants of the houses and not in the Crown. This conclusion was reached on the interpretation of certain orders and letters of the Chief Commissioner of Oudh as having the effect of releasing such lands from the operation of Lord Canning's Proclamation of 1858. We are of opinion that the defence fails and the plaintiff is entitled to the decree for which he has asked.

On the merits of the case the learned Subordinate Judge distinctly finds that prior to the suit of 1915 the defendants' predecessor-in-interest held the lands in question in the status of a tenant and paid rent thereof to the Secretary of State. On those facts it follows that the Secretary of State had title by estoppel to the lands in suit and this title had originated or at least continued to operate subsequent to the alleged release from the operation of the confiscation of 1858 by the Chief Commissioner of Oudh. In this view of the case the title of the Secretary of State cannot be treated to have been founded solely on the confiscation. Thus there is no basis for the contention that the Secretary of State was under a mistaken belief as to his title on the date of the compromise in the suit of 1915.

We have already stated that the suit of 1915 directly raised the issue as to the title of the lands in suit. The object of the compromise was to stop investigation of the issue as to title.

The agreement contained in the compromise and in the subsequent deeds following it was not conditional on the existence of title, as a matter of fact, in

(1) 61 Ind. Cas. 721; 24 O. C. 33; 8 O. L. J. 233; 3 U. P. L. R. (Oudh) 35.

the Secretary of State. The essence of the compromise was the recognition of antecedent title independently of the fact as to whether it actually existed or not. Thus the matter that the title actually lay in the Secretary of State was not a fact essential to the agreement.

The result is that we allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance. The plaintiff-appellant will be entitled to his costs in all the three Courts.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2834 OF 1922.
July 5, 1926.

Present:—Mr. Justice Broadway and Mr. Justice Coldstream.

SMAIL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAHAB AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaratory suit—Limitation—Fresh invasion of right—Fresh cause of action—Entry of joint ownership in revenue records, effect of.

The plaintiffs and the defendants were entered as joint owners in the revenue records though the defendants were not in possession. In 1897 the plaintiffs attempted to have the entries altered so as to have their names recorded as sole owners but their application was rejected. In 1921 one of the defendants applied for partition of the land. The plaintiffs pleaded their exclusive title and were referred to the Civil Court. The plaintiffs sued for declaration of their title:

Held, (1) that the plaintiffs' suit was not barred inasmuch as the application for partition was an act of invasion which gave a new cause of action; *Hakim Singh* v *Waryaman* (1) and *Jahana* v. *Wali* (2), followed.

(2) that the fact that the entries related to co-ownership and not to sole-ownership did not affect the question.

Second appeal from the decree of the District Judge, Montgomery at Lahore, dated the 11th August, 1922, modifying that of the Subordinate Judge, First Class, Montgomery, dated the 21st March, 1922.

Chaudhari *Zafar Ullah Khan*, for Mr. *Abdul Aziz* and Mr. *Anant Ram*, for the Appellants.

Mr. *Aziz Ahmad*, for the Respondents.

JUDGMENT.

Broadway, J.—The only point for determination in this appeal is whether the suit brought by the plaintiffs is within limitation. The trial Court held that it was. The lower Appellate Court came to the conclusion that it was not. It is not necessary to set out the facts of this case in any detail. The Revenue Records show that the land in suit in the "ownership" column is entered as belonging to the plaintiffs and the defendants but the possession is with the plaintiffs. This state of affairs has existed since 1872 or thereabouts. In 1897 an attempt was made by the plaintiffs to have the Revenue Records altered and their names entered not only as in sole possession but as sole owners. This application was rejected. In 1921 one of the defendants applied for partition of the land in suit. The plaintiffs pleaded their title and were referred by the Revenue Authorities to the Civil Court. In my judgment the suit is clearly within limitation. In *Hakim Singh* v. *Waryaman* (1) a similar question arose for decision and it was held that the application for partition was an act of invasion which gave a new cause of action. *Jahana* v. *Wali* (2) is an authority to the same effect. Mr. Aziz Ahmad for the respondent very frankly accepts the propositions enunciated in those authorities but has attempted to differentiate this case from those on the ground that in the reported cases the entries showed sole-ownership whereas in the present case the entries related to co-ownership. This is a distinction, no doubt, but I do not think it affects the question.

I would, therefore, accept this appeal and return the case to the Court of the District Judge, for disposal of the other questions raised in appeal. Costs in this Court will follow the event. The stamp on appeal will be refunded.

Coldstream, J.—I agree.

A. N. A. *Appeal accepted: Case remanded.*

(1) 140 P. R. 1907; 187 P. W. R. 1907.
(2) 53 Ind. Cas. 595; 98 P. R. 1919

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1250 OF 1924.
December 23, 1926.
Present:— Mr. Justice Dalal and Mr. Justice Pullan.

MADAN MOHAN LAL—DEFENDANT—APPELLANT
versus
JAI NANDAN LONIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—Registered instrument, necessity of—Mere delivery of possession, effect of.

The fact that a person is put in possession of property in lieu of some money due to him does not confer on him any title to possession of the property in the absence of a registered instrument of mortgage.

Where a Statute requires that a particular kind of transfer, as for instance a mortgage, shall be effected by a particular kind of instrument, its provisions must be enforced with stringency.

Salamat-uz-zamani Begam v. *Masha Allah Khan* (2), followed.

Mahomed Musa v. *Aghore Kumar Ganguli* (1), distinguished.

Second appeal against the decree of the Subordinate Judge, Jaunpur, dated the 28th of April, 1924.

Dr. *K. N. Katju*, for the Appellant.

Mr *P. L. Banerji*, for the respondents.

JUDGMENT.—A suit for redemption was decreed. The appellant was a party as defendant to the suit because he was in possession. In appeal the argument advanced is that the mortgage was to continue for 30 years from 17th December, 1906, and, therefore, the suit was premature.

We, however, find that the appellant has no title to possession and cannot resist the suit for redemption. His case was that the widow of the mortgagee Bhagwanta Lonia put him in possession of the property in lieu of some money due to him from Bhagwanta. There was, however, no registered deed of transfer.

A large number of rulings was produced before us. We have read them all. They are all based on the observations of their Lordships of the Privy Council, in the case of *Mahomed Musa* v *Aghore Kumar Ganguli* (1).

That ruling does not imply that a transfer under such circumstances as existed in the present case, could be made without a registered document. We agree with the observations of Mr. Justice Piggott in *Salamat-uz-zamani Begam* v. *Masha Allah Khan* (2). The obsevations are at page 196*; where the Statute requires that a particular kind of transfer, as for instance a mortgage, shall be effected by a particular kind of instrument, it seems to us that their Lordships have always enforced such a provision with great stringency. We hold that the appellant has no title to the property, and, therefore, cannot resist the suit for redemption.

We dismiss the appeal with costs which shall include fees here on the higher scale.

A. N. A. *Appeal dismissed.*

(1) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. (P. C.).

(2) 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 198.

*Page of 40 A.—[*Ed.*]

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1062 OF 1926.
February 8, 1927.
Present:—Mr. Justice Jai Lal.

HARI SINGH AND OTHERS—VENDEES—DEFENDANTS—APPELLANTS
versus
SAHIB SINGH—PLAINTIFF AND ASA SINGH—VENDOR—DEFENDANT—RESPONDENTS.

Custom—Alienation—Antecedent debt, nature of debt, enquiry into—Stamp Act (II of 1899), ss. 36, 61—Document insufficiently stamped—Objection in appeal.

Where an alienee, after having satisfied himself as to the existence of the antecedent debt due by the alienor actually discharges that debt, no question of enquiry as to the nature of the debt arises unless it is proved that it is tainted with immorality or that there are suspicious circumstances which should have put the alienee to enquiry. [p. 734, col. 1.]

The objection as to the inadmissibility of a document for want of sufficient stamp cannot be taken up for the first time in appeal. [*ibid.*]

Second appeal from the decree of the District Judge, Jullundur, dated the 28th January, 1926, reversing that of the Sub-Judge, Second Class, Jullundur, dated the 31st March, 1925.

Mr. *D. C. Ralli*, for the Appellants.

Mr. *C. L. Mathur*, for the Respondents.

JUDGMENT.—In pursuance of my order of remand dated the 8th of October, 1926, the District Judge has submitted a finding that Rs. 850 was paid by the appellant to Basant Singh in discharge of a debt due to him from the alienor. This finding is based on evidence on the record and cannot be attacked before me and the appeal, therefore, is concluded by it. Counsel for the respondents has raised objections to the report of the District Judge,

The first objection is that the document in favour of Basant Singh was inadmissible in evidence for want of sufficient stamp. This objection cannot be taken on appeal, considering that the document has already been admitted in evidence by the trial Court. The second objection is that the appellant has not shown that he made an enquiry as to the nature of the debt, that is to say, whether there was any necessity for the alienor to borrow the money from Basant Singh. In this connection it may be noted that there is absolutely no evidence on behalf of the respondent who did not think it necessary to go into the witness-box himself. The alienee having satisfied himself as to the existence of the antecedent debt due to Basant Singh and having actually discharged that debt, no question of enquiry as to the nature of the debt arises unless the plaintiffs prove that it was tainted with immorality or that there were suspicious circumstances which should have put the alienee to enquiry. In my opinion there is no force in the objections by the respondents. I accept this appeal, set aside the decree of the learned District Judge and grant the plaintiffs a decree to the effect that the alienation in dispute shall not affect their reversionary rights in the property in suit except to the extent of Rs. 650. Under the circumstances of the case I leave the parties to bear their own costs throughout.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 910 OF 1924.
November 29, 1926.
Present:—Mr. Justice Dalal and Mr. Justice Pullan.

MANGAT—DEFENDANT—APPELLANT
versus
Musammat BHARTO—PLAINTIFF AND HARGYAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Re-marriage—Forfeiture of widow's estate—Custom to the contrary—Possession for twelve years after re-marriage—Adverse possession—Hindu Widow's Re-marriage Act (XV of 1856), s. 2.

The rule enacted by s. 2 of the Hindu Widow's Re-marriage Act of 1856, that a Hindu widow on re-marriage forfeits all her rights and interest in her deceased husband's property does not apply to a Hindu widow who was permitted by custom to re-marry even prior to 1856, and such a widow does not, therefore, acquire ownership of her husband's estate by adverse possession by continuing in possession of the same for more than twelve years after her re-marriage.

Gajadhar v. *Kaunsilla* (1), followed.

Second appeal from an order of the Additional District Judge, Meerut, dated the 12th of April, 1924.

Mr. *N. P. Asthana*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—For the purposes of this second appeal, it must be held that the plaintiff *Musammat* Bharto is the daughter of *Musammat* Rukmin by Hari Ram. This was disputed by the defendant, but both the Subordinate Courts held in favour of the plaintiff. The next point is whether the suit for declaration by the plaintiff that the deed of gift executed by *Musammat* Rukmin in favour of defendants Nos. 1 and 2 was not binding on her was time-barred or not. It was argued that *Musammat* Rukmin lost her right to hold her husband's estate for her life on her re-marriage, and as she continued in possession she became owner by adverse possession after a lapse of twelve years. Reference was made to s. 2 of the Hindu Widow's Re-marriage Act (XV of 1856), which enacted that a Hindu widow on re-marriage forfeited all her rights and interest in her deceased husband's property. This Court, however, has held repeatedly that this forfeiture does not apply to a Hindu widow, who is permitted to re-marry, prior to 1856. All the previous judgments are referred to at page 165* of a Bench ruling of this Court in *Gajadhar* v. *Kaunsilla* (1). Mr. Justice Banerji who delivered the judgment of the Court felt thimself bound by the previous rulings. His personal opinion appears to be that the rulings of the Calcutta and Madras High Courts more correctly interpreted the law. We are in the same position and are not prepared to refer the matter to a Full Bench after this Court has taken one view for a long series of years.

It was next argued that a *Jat* of the class to which *Musammat* Rukmin belonged was not permitted to re-marry prior to 1856. The learned Judge of the lower Court has examined the evidence on page 12 of the printed book. We agree with him that the *wajib ul-arz* did not record any custom confined to *Jats* alone because the co-sharers of the village belonged to communities

(1) 1 Ind. Cas. 761; 31 A. 161; 6 A. L. J. 107.

*Page of 31 A.—[*Ed.*]

other than *Jats* as well as *Jats*. The learned Judge referred to the evidence of Pirthi Singh witness for the defence who deposed that a Hindu widow in the village in which the parties lived never forfeited her right to her deceased husband's property by her re-marriage.

Musammat Rukmin was, therefore, a life-holder and did not start any adverse title by her re-marriage.

We dismiss the appeal with costs including in this Court fees on the higher scale.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 88 OF 1926.

February 9, 1927.

Present :—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Banerji.

MAKHAN LAL—DECREE-HOLDER—APPELLANT

versus

Chaudhri MUSHTAQ ALI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, O. XL—Mortgage-decree—Execution—Appointment of Receiver, legality of—Equitable execution, exceptional remedy.

Order XL of the Civil Procedure Code relating to the appointment of Receivers has no application to the execution of mortgage-decrees.

Appointment of a Receiver by way of execution is an exceptional remedy derived from English practice.

First appeal from an order of the Subordinate Judge, Badaun, dated the 13th of April, 1926.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *Mushtaq Ahmad*, for the Respondent.

JUDGMENT.—This order is wholly without jurisdiction. We do not propose to discuss the various cases which the learned Judge has referred to in Indian Cases, because some of them contain *dicta* of a very wide character, which open up a variety of rather debatable question. In our view, O. XL of the First Schedule has nothing to do with the execution of mortgage-decrees. The learned Judge says that there is no prohibition in law against the appointing of a Receiver in the case of a mortgage-decree. There are great many things which are not prohibited in the Code One might just as well say that as there is no prohibition in the Code to a Judge appointing himself as Receiver at a large salary, that he has, therefore, jurisdiction to do so. In our opinion, the matter becomes quite plain when O. XL, which deals with the appointment of a Receiver, is understood. The appointment of a Receiver by way of execution is an exceptional remedy derived from English practice; indeed in England it is called equitable execution. It is quite clear that it is intended to be a form of execution by this Code. Section 51 of the Code, that is to say, in the controlling part of the Code, lays down the various forms of execution. These include the appointment of a Receiver. Order XL is the only provision to be found in the First Schedule dealing with the appointment of a Receiver. It is, therefore, clearly intended to provide the machinery for carrying out that form of execution which has already been provided for by s. 51 of the Code.

The case of mortgage decrees is quite special. It is all contained in O. XXXIV. Subordinate Judges ought not to require being reminded in these days that O. XXXIV was transferred from the Transfer of Property Act, because difficulties had arisen and confusion had occurred in differentiating between the case of execution of mortgage-decrees and other decrees, and the enactment of the provisions of s. 34 for enforcing mortgage-decrees was specially brought into the Schedule and placed into watertight compartments in order to prevent misunderstanding. We are clearly of opinion that the provisions of O. XXXIV in the execution of mortgage-decrees allow no loophole for the application of the procedure provided by O. XL to mortgage-decrees. We must allow the appeal and set aside the order of the Court below with costs here and below including fees in this Court on the higher scale.

A. N. A. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 273 OF 1925.

March 30, 1926.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Mukerji.

GNANADA SUNDARI MOJUMDAR—APPELLANT

versus

CHANDRA KUMAR DE—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 144, 151,

O. XXI, r. 92—Execution sale—Order for restitution under s. 151, whether appealable—Tenants of auction-purchaser, whether can be proceeded against in execution.

An order for restitution, made under s. 151 of the Civil Procedure Code, but in fact, in exercise, by analogy, of the jurisdiction under s. 144 of the Code, is appealable. [p. 737, col. 1]

Sukhdeo Dass v. *Rito Singh* (1), not followed.

When an execution sale is set aside, the judgment-debtor is not entitled in execution proceedings to have an order for delivery of possession by way of restitution against a person who has been settled on the land by the auction-purchaser after his purchase. [*ibid.*]

The proper remedy of the judgment-debtor in such a case is either to treat him as a tenant or to sue to eject him as a trespasser. [*ibid.*]

Appeal against an order of the Additional Subordinate Judge, Noakhali, dated the 20th April, 1925, reversing that of the Munsif, First Court, Lakhipur, dated the 1st of December, 1924.

Babu *Hem Kumar Bose*, for the Appellant.

Babu *Jitendra Kumar Sen Gupta*, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the judgment-debtor against a decision of the Subordinate Judge of Noakhali reversing the order of the First Munsif of Lakhipur. The facts are as follows:—The Opposite Party No. 1 held an under-*raiyati* under the appellant. In execution of a decree in ejectment the appellant obtained *khas* possession of the under-*raiyati* against the Opposite Party No. 1. The superior landlords subsequently obtained a rent-decree against the appellant and in execution thereof the holding was brought to sale and purchased by the Opposite Party No. 3. The Opposite Party No. 1 obtained settlement of the land from the auction-purchaser at the execution sale, the Opposite Party No. 3. After this the judgment-debtor applied to set aside the sale by the landlord in execution of the rent-decree. This was contested by the auction-purchaser, but a compromise was arrived at and the sale was set aside. Thereupon the appellant applied for restoration of possession against the Opposite Party No. 1 who held the under-*raiyati*. The Munsif said that he had no jurisdiction to deal with the matter under the provisions of s 140, Civil Procedure Code, but that as he considered the applicant was entitled to be restored to the position in which he would have been if the execution sale had never taken place, he passed an order under s. 151, Civil Procedure Code, for possession against the Opposite Party No. 1 who had been settled on the land after the purchase by the Opposite Party No. 3. Possession under this order was given to the appellant and he is now in possession. Thereafter an appeal was preferred by the Opposite Party No. 1 against the decision of the Munsif and the Subordinate Judge reversed the order of the Munsif for reasons which he has indicated in his judgment. As a result this appeal has been preferred to this Court.

Two points have been urged before us on behalf of the appellant. First, it is said that as the Munsif acted not under s. 144, Civil Procedure Code, but under his inherent jurisdiction under s. 151, Civil Procedure Code, no appeal lay to the Subordinate Judge and that in the result the judgment of the Munsif should be restored, secondly, it was said that on the merits by virtue of the provisions of O. XXI, r. 92, the appellant was entitled as against the Opposite Party No. 1 to the order which the Munsif had made. It was urged that he was entitled when the auction-sale was set aside to be placed in exactly the same position as he would have been if the sale had never taken place and that consequently he was not merely entitled to have the sale set aside as against the Opposite Party No. 3, but to have an order for possession of the land against the Opposite Party No. 1 who had been settled on the land by the Opposite Party No. 3 after the Opposite Party No. 3 had purchased at the sale in execution of the rent-decree.

So far as the first point is concerned, namely, that there was no appeal, we were referred to the decision of the Patna High Court in *Sukdeo Dass* v. *Rito Singh* (1). In that case it was held that as the order of the executing Court must have been made under s. 151, Civil Procedure Code, and that as O. XLIII, r. 1, does not provide for an appeal against such an order the lower Appellate Court had no jurisdiction to set aside the order of the first Court; that is to say, it was held that there was no appeal to the Subordinate Judge from an order made by the Munsif under the provisions of s. 151, Civil Procedure Code. There is another case of *Jagdip Narain*

(1) 39 Ind. Cas. 763; 2 P. L. J. 361; 1 P. L. W. 551.

Singh v. *Holloway* (2); the point was not actually decided there but one of the learned Judges who formed the Division Bench expressed an opinion, which, no doubt, is *obiter*, that an appeal did lie, as it was an adjudication between the parties and not an order against which an appeal lies as an appeal from an order. There does not seem to be any direct authority in this Court dealing with the actual point but the learned Vakil who appears for the respondents says that in many cases an appeal has been entertained against an order passed under s. 151 and he refers us in support of this contention to a decision of the Judicial Committee, *Jai Barham* v. *Kedar Nath Marwari* (3). But I do not think that that case really covers the point which we have to decide. But I am inclined to think that an appeal does lie. It certainly seems a curious position that if the Court deals with the matter under s. 144, Civil Procedure Code, an appeal lies whereas if the Court under s. 151 exercises the same jurisdiction which s. 144 gives it, but exercisest hat jurisdiction under s. 151, because s 144 is not strictly applicable, no appeal lies; and the view I take is that if, as here, the order is made under the provisions of s. 151, but in fact in exercise, by analogy, of the jurisdiction under s. 144 an appeal does lie. The first point, therefore, accordingly fails.

So far as the second point is concerned I think that the Subordinate Judge was right. I do not see how the Opposite Party No. 1 can be brought into the execution proceedings and an order such as is sought against him be passed in those proceedings. It seems to me that the remedy of the appellant does not lie in this direction. He can either recognise the Opposite Party No. 1 as tenant on the land and take rent from him, or recognising him as a tenant he can terminate his tenancy by notice, and if possession is not given sue for ejectment, or he can treat him as a person who under the facts and circumstances of this case is no better than a trespasser and has no right whatever on the land, and sue in ejectment to recover possession of the land. It seems to me that one or other of these courses is the proper course for the appellant to adopt and that he cannot get the order which he seeks as against the Opposite Party No. 1 in the execution proceedings to which the Opposite Party No. 1 is not a party.

We are pressed with the fact that the present appellant is in possession and it is said that it would be, therefore inequitable to make any order which might have the effect of disturbing that possession. But I do not think that that fact can influence us. If the appellant is wrong in his contention then the order of the Subordinate Judge was correct and we are bound to say so whatever the consequence may be.

In the result, therefore, the appeal fails and it is dismissed with costs, the hearing-fee is assessed at one gold *mohur*.

The connected application is rejected.

Mukerji, J.—I agree.

A. N. A. *Appeal dismissed.*

(2) 39 Ind. Cas. 653; 2 P. L. J. 203; 3 P. L. W. 423; (1919) Pat 282.

(3) 69 Ind. Cas. 278; 49 I. A. 351; 27 C. W. N. 582; A. I. R. 1922 P. C. 269; 4 P. L. T. 61; 32 M. L. T. 10; 37 C. L. J. 351; 44 M. L. T. 735; 21 A. L. J. 490; 25 Bom. L. R. 643; (1923) M. W. N. 368; 2 Pat. 10; 18 L. W. 802 (P. C.).

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 182 OF 1926.

January 20, 1927.

Present:—Mr. Justice Lindsay.

RAM SINGH—DEFENDANT—APPELLANT

versus

MAN SINGH—PLAINTIFF—RESPONDENT.

Stamp Act (II of 1899), s. 44 (3)—Deficiency in stamp duty paid by party to suit—Amount paid not included in costs—Suit to recover amount paid, whether maintainable.

Plaintiff instituted a suit on the basis of a mortgage and during the pendency of the suit it was discovered that the mortgage-deed was not sufficiently stamped. In order to obtain a decree in the suit plaintiff paid up the deficiency and the penalty. The amount paid by him was, however, not included in the costs of the suit and plaintiff instituted a subsequent suit to recover the amount paid by him from the defendant:

Held, that the case fell within the purview of s. 44 (3) of the Stamp Act and that the suit was barred by the provisions of that section. [p. 738, col. 1.]

Civil revision from an order of the Small Cause Court Judge, Chandausi, dated the 6th of September, 1926.

Mr. *P. N Sapru*, for the Appellant.

Mr. *Panna Lal*, for the Respondent.

JUDGMENT.—The question in this case is the correct interpretation of s. 44, sub-s. 3 of the Indian Stamp Act. This sub-section was pleaded as a bar to the suit in the Court below. The Judge of the Small Cause Court overruled the objection

and held that sub-s. (3) to s. 44 was not a bar. In my opinion the decision is erroneous. The section has not been correctly interpreted by the Court below. The facts are quite clear. The plaintiff Man Singh held a mortgage from the defendant Ram Singh dated the 11th November, 1922. He put that mortgage in suit, and while the case was pending it was discovered that there was a deficiency of stamp duty. Nobody denies that Ram Singh the mortgagor was the person who was liable for this deficiency.

The plaintiff having paid the deficiency in order to make the instrument regular and in order to get a decree has brought this suit for the recovery of the money paid by him. He apparently did not make any application to the Court which was trying the mortgage-suit to include the amount so paid in the costs of the suit.

The terms of s. 44 (3) require :

"Such amount may, if the Court thinks fit, be included in any order as to costs in any suit or proceeding to which such persons are parties and in which such instrument has been tendered in evidence."

Here the plaintiff and defendant were parties to the mortgage-suit and the mortgage was tendered in evidence The sub-section then goes on to say:

"If the Court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable."

These last words are as precise as can be, and, in my opinion, they indicate clearly that a suit for the recovery of deficiency in stamp duty cannot be entertained if the case falls within the provisions of sub-s. (3) of s. 44.

I allow the application, set aside the decree of the Court below and dismiss the plaintiff's claim.

Parties will bear their own costs in both Courts.

Z. K. *Application allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2050 OF 1926.

February 2, 1927.

Present:—Mr. Justice Tek Chand.

Musammat KISHNO—APPLICANT—APPELLANT

versus

Musammat PARTABO—2ND PARTY—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 7, 39 —Removal of guardian, principles relating to—Testamentary guardian, when to be removed—Welfare of minor.

Under s. 7 of the Guardians and Wards Act a Court cannot appoint another person as guardian in place of a testamentary guardian until the powers of such a guardian have ceased under the Act. But, under s. 39 of the Act it is as much the duty of the Court to remove a testamentary guardian as it is to remove a guardian appointed by itself, if any of the grounds mentioned in that section exists. [p. 739, col. 2.]

If there are reasons to suspect that a testamentary guardian is guilty of continued failure to perform the duties of his trust and has ill-treated or neglected to take proper care of the ward, the Court should, acting either on the application of any person interested or *suo motu*, remove him, the paramount consideration for the decision of the Court being always the welfare of the minor. [*ibid.*]

Miscellaneous first appeal from the order of the District Judge, Lyallpur, dated the 20th May, 1926.

Mr. *Charan Singh*, for the Appellant.

Mr. *Ram Chand Manchanda*, for the Respondent.

ORDER.—One Chanan Singh, a *Jat* proprietor in the Lyallpur District, who originally came from a village called Mansuran in the Ludhiana District, died about the end of 1921 leaving behind him surviving a widow, *Musammat* Partabo, and a son Puran by his former wife, *Musammat* Ram Kaur. This boy was a little over five years of age at the time of Chanan Singh's death. Chanan Singh had on the 21st June, 1921, executed a Will in which he recited that *Musammat* Ram Kaur, his first wife, had become unchaste and had been turned out of his house by him, that the sole heir of his property would be his son Puran, minor, and that his "*Muntazim* and guardian would be *Musammat* Partabo, his step-mother, so long as the boy does not attain majority." It seems that *Musammat* Ram Kaur died either in the lifetime of Chanan Singh or soon after his death. On the 22nd May, 1925, an application under s. 7 of the Guardians and Wards Act was presented in the Court of the District Judge, Lyallpur, by *Musammat* Kishno, the maternal grandmother

of the minor, for appointment as guardian of the person and property of the minor. She alleged that the minor had been living with her and that the step-mother *Musammat* Partabo was wasting his property. Along with this application was filed a schedule of moveable and immoveable property of the minor, valued at Rs. 23,880. On the 23rd June, 1925, the step-mother *Musammat* Partabo also filed an application propounding the Will of her husband dated the 21st June, 1921, already referred to and claiming to be the testamentary guardian of the person and property of the minor. She gave the total value of the property of the minor as Rs. 11,400 only and prayed for her formal appointment as such. The genuineness of this Will was not admitted by *Musammat* Kishno.

The learned District Judge held the Will duly proved and, holding that there was no reason to interfere with the discretion exercised by the deceased, he dismissed *Musammat* Kishno's application and appointed *Musammat* Partabo as guardian of the person and property of the minor. It is noteworthy that the minor was not willing to go to *Musammat* Partabo but the learned District Judge thought "that probably by and by he shall get used to live with her."

In appeal Mr. Charan Singh who appeared for *Musammat* Kishno has attacked the finding with regard to the execution of the Will. I have carefully examined the evidence led by the parties and have reached the conclusion that the learned District Judge was right in holding the Will proved. Mr. Charan Singh has further contended that according to the terms of the Will *Musammat* Partabo was appointed guardian only of the property of the minor and not of his person. The terms of the Will are, however, clear and leave no doubt in my mind that the testator intended to appoint her guardian both of the person and property of the minor These findings, however, are, in my opinion, insufficient to warrant a decision in favour of *Musammat* Partabo. It is to be noted that Chanan Singh died in 1921 and the present application was not filed till 1925. How did *Musammat* Partabo discharge her duties as a testamentary guardian during these 4½ years? Mr. Charan Singh for the appellant contends that the boy has all along lived with his maternal grandmother *Musammat* Kishno and that *Musammat* Partabo has taken no interest whatever in his welfare. He also alleges that *Musammat* Partabo has not only neglected her duties as a testamentary guardian but has appropriated the bulk of the income of the minor's estate to her own use and that she has taken no steps whatever to realise or to keep alive the debts that were due to the minor's estate and most of which have now probably become barred by limitation. It is most unfortunate that there are no materials on the record on which it is possible to come to a decision on these important points. It seems to me that this aspect of the case was entirely lost sight of in the lower Court. *Musammat* Partabo is, no doubt, the testamentary guardian of the minor and under s. 7 the Court cannot appoint another person to be guardian in her place until her powers as such have ceased under the provisions of the Act. But, under s. 39 it is as much the duty of the Court to remove a testamentary guardian as it is to remove a guardian appointed by itself, if any of the grounds mentioned in that section exists. If there are reasons to suspect that a testamentary guardian is guilty of continued failure to perform the duties of his or her trust and has ill-treated or neglected to take proper care of the ward, the Court should, acting either on the application of any person interested or *suo motu* remove her. It is to be noted that the paramount consideration for the decision of the Court is the welfare of the minor. In the present case, in view of the fact that the question of the appointment of a guardian did not come into Court till four years after the death of Chanan Singh, it seems to me to be absolutely necessary to make an enquiry into the conduct of *Musammat* Partabo towards the minor during this period. If as is contended on behalf of the appellant, it is a fact that *Musammat* Partabo has taken no interest in the minor and has neglected the performance of her duties as a testamentary guardian and has allowed the estate to deteriorate, it would be the duty of the Court to remove her under s. 39 and to appoint a new guardian instead. If, on the other hand, *Musammat* Partabo has not neglected her duties but has been looking after the boy and taking such steps as she was capable of to protect his property, then, in that case, the wishes of the father must be given effect to and

the Court must declare her to be the properly appointed guardian both of the person and property of the minor. In order to determine this matter it is necessary to remand the case to the lower Court for proper enquiry. I accordingly remit the following issues to the lower Court:

(a) With whom has the minor been living since the death of Chanan Singh?

(b) What was the property inherited by the minor from his father, and what income has been received therefrom since Chanan Singh's death?

(c) How has *Musammat* Partabo managed the estate since Chanan Singh's death and has she been looking after the ward properly?

The parties will be allowed to produce fresh evidence on these points and a return will be submitted to this Court within three months.

R. L. *Case remitted for finding.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1159 OF 1924.

January 10, 1927.

Present:—Mr. Justice Iqbal Ahmad.

TIRKHA RAM—PLAINTIFF—APPELLANT

versus

CHHOTEY—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), s. 86—Cess and rent, distinction between—Cess not mentioned in wajib-ul-arz, *whether can be recovered.*

The primary notion of a cess is a payment not for the benefit of the landlord but a payment for some purpose of public convenience such as sanitation, Police and the like. [p. 740, col. 2.]

A *wajib-ul-arz* contained a clause stating that certain persons were appointed *chaukidars* for the safety of the village, that their salaries would be contributed to by the *ryots* at a certain rate and that if this collection was short of the sum required, the *zemindars* of the village would make up the balance. It was further stated that no house rent was realised from the tenants. In the *wajib-ul-arz* prepared at the next subsequent Settlement it was stated that *chaukidara* dues were realised from the *ryots* in the village. In the third Settlement, however, there was no record of *chaukidara* dues being payable:

Held, (1) that the *chaukidara* dues mentioned in the first two *wajib-ul-araiz* were in the nature of a cess and not in the nature of rent; [p. 741, col. 1.]

(2) that inasmuch as there was no provision in the *wajib-ul-arz* of the last Settlement for recovery of such dues, they could not be recovered in view of the provisions of s. 86 of the U. P. Land Revenue Act. [*Ibid.*]

Second appeal against the decree of the Additional Subordinate Judge, Meerut, dated the 15th of April, 1924.

Mr. *Benod Behari Lal*, for the Appellant.

JUDGMENT.—The decision in this appeal must turn on the question as to whether the *chaukidara* dues claimed by the plaintiff-appellant was house rent due from the defendant-respondent or a cess of the nature contemplated by s. 86 of the Land Revenue Act (III of 1901). Both the Courts below have differed on the point. The trial Court held that the amount claimed was not a cess and it accordingly passed a decree in the plaintiff's favour. The lower Appellate Court has held that the amount claimed was a cess and has dismissed the plaintiff's claim.

The plaintiff's case was that he was entitled to *chaukidara* dues claimed by him on the basis of a custom obtaining in the village. The documentary evidence relating to the *chaukidara* dues consisted of the *wajib-ul-arz* of 1860 prepared by Munshi Mohar Singh and of the *wajib-ul arz* of 1870 prepared by Munshi Nisar Ali. Paragraph 9 of the *wajib ul-arz* of 1860 runs thus:—"Two persons, Shadi son of Kallu and Tula son of Yad Ram, are appointed as *chaukidars* for the safety of the village at Rs. 17 annually. Their salaries are contributed to by the *ryots* in each crop exempting the houses of widows and mendicants, and if this collection comes short, the *zemindars* of the village make up the balance." It was also recorded in the *wajib ul-arz* of Munshi Nisar Ali that *chaukidara* dues are realised from the *ryots* in the village. It appears from para. 15 of the *wajib-ul-arz* of Munshi Mohar Singh that no house rent or *parjawat* was realised from the tenants nor were the tenants liable to make any payment for the occupation of their houses.

In the *wajib-ul arz* prepared in the recent Settlement of 1896-1897 there is no mention of any *parjawat* being realisable from the *ryots*.

It was pointed out in the case of *Abdul Hai* v. *Nathua* (1) that "the primary notion of a cess is a payment not for the benefit of the landlord but a payment for some purpose of public convenience such as sanitation, Police, and the like.....

(1) 1 A. L. J. 537 at p. 540.

All these words as 'rent,' 'cess' and so forth, must be interpreted with reference to the meaning attached to them at the time for which payments are claimed." In view of the decision noted above in order to determine whether or not the amount claimed was a cess, one has to look for the purpose for which the *chaukidara* dues were paid by the *ryots* in the village.

A consideration of the relevant provisions of the *wajib-ul-araiz* of 1860 and 1870 leaves no room for doubt that the amount claimed on account of *chaukidara* was not an amount payable by the tenants on account of the use and occupation of their houses or on account of the rent of the site of their houses. As has been pointed out above para. 15 of the *wajib-ul-arz* of Munshi Mohar Singh leads to the conclusion that the tenants were not under a liability to pay any rent either for the site of their houses or for their houses. The *chaukidara* dues paid by the *ryots* was paid on account of salaries of the *chaukidars* maintained for the safety of the village. This obviously could not be on account of the rent of their houses but was a cess. This, if it was a cess, was levied in accordance with the village custom. But now it is obviously not recoverable in view of the provisions of s. 86 of the Land Revenue Act as it is common ground that it was not recorded by the Settlement Officer in the last Settlement, *viz*, 1896-1897. Reliance has been placed by the learned Counsel for the appellant on the case of *Assanulla Khan Bahadur* v. *Tirthabashini* (2). In my opinion, that case has no bearing on the case that I have to decide. The decision in that case turned upon a consideration of the particular terms on which a certain *putni* Settlement was made and on a consideration of the Regulations governing such Settlements. It was nowhere laid down in that case that a *chaukidara* tax, as such, is not a cess. The case of *Balwant Singh* v. *Shankar* (3) relied on by the learned Munsif is also distinguishable. In that case the amount claimed as *Ghurghana* was an amount claimed by the *zemindar* in respect of the occupation of houses by the *ryots* in the *abadi* of the village, and as such it was held by this Court that the claim was not with respect to a cess.

(2) 22 C. 680; 11 Ind. Dec. (N. S.) 453.
(3) 5 A. L. J. 361; A. W. N. (1908) 95; 30 A. 235.

In the present case as noted above the amount claimed could not be on account of rent of the house in occupation of the defendant.

The question of law involved in this case was by no means one free from difficulty and as such, it is no wonder if the learned Munsif took a view contrary to the one taken by the lower Appellate Court and taken by me in second appeal. But the mere fact that the view taken by the learned Munsif did not commend itself to the lower Appellate Court was no justification for such observations as "if the learned Munsif would have read this ruling it should have benefited him in distinguishing between rent and cess." There was absolutely no ground for the lower Appellate Court to have assumed that the learned Munsif did not go through the authorities noticed by him in his judgment.

For the reasons given above, I dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 140 OF 1925.
December 1, 1926.
Present:—Mr. Justice Waller and Mr. Justice Madhavan Nair.

DEVAGUPTAPU CHENDRAMMA AND ANOTHER—APPELLANTS

versus

DEVAGUPTAPU NARASIMHAM AND OTHERS—RESPONDENTS.

Inam *grant—Construction—"Grant to representatives and assigns"—Death of grantee before signature by* Inam *Commissioner—Grant, whether enures to heirs of grantee—Madras Board's Standing Order No. 52 (2), applicability of.*

An *inam* title-deed issued by the Government ran as follows:—"The *inam* is now confirmed to you, your representatives and assigns to hold or dispose of as you or they think proper." The grantee, however, died before the *Inam* Commissioner signed the grant. On a question arising whether the title to the grant enured to the benefit of the heirs of the grantee:

Held, (1) that the words "representatives and assigns" were mere words of limitation intended to express the absolute estate which the Government proposed to confer upon the grantee; [p. 742, col. 2.]

(2) that the title-deed did not, therefore, grant any estate to the heirs of the grantee and, as he was dead before it was actually executed and signed by the *Inam* Commissioner, his heirs did not obtain any rights under it; [p. 743, col. 1.]

Lal Ram Singh v. *Deputy Commissioner of Pratabgarh* (1) followed.

(3) that Order No. 52 (2) of the Madras Board's Standing Orders which referred to cases of death of grantee after the actual grant had no application to the case. [p. 742, col. 2.]

Letters Patent Appeal against the order of Mr. Justice Phillips, dated the 30th April, 1925, passed in S. A. No. 1574 of 1922 and reported as 92 Ind. Cas. 321, preferred against the decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 112 of 1922, (A. S. No. 309 of 1920, on the file of the District Court, Vizagapatam, A. S. No. 161 of 1920, on the file of the Court of the Subordinate Judge, Vizagapatam), preferred against that of the Court of the District Munsif, Vizagapatam, in O. S. No. 83 of 1918.

Mr. *Y. Suryanarayana*, for the Appellants.

Mr. *C. Rama Rao*, for the Respondents.

JUDGMENT.—Defendants Nos. 1 and 2 are the appellants. The facts in this case which are undisputed are briefly these. The plaintiffs are the nearest reversioners of one Venkataraju in whose favour with others 3 *inam* title-deeds were issued in 1906 and 1907. Plaintiffs' suit was to recover possession of the share of Venkataraju. The first two Courts found that, as Venkataraju was dead on the day when these title-deeds were signed by the Commissioner, he obtained no rights in the suit property, and, therefore, the plaintiffs as his heirs have got no rights. In this view their suit was dismissed. In second appeal this decision was set aside by Phillips, J.

The title-deed runs as follows:—"Title-deed granted to (1) Devaguptapu Subbaraduju (2), Devaguptapu Chandramma (3), Devaguptapu Venkataraju and four others as per register" and it recites, "the *inam* is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper" The question is whether this is a grant to Venkataraju, his representatives and assigns, or whether these words are merely words of limitation as contended for by the appellants. The learned Judge held that these words were not mere words of limitation, that they were ambiguous and that by the use of these words the Government intended "to secure the grant to the heirs of the deceased grantee." In this view he held that though Venkataraju was dead, the plaintiffs as his heirs are entitled to the properties covered by the grant. To show that in cases like the present the Government intends to secure the grant to the heirs of the grantee, reference was made to the Board's Standing Order No. 52 (2) which runs as follows:—"Cases where title-deeds have been issued by the *Inam* Commissioner but not delivered to the parties"... "in case of the death of the holder of an enfranchised *inam* before the actual delivery to him of the title-deed, the deed should, in the first place, be entrusted to the Revenue Authorities for safe custody. The Collector should make the enquiry as to who is the party entitled, as heir of the deceased, to receive the deed, and is enjoined to hand it over, exactly as received, to the heir of the deceased."

In our opinion, the Board's Standing Order No. 52 (2) has no application to the facts of the present case. The words of the order show that it applies only to cases where the grantee dies after the actual grant, *i. e.*, after the execution and signature of the deed by the Commissioner but before the actual delivery of the document to him. Though the grantee dies before the actual delivery, he having become "the holder of an enfranchised *inam*" by the title-deed having been executed and actually signed by the Commissioner in his favour, the order states that the Collector after making an enquiry should hand the deed to the heir of the deceased. As in this case, it is admitted that Venkataraju died before the title-deed was signed by the *Inam* Commissioner; he had not become the holder of an enfranchised *inam* before his death, and, therefore, the main condition for the application of the Standing Order fails.

We have, no doubt, that the words of the title-deed already referred to are mere words of limitation, *i. e.*, they were merely intended to express the absolute estate which the Government proposed to confer upon Venkataraju. This construction is supported by the decision in *Lal Ram Singh* v. *Deputy Commissioner of Partalgarh* (1). In that case the holder of an Oudh *Taluka* executed a deed of settlement which provided that after the deaths of the exe-

(1) 76 Ind. Cas. 922; 45 A. 596; (1923) M. W. N. 591; A. I. R. 1923 P. C. 160; 9 O. & A. L. R. 746; 21 A. L. J. 777; 26 O. C. 257; 33 M. L. T. 355; 10 O. L. J. 513; 50 I. A. 265; 47 M. L. J. 260; 29 C. W. N. 86 (P. C.).

cutant and the son and the widow of his eldest son (to each of whom a life interest was given), "his second son *L* and his heirs and representatives shall succeed to the entire estate....." Their Lordships of the Privy Council held that "the words 'heirs and representatives' (in this deed) are to be treated as words of limitation, and not of purchase, that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life-estates which had preceded it." "Where there is a grant to a man and his heirs and nothing to control the only meaning of the words, the grantee takes an absolute interest:" see *Dosibai* v. *Ishvardas Jagjivandas* (2).

We, therefore, hold that the title-deed in this case did not grant any estate to the heirs of Venkataraju, and, as he was dead before it was actually executed and signed by the *Inam* Commissioner, the plaintiffs cannot as his heirs obtain any rights under it. We must, therefore, set aside the decision of the learned Judge and restore that of the Subordinate Judge with costs here and before the learned Judge.

It was argued by the respondent that as the plaintiffs as the sons of Subbarajudu, one of the grantees under the title-deed, are entitled in that right to some share of the property, though a smaller one, they should be allowed to amend the plaint and that the lower Court should be asked to consider their claim for possession on this ground. We cannot accede to this request. The suit was based upon the plaintiffs' claim as reversioners of Venkataraju. What the plaintiffs are now asking us is to allow them to base their claim for possession upon their own right. It is admitted that the title deed was originally granted in favour of 7 grantees. The representatives of all the grantees are not before us. In these circumstances we think it is not proper to allow the plaintiffs to amend the plaint at this stage.

V. N V. *Appeal allowed.*

(2) 15 B. 222 at p. 227; 18 I. A. 22; 15 Ind. Jur. 151 & 281; 6 Sar. P. C. J. 10; 8 Ind. Dec. (N. S.) 150 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 051 OF 1924.

January 5, 1927.

Present:—Mr. Justice Iqbal Ahmad.

BADRI PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GIRDHAR AND OTHERS—DEFENDANTS—RESPONDENTS

Agra Tenancy Act (II of 1901), s. 164—Suit for profits—Failure to collect rents—Negligence of Lambardar—*Presumption—Suit relating to several years —Accounts how to be taken.*

In a suit for profits instituted against a *Lambardar* the mere fact that a large proportion of the rents remains uncollected does not by itself necessarily lead to the inference that the *Lambardar* was negligent. [p. 744, col. 1.]

Where a suit is brought to recover profits for several years the accounts for all the years in suit must be gone into in order to decide whether or not any amount is due to the plaintiff. [p. 744, col. 2.]

Second appeal against the decree of the Additional District Judge, Aligarh, dated the 28th of March, 1924.

Messrs. *Shankar Saran* and *Panna Lal*, for the Appellants.

Mr. *Girdhari Lal Agarwala*, for the Respondents.

JUDGMENT.—This is a plaintiffs' appeal and arises out of a suit brought by them for their share of the profits against the defendant *Lambardar* under s. 164 of the Agra Tenancy Act. The claim was with respect to 1325 to 1328 *Faslis*. The suit has been dismissed by both the Courts below. The plaintiffs claimed profits on the basis of gross rental. This has not been allowed by either of the Courts below.

In appeal before me two points have been argued by the learned Counsel for the appellants In the first place it is argued by him that the collections made by the *Lambardar* in the years in suit represented a very small percentage of the rents actually due from the tenants, and as such the lower Appellate Court ought to have presumed that it was due to the negligence of the defendant *Lambardar* that a large percentage of the rents remained uncollected and, in view of the provisions of cl. (2) of s. 164 of the Agra Tenancy Act, ought to have passed a decree in the plaintiffs' favour on the basis of gross rental. The second point argued by the learned Counsel is that even according to the accounts made by the *Patwari* and accepted by the Courts below, a sum of Rs. 41-8-9 was due to the plaintiffs with respect to

1328 *Fasli*, and, in any case, a decree for that amount ought to have been passed in the plaintiffs' favour.

In my opinion, there is no force in either of the contentions advanced by the learned Counsel. The lower Appellate Court has given due weight to the fact that the collections made by the *Lambardar* were not good, but has come to the conclusion that the presumption, if any, arising in favour of the plaintiffs by the fact of the collections not being good, was counter-balanced by certain other facts that have been noticed by the lower Appellate Court in its judgment. The mere fact that a large proportion of the rents remained uncollected does not necessarily lead to the inference that the *Lambardar* was negligent, *vide* the case of *Jodhi Ram* v. *Kaunsilla* (1). I am not unaware of the cases in which it has been held that the fact of a large proportion of the rents having remained uncollected coupled with certain other facts may raise a presumption that the *Lambardar* was negligent. Two of such cases are the cases of *Mithan Lal* v. *Mizaji Lal* (2) and *Shiva Chander Singh* v. *Ram Chander Singh* (3). But in every one of those cases there were certain other facts, apart from the mere fact of a large proportion of the rents having remained uncollected, from which the Court presumed negligence on the part of the *Lambardar*. In the present case, apart from the fact that the collections made by the *Lambardar* did not represent a high percentage of the actual amount due from the tenants, there were no other facts from which his negligence could be presumed. On the contrary there were facts that accounted for the failure of the *Lambardar* to realise an amount greater than that actually realised by him.

The lower Appellate Court has noticed in its judgment that a sum of Rs. 41-8 9 would be due to the plaintiffs on account of the year 1328 *Fasli* in accordance with the account prepared by the *Patwari*, but has refused to pass a decree in the plaintiffs' favour with respect to that amount on the ground that the plaintiffs by bringing a suit for four years "have acquiesced in the position that a general account for those four years should be taken." In my opinion, the lower Appellate Court was right in declining to pass a decree for that sum in favour of the plaintiffs. No question of set off arises in the case. The suit was for profits for four years. The accounts of all the four years had to be gone into in order to decide whether or not any amount was due to the plaintiffs. On a consideration of the accounts for the four years the Courts below have come to the conclusion that no amount is due to the plaintiffs. On that finding the claim with respect to 1328 *Fasli* as well has been rightly dismissed.

In my judgment, the decree of the lower Appellate Court is perfectly correct and I dismiss the appeal with costs including in this Court fees on the higher scale.

Z. K. *Appeal dismissed.*

(1) 67 Ind. Cas. 521; 20 A. L. J. 313; 4 U. P. L. R. (A.) 160; A. I. R. 1922 All. 111.
(2) 17 Ind. Cas. 914; 10 A. L. J. 529.
(3) 30 Ind. Cas. 550; 13 A. L. J. 851; 37 A. 595.

MADRAS HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

August 5, 1926.

Present:—Mr. Justice Srinivasa Iyengar.

In the matter of the INDIAN COMPANIES ACT: AND *In the matter of* BRITISH BANKING AND INDUSTRIAL CORPORATION LTD., BOMBAY.

Companies Act (VII of 1913), ss. 2 (3), 164, 199, 200—Payment order by one High Court—Contributories residing in mofussil *centres within jurisdiction of another High Court—Enforcement of order—Procedure.*

Where payment orders have been made by one High Court in the matter of the winding-up of a Company under the Companies Act for various amounts against contributories residing in certain *mofussil* parts within the jurisdiction of another High Court, such orders for purposes of enforcement of them in execution must, by the conjoint effect of ss. 2 (3), 199 and 200 of the Act, be treated in the same manner as a decree passed by the latter High Court and may be transferred for execution to the various District Courts within whose respective jurisdictions the contributories reside. To such a case s. 164 of the Act has no application whatever. [p. 745, col. 2.]

In the matter of the National Insurance & Banking Co., Ltd. (1), distinguished.

Judge's summons to the High Court, Madras (Original Side) for issuing directions to certain *Mofussil* District Courts for the enforcement of certain payment orders made by the Bombay High Court.

Mr. *T. D. Srinivasa Chari*, for the Petitioners.

ORDER.—These are applications made in terms for directing the respective District Courts to enforce the payment orders made by the Bombay High Court in

the matter of the winding-up of the Company named in the cause title against contributories for various amounts. The certified copies of the orders passed by the Bombay High Court have now been put in.

By virtue of s. 200 of the Companies Act an order made by one Court, it is stated:

"shall be enforced in any place in British India other than that in which that Court is situate, by the Court that would have had jurisdiction in respect of such Company if the registered office of the Company had been situate at such other place, and in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same."

The places where the orders are required to be enforced are the places in the Districts mentioned respectively in the applications. If the Company had had registered offices in those places the Court which would have had jurisdiction in respect of such Company is this Court under the definition of "Court" in s. 2, cl.(3) of the Companies Act. Further the same s. 200 provides that the "order shall be enforced in the same manner in all respects as if such order had been made by the Court that is hereby required to enforce the same."

In other words, that section authorizes this Court, for purposes of enforcement, to regard it as an order passed by this Court itself. Nextly, under the provisions of s. 199 of that Act it is provided that, "all orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced."

The result, therefore, is that by virtue of s. 200 the order made by the Bombay High Court is required to be regarded as an order made by this Court, and by virtue of s. 199 that order comes to have the same force and effect as a decree passed by this Court.

The learned Vakil for the petitioner, Official Liquidator, submitted that, under the provisions of s. 164 of the Companies Act, this Court should make an order directing all subsequent proceedings to be had in the District Court. I am satisfied that that section has absolutely no application whatever to the matter on hand.

That refers only to the Court that passes the winding-up order and the order contemplated to be made by the section is an order that all subsequent proceedings in the winding-up should be had or may be had in a District Court, but that is not the order now contemplated or required. The learned Vakil also referred me a case reported in *In the matter of the National Insurance & Banking Co., Ltd.* (1). In that case two learned Judges of the Allahabad High Court would appear to have held that, under the provisions of s. 164 of the Companies Act, it was competent to the Allahabad High Court to authorize the Official Liquidator to apply to the District Courts within the United Provinces for enforcing the orders passed by the Punjab Court. With all due deference to the learned Judges that decided that case, I am unable to agree with the decision. I rather think that the proper procedure as indicated by the conjoint effect of ss. 199 and 200 of the Companies Act is that the order now filed in this Court should be treated in the same manner as a decree passed by this Court and transferred for execution to the respective District Courts.

There will, therefore, be an order in all these applications directing the transfer of the order to the District Court concerned for execution by that Court against the contributory in the same manner and to the same extent as if the order was a decree passed by this Court.

V. N. V. *Order transmitted for execution.*

(1) 51 Ind. Cas. 381; 1 U. P. L. R. (A.) 182.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1273 OF 1924.

January 20, 1927.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

RAGHUNATH PRASAD AND OTHERS —PLAINTIFFS—APPELLANTS

versus

RAM BHAROSE AND ANOTHER— DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Alienation by Hindu father—Decree setting aside alienation on condition of deposit of part of consideration—Subsequent suit by vendee for balance of purchase-money—Res judicata—*Limitation—Accrual of cause of action—Limitation Act (IX of 1908), Sch. I, Art. 97.*

The plaintiffs purchased a certain property from a Hindu father. The sons sued to set aside the sale and a decree was passed cancelling the sale and ordering delivery of possession of the property to the sons on their depositing a certain portion of the sale consideration in Court. In a suit by the plaintiffs against the sons as legal representatives of

the vendor for refund of the balance of the purchase-money:

Held, (1) that the suit was not barred by *res judicata* by the decision in the prior suit inasmuch as money paid to the father as consideration for the sale at the time of sale could not be regarded as a debt of the father until the sale had been set aside and the right of the vendees to get back the sale consideration had accrued;

Madan Gopal v. *Sati Prashad* (1), applied.

(2) that the decree in the prior suit became operative only on the deposit of the amount ordered to be deposited and the period of limitation for the suit began to run under Art. 97 of Sch. I of the Limitation Act only from that date and not from the date of the passing of the decree.

Second appeal from the decree of the Additional District Judge, Cawnpore, dated the 12th July, 1924.

Mr. *Haribans Sahai*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—The plaintiffs sued for the refund of purchase-money under the following circumstances: They purchased a certain property from a Hindu father and the sale was subsequently cancelled on the opposite side depositing Rs. 900 in Court for payment to the plaintiffs. The sale consideration was Rs. 3,475 and the plaintiffs sued the defendants who are sons of Hanuman, vendor, for the balance of the purchase-money. The trial Court in a well-reasoned judgment held that the suit was not barred under the provisions of s. 11 of the Code of Civil Procedure but that it was barred by limitation. On appeal these decisions were reversed, but the result was the same and the plaintiffs' suit was dismissed This is a second appeal.

We agree with the trial Court that the suit is not barred by the principles of *res judicata*. There is a ruling of this Court in support of the view that in the former suit by the sons of the Hindu vendor then deceased the plaintiffs as defendants could not have claimed refund of the purchase-money. In the case of *Madan Gopal* v. *Sati Prasad* (1) two learned Judges of this Court pointed out at page 488* that money paid to the father as consideration for the sale at the time of the sale cannot be regarded as a debt of the father until the sale had been set aside and the right of the vendee to get back the sale consideration from the father has accrued. When the Hindu sons, the defendants of the present case, sued the plaintiffs of the present case for cancellation of the sale-deed the vendees' right to claim refund of sale consideration had not accrued. The matter could not, therefore, have been decided in the former suit and must be decided in a separate suit.

On the question of limitation, we have given due weight to the observations of the trial Court on pages 13-15 of the printed book. There is considerable force in what the learned Subordinate Judge has observed. We are, however, of opinion that he has not properly interpreted the decree passed in the suit by the Hindu sons. It is true that the decree starts by declaring that the sale-deed is cancelled, but it makes possession of the landed property dependent on the deposit by the sons of the vendor of Rs. 900 before they could take possession. If the sale had been merely cancelled we think that the observations of the learned Subordinate Judge would have great force and the principle enunciated by their Lordships of the Privy Council in the case of *Hanuman Kamat* v. *Hanuman Mandur* (2) would have applied. The decree was passed on the 6th June, 1918, so in that case the present suit instituted on 27th September, 1921, would have been barred under Art. 97 of the Second Schedule of the Limitation Act. We are, however, of opinion that the decree did not become operative till Rs. 900 was deposited in Court in August, 1919. The frame of the decree is unsatisfactory but its purport is clear that the sale would not be cancelled until the sons deposited money in Court Mere cancellation of the deed without possession would be of no avail to the Hindu sons. We are, therefore, of opinion that the decree became operative in August 1919 and the period of limitation under Art. 97 would run from that date and not from the date of the passing of the decree on 6th June, 1918. For this reason we hold that the suit was within time.

In the result we set aside the decree of the lower Courts and decree the plaintiffs-appellants' suit with costs of all Courts.

The cross-objections fail as we have decreed the appeal and are, therefore, dismissed with costs.

A. N. A *Appeal allowed.*

(1) 40 Ind. Cas. 451; 39 A. 485; 15 A. L. J. 425.

*Page of 39 A.—[*Ed.*]

(2) 19 C. 123; 18 I. A. 158; 6 Sar. P. C. J. 91; 9 Ind. Dec. (N. S.) 527 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 255 OF 1924.

October 1, 1926.

Present :—Mr. Justice Devadoss.

SIVANARAYANA PILLAI—DEFENDANT—APPELLANT

versus

MUTHUKUMARA SITHAPATHIAR—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation by co-parcener—Suit for partition by other members—Allotment of property alienated to alienor's share—Equities—Date of ascertaining value of alienor's share.

Where a member of a joint Hindu family alienates a particular item of property for purposes not binding upon the family and the value of the property so alienated is less than the share of alienor, in the joint family properties, in a suit for partition brought by another member of the family, it is competent to the Court to allot the property so alienated to the alienating member and thereby allow the vendee to retain it. [p. 747, col. 2.]

The value of the share of such alienating member must be determined as at the date of the alienation and not at the date of suit. [p. 748, col. 1.]

Chinnu Pillai v. *Kalimuthu Chetti* (1) and *Ramaswami Iyer* v *Venkatarama Iyer* (2), followed.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Tinnevelly, in A. S. No. 171 of 1923 (A. S. No. 1256 of 1922, District Court, Tinnevelly), preferred against that of the Court of the District Munsif, Tinnevelly, in O. S. No. 420 of 1920.

Mr. *T. M. Ramaswami Iyer*, for the Appellant.

Messrs. *K. Rajah Iyer* and *V. Ramaswami Iyer*, for the Respondent.

JUDGMENT.—The plaintiff has brought this suit for possession of the suit property on the ground that the alienation in favour of the defendant by his deceased brother Kanakasabapathi Asari is not binding on him. On appeal the Subordinate Judge gave a decree for a moiety of the plaint property. The defendant has preferred this second appeal. The contention of Mr. T. M. Ramaswami Iyer is that the defendant is entitled to the whole of the property inasmuch as on the date of the alienation the value of the alienor's share was considerably more than the value of the property conveyed to the defendant. The admitted facts are: The plaintiff had a brother Kanakasabapathi Asari. The defendant obtained a decree against Kanakasabapathi Asari in 1915 and purchased the property in execution of the decree. Then, not being able to obtain possession of the property, he brought a suit O. S. No. 228 of 1918 against Kanakasabapathi and obtained a decree for possession. Kanakasabapathi Asari is dead and the plaintiff the surviving brother has brought this suit for possession of this property. The question is whether the Court should take into consideration the state of the family at the time when the alienation was made or as contended by Mr. V. Ramaswami Iyer, for the respondent the state of the family, at the time when the plaintiff's suit was brought. The family property was worth about Rs. 7,000 and the share of Kanakasabapathi Asari was at least Rs. 3,500 and the value of the property sold in execution of the decree was worth Rs. 1,500 and the share, therefore, of Kanakasabapathi Asari was much more than the value of the property sold to the defendant. The Subordinate Judge has decreed half the property to the plaintiff on the ground that his share was not conveyed to the respondent. But the question is, in a case of this kind should the Court take into consideration the state of the family on the date of the sale or on the date of the suit. When a member of a joint Hindu family alienates a particular item of property in favour of a stranger and a suit for partition is afterwards brought, the Court when the circumstances are favourable may allot the property alienated to the member who alienated it and thereby allow the vendee to retain that property. It is not in all cases necessary that the vendee should be driven to a suit for the purpose of enforcing his right under the purchase from the member of the joint Hindu family. In this case the defendant bought the property from Kanakasabapathi Asari; but Kanakasabapathi Asari being dead, the plaintiff now asks for a share of the family property in defendant's hands. There was other family property to satisfy the claim of the plaintiff if he had brought the suit on the date of the sale to defendant and the latter would have pleaded that the property alienated should be allotted to the alienor's share. We must not take into consideration the state of things now. As found by the learned Subordinate Judge all the family property was sold by both the brothers on account of their debt.

If the contention of the respondent is to hold good it will amount to this. Supposing for argument's sake the family property is worth a lakh of rupees when the alienation is made and the share of the alienating member is about Rs. 50,000 and the

value of the property actually alienated is only Rs. 5,000 and if after the alienation the family contracts debt too recklessly or sells the rest of the family property invests the proceeds upon some security and such security is lost, the alienee cannot retain the whole of the property if any one of the members of the joint family bring a suit for partition and asks for his share of the property alienated as that is the only property that is left. I think it would be opposed to all principles of equity to give a decree against the alienee in such a case, for the alienee has got his own equity as much as the joint family member. I think it was well-settled that the time at which the share of the alienating brother should be determined is the date of the alienation: *vide*, *Chinnu Pillai* v. *Kalimuthu Chetti* (1).

It is unnecessary to discuss the objections raised by Mr. V. Ramaswami Iyer at great length as the present case is covered by a clear authority of this Court in *Ramaswami Iyer* v. *Venkatarama Iyer* (2). In that case the share of the alienor at the time when the alienation was made was comparatively more than the value of the property alienated. Mr. Justice Phillips and Venkatasubba Rao, J., upheld the alienation on the ground that at the time of the alienation the share of the alienor was considerably more than the value of the property and they held that the alienee need not be directed to institute a separate suit to work out his rights by a partition but was entitled under the co-parcener's suit as a defendant to get a decree for partition and claim to allot the item in respect of his vendor's share In this case there is no other co-parcener, Kanakasabapathi Asari being dead and the circumstances are such as would not justify the Court in decreeing partition of the suit property in favour of the plaintiff. That being so, I do not think that the plaintiff is entitled to a decree for partition and the decree of the Subordinate Judge is set aside and the plaintiff's suit is dismissed with costs throughout.

V. N. V. *Appeal allowed.*

(1) 9 Ind. Cas. 596; 35 M. 47; (1911) 1 M. W. N. 238; 9 M. L. T. 389; 21 M. L. J. 246.

(2) 75 Ind. Cas. 406; 46 M. 815; 45 M. L. J. 203; 18 L. W. 183; (1923) M. W. N. 786; A. I. R. 1924 Mad. 81.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 254 OF 1924.

October 20, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

BINDESHARI BUX SINGH—DEFENDANT APPELLANT

versus

CHANDIKA PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 11—Contract by minor—Ratification after attaining majority—Validity of contract.

A minor is not competent on attaining majority to execute a fresh bond ratifying as it were a bond executed by him during his minority. [p. 748, col. 2.]

Indran Ramaswami Pandia Thalavar v. *Anthappa Chettiar* (2) and *Krishnan Chetty* v. *Vellaichami Thevan* (3), followed.

Kundan Bibi v. *Sree Narayan* (1), not followed.

Gregson v. *Udoy Aditya Deb* (4), distinguished.

Second appeal from a decree of the District Judge, Allahabad, dated the 24th March, 1923.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *J. N. Takru*, for the Respondents.

JUDGMENT.

Pullan, J.—The two lower Courts have concurred in finding that the whole amount contained in a mortgage-bond, dated the 19th of September, 1914, is due to the plaintiff from Bindeshri Bux Singh, who is the appellant before us. We are only concerned with the lower Court's decision on this point. It is admitted that the consideration for that bond included an item of Rs. 510 due on a bond of the 7th of February, 1914, and that on that date the executant Bindeshri Bux Singh was a minor. It is contended that a minor is not competent on attaining majority to execute a fresh bond ratifying as it were a bond executed by him during his minority. The lower Courts held otherwise relying on a ruling of the Calcutta High Court in the case of *Kundan Bibi* v. *Sree Narayan* (1) but we are asked to consider that that ruling is not good law. All transactions entered into by a minor are void. Consequently the bond entered into on the 7th of February, 1914, must be held to have been without any consideration, and the minor when he attained majority could not take upon himself a liability, which, from the point of view of law, never really existed.

We have been shown two rulings of the Madras High Court reported in the case of *Indran Ramaswami Pandia Thalavar* v.

(1) 11 C. W. N. 135.

Anthappa Chettiar (2) and the case of *Krishnan Chetty* v. *Vellaichami Thevan* (3) in which the matter has been discussed at length, and we are of opinion that we should follow the view taken by their Lordships of the Madras High Court and not that of a Single Judge of the Calcutta High Court cited above.

In reply we have been referred to a ruling of their Lordships of the Privy Council in the case of *Gregson* v. *Udoy Aditya Deb* (4) but there is an essential difference between the decision of their Lordships and the case before us, for they were considering not the case of a minor whose transactions are void, but the case of a disqualified proprietor whose transactions were voidable.

We are of opinion, therefore, that the sum of Rs. 510 must be excluded from the amount due under the bond of the 19th of September, 1914, and to this extent we allow this appeal, and order that the decree of the lower Court be modified and that a decree be substituted for the amount due on the bond of the 10th of August, 1915, and for the amount of Rs. 290 due on the bond of the 19th of September, 1914, together with interest as already allowed and proportionate costs and in this Court we allow proportionate costs.

A. N. A. *Appeal allowed in part.*

(2) 16 M. L. J. 422.

(3) 12 Ind. Cas. 568; 37 M. 38; 10 M. L. T. 385; (1911) 2 M. W. N. 461; 21 M. L. J. 1077.

(4) 16 I. A. 221; 17 C. 223; 13 Ind. Jur. 410; 5 Sar. P. C. J. 416; 8 Ind. Dec. (N. S.) 686 (P. C.).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 356 OF 1923.

December 20, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—APPELLANT

versus

MOHAMMAD ISMAIL KHAN AND OTHERS—APPLICANTS—RESPONDENTS.

Land Acquisition Act (I of 1894), ss. 23 (4), 24 (3)—Acquisition for opening market—Loss of profits from adjoining market, whether can be awarded—Damna absque injuria.

Held, per *Walsh, A. C. J.* and *Pullan, J.*—(*Dalal, J.* dissenting).—An owner whose land has been acquired under the Land Acquisition Act for opening a market is not entitled to receive compensation for loss of profits derived from an existing market on other land. [p. 752, col. 1; p. 754, col. 2.]

Section 23 of the Act is limited by s. 24 which lays down certain circumstances which must not be considered in awarding compensation, though presumably the case otherwise falls within the purview of s. 23. [p. 752, col. 2.]

Sub-section (3) of s. 24 refers to claims by persons interested. [p. 754, col. 1.]

Per *Dalal, J.*—Section 24 (3) was enacted to provide against claims by persons other than the owners of the land acquired. [p. 751, col. 2.]

Collector of Dinagepore v. *Girja Nath Roy* (4), doubted.

Guru Das Kundu v. *Secretary of State for India* (3) and *Rameswar Singh* v. *Secretary of State for India* (5), approved.

First appeal from an order of the District Judge, Bulandshahr, dated the 16th May, 1923.

Mr. *G. W. Dillon*, Government Advocate, for the Appellant.

Dr. *S. N. Sen*, and Mr. *S. N. Gupta*, for the Respondents.

JUDGMENT.

Dalal, J.—(*November 15, 1926*)—The Secretary of State for India in Council has appealed from an award of the District Judge of Bulandshahr under s. 26 of the Land Acquisition Act (I of 1894). The learned Government Advocate on behalf of the appellant accepted the correctness of the market value of the land assessed by the learned Judge at Rs. 1,800. Exception was taken to the amount of Rs. 6,200 awarded by the Court under the provisions of s. 23, cl. (4) of the Act which lays down that in determining the amount of compensation to be awarded the Court shall take into consideration the damage (if any) sustained by the person interested at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, moveable or immoveable, in any other manner. The purpose for which the land was acquired was stated in the publication under s. 6 of the Act to be the establishment of a market. It so happens that the applicants have already got a market of their own on the land which has not been acquired and which is at a distance of about half a mile from the land acquired. The learned Government Advocate very rightly conceded that the applicants' own market will suffer by the establishment of another within a distance of half a mile. What he urged was that even if the applicants' income from their market was reduced on account of the establishment of the Government market, the damage was prospective and did not take place "at the time of the Collector's taking possession of the land." According to him, at the time of taking possession there was no-

market on the acquired land, and consequently no damage had been suffered by the applicants at that time. The second contention is that the Court was barred from taking such damage into consideration by reason of the third clause of s. 24 of the Act, which precludes the consideration of any damage sustained by the person interested in the land which, if caused by a private person, would not render such person liable to a suit.

The first objection is easily answered. The Act requires that the Government shall proclaim the purpose for which the land is to be acquired, and there can be no doubt that as soon as this purpose was proclaimed the market-value of the applicants' market was reduced by the fear that its income would suffer diminution by competition of the new market. This was damage sustained by the applicants at the time of the taking possession by the Government of the acquired land. There is nothing prospective or uncertain about it. It is quite possible that the new market may prove a failure and the applicants' old market may retain its custom. These are considerations for the future. What the Court has to see is whether a prudent man desiring to purchase the market would be influenced or not and would offer a lower price or not because of the alarm caused by the threatened opening of a market on the acquired land by Government. It stands to reason that the acquisition of this land by Government with the intention of establishing a market thereon will reduce the sale value of the applicants' market.

On a summary consideration the second objection of the learned Government Advocate raises difficulties in the way of the applicants. The way the learned Government Advocate argued was this: Suppose the acquired land had belonged to a neighbour *A* of the applicants and *A* had opened a market on this land in competition with that of the applicants, the applicants would have had no right to sue. In our opinion, the difference is that the land did not belong to the Government, and it is the power of the Statute which enables the Government to open the market. There can be no doubt that under the English Law compensation would be allowed. In *Essex* v. *Acton Local Board* (1) the land was desired to be acquired for sewage works under statutory powers incorporating the Lands Clauses Consolidation Act, 1845. Evidence was given that the existence of sewage works, *even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellants' other lands for building purposes.* The acquired land was let on long building leases; of the other lands part was in hand, and was let for short periods for brick making, The land taken was separated from the other lands, in part by other property of the appellants, and in part by a Railway. The Jury gave a verdict, in addition to the value of the land taken, for a further sum or damage sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers It was held by the House of Lords that the Jury was correct in awarding the further sum, as compensation might be awarded for damage to be sustained by reason of the injuriously affecting the appellants' other lands, not only by the construction of the sewage works but by their use. It was further held that the damage was not too remote to form the subject of compensation, even though no nuisance might be caused. This decision approved of the decision in *In re Stockport Timperley and Altringham Railway Company* (2).

The learned Government Advocate argued that those cases depended on the special wording of the Lands Clauses Consolidation Act, 1845, and that their application to India was specifically prevented by the third clause of s. 24 of the Land Acquisition Act (I of 1894). We do not agree with this argument. In 1900 a Full Bench of the Calcutta High Court in *Guru Das Kundu* v. *Secretary of State for India* (3) held that the principles of these English cases were applicable to the Indian Act. In that case the appellants contended that as the Municipality had only taken a portion of their land and intended to use the portion so taken for the purpose of erecting thereon a sewage discharge depot, their adjoining lands would be injuriously affected and they claimed compensation for such injurious affection. The claim appears to have been opposed by the Secretary of State for India on the same ground as is put forward here that the English cases on the subject

(1) (1889) 14 A. C. 153; 58 L. J. Q. B. 594; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756.

(2) (1864) 33 L. J. Q. B. 251; 10 Jur. (N. S.) 614; 10 L. T. 426; 12 W. R. 762; 144 R. R. 735.

(3) 22 Ind. Cas. 354; 18 C. L. J. 214.

were not applicable. The learned Chief Justice, in delivering the judgment of the Court, said (page 247*): "Now I come to the question of injurious affection, and I think I am doing no injustice to the argument of the learned Senior Government Pleader, when I...say that although there is a slight distinction in the language of the English Land Clauses Act in the section relating to injurious affection as compared with the language of s. 23, sub-s. (4), of the Land Acquisition Act of this country, he felt that he could not successfully contend, as a matter of law, that the principle laid down in the case of *Essex* v. *Acton Local Board* (1) and other similar cases in the Courts of England, was not applicable to the case now before us. In my opinion: that principle is applicable, otherwise it would be difficult to see to what class of cases s. 23 of the Land Acquisition Act can properly apply."

The learned Judge of the lower Court has based his finding on the ruling of the Calcutta High Court in *Collector of Dinagepore* v. *Girja Nath Roy* (4). This judgment was approved by another Bench of that Court in *Rameshwar Singh* v. *Secretary of State for India* (5).

We construe the third clause of s. 24 so as to limit it to damage claimed by persons other than those to whom the acquired land belonged. Those are cases like the one of *Metropolitan Board of Works* v. *McCarthy* (6). In this case Lord Penzance said: "There are many things which a man may do on his own land with impunity, though they seriously affect the comfort, convenience, and even pecuniary value which attach to the lands of his neighbour. In the language of the law these things are *damna absque injuria*, and for them no action lies. Why then, it may surely be asked, should any of these things become the subject of legal claim and compensation because instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third persons who, for the public benefit, have been compulsorily substituted for the original owners?" The claim here was not by the person whose land was acquired but by a neighbour who claimed compensation because of acts done by the works after acquisition. Similarly, where the tenant of a public house claimed compensation for the loss of profits which he had sustained by reason of a Railway Company having pulled down the adjoining houses (which did not belong to him and had been acquired by the Company from other persons), it was held that he was not entitled to compensation, for, if any private person had purchased and pulled down the adjoining property, no action would have lain against him. We are of opinion that it is to provide against such claims by persons other than the owners of the land acquired that the third clause of s. 24 was enacted.

Having approved of the lower Court's finding that compensation is due to the respondents for injurious affection of their market by the acquisition, we must proceed to determine the amount of compensation. As rightly pointed out by the learned Government Advocate, we must take into consideration the time of the Collector's taking possession. In our opinion it is not the correct procedure to make an estimate of the probable loss that the respondents may suffer in future. In fact, there may be no loss ultimately, and even no market may be constructed by the Government. What we have to consider is the diminution of its value by the general report that a new market was to be started within half a mile of the respondents' market. The real test will be by what percentage the value of the property was decreased on account of the proclamation. We must, therefore, first determine the value of the property. The lower Court appears to have made a very generous estimate of the income derived by the respondents from the market, but in default of other evidence we must accept its finding. It fixed the annual income at Rs. 2,685: Rs. 1,155 from *tehbazari* and weighment dues, Rs. 130 from Thursday and Sunday markets, and Rs. 1,400 from the *parao*. We think that it is a fair estimate to assess the value at sixteen times this income. The value of the property will, therefore, be Rs. 42,960. Such an assessment of value was made by the Full Bench in the case already quoted, *Guru Das Kundu* v. *Secretary of State for India* (3). We have considered all the circumstances of the acquisition and the distance of the respondents' market from the proposed market. We think that the

(4) 25 C. 346; 13 Ind. Dec. (N. S) 231.

(5) 34 C. 470 at p. 488; 11 C. W. N. 356; 5 C. L. J. 669.

(6) (1874) 7 H. L. 243; 43 L. J. C. P. 385; 31 L. T. 182; 23 W. R. 115.

*Page of 18 C. L. J.—[*Ed.*]

threat of the opening of a new market did not reduce the value of the respondents' market by more than 10 per cent We, therefore, allow them Rs. 4,296

Fifteen per cent. shall be added to this sum for compulsory acquisition. We amend the decree of the lower Court accordingly and fix the total compensation at Rs. 6,095 with an addition of 15 per cent.

We direct the parties to bear their own costs of both the Courts.

We only direct future interest to run at 6 per cent. per annum and no past interest as the amount of compensation was in dispute and not finally determined till to day.

Pullan, J.—(*November 15, 1926*)—The question to be determined in this appeal is the right of an owner, whose land has been acquired for the purpose of opening a market, to receive compensation for loss of profits derived from an existing market on other land.

As it is conceded by the learned Government Advocate that the opening of the new market must interfere with the profits derived from another market half a mile distant, it is not necessary to consider the possibility that no loss might be incurred. But the law does not compensate for any and every loss that may befall an owner of land, and compensation can be awarded only if the conditions laid down in the Land Acquisition Act are complied with.

If it be held that the Statute excludes consideration of the purpose for which the land is acquired, the present case is not one in which compensation can be awarded, for the mere acquisition of the plot has no effect on any rights of the landlord in other land. But the cases in which mere acquisition affects on rights or earnings from other land are rare, and it would be a narrow interpretation of s. 23, cl. (4) of the Land Acquisition Act which would exclude from the word acquisition all consideration of the purpose of acquisition. The Statute, moreover, is founded closely on the English Law, and although the authority of the judgment of the Court of Appeal in *Hopkins* v. *Great Northern Railway Co.* (7) may be cited in favour of that view, other decisions, notably the *Essex case* (1), show clearly that in England the purpose of the acquisition is taken into account. In the latter case damages were awarded because the land was acquired for a sewage farm, which would affect injuriously the value of adjoining property and the former case found that the mere building of a bridge did not affect the interest of a ferry owner, but the use to which the bridge was to be put. This is not strictly parallel to the case of a market, which as soon it is opened, that is, as soon as the land is taken over for the purpose of holding a market thereon, *ipso facto* affects the earning capacity of another market in the immediate neighbourhood.

On the other hand, the case of a sewage farm gives the owner a better claim than that of a market, for the presence of such a farm will deter other persons from becoming tenants of the adjoining land, and will affect its selling and letting value, whereas the opening of a market may actually enhance the value of the land in the neighbourhood. But the Indian Statute does not deal only with the effect of the acquisition on land, it expressly specifies earnings, apart from land. *Finding that the very proclamation of the acquisition of this land for the purpose of opening a new market affects the future earning of the landlord from his existing market, we see no reason to exclude the case before us from the operation of s. 23 of the Land Acquisition Act, if that section is complete in itself.*

But s. 23 of the Act is limited by s. 24, which lays down certain circumstances which must not be considered in awarding compensation although presumably the case otherwise falls within the purview of s. 23. The third clause runs as follows, "(the Court shall not take into consideration) any damage sustained by him, *i.e.*, the person interested, which, if caused by a private person, would not render such person liable to a suit." This clause is based on the principle followed by the English Courts, and we are as much bound to accept the leading English authorities when they favour the Crown as when they appear to favour the public. The principle is that unless something is done which would be actionable if done by a private person there is no right to compensation. Lord Campbell in *In re Penny* (8) said: "Unless the particular injury would have been actionable before the Company had acquired their statutory powers, it is not an injury for which compensation can be claimed." This dictum

(7) (1877) 2 Q. B. D. 224; 46 L. J. Q. B. 265; 36 L. T. 898.

(8) (1857) 7 El. & Bl. 660 at p. 669; 26 L. J. Q. B. 225; 3 Jur. (N. S.) 957; 5 W. R. 612; 119 E. R. 1390; 29 L. T. (O. S.) 124; 110 R. R. 773.

was re-affirmed by Lord Chelmsford in *Ricket* v. *Metropolitan Railway Co.* (9) and the *ratio decidendi* of the decision referred to above, [*Hopkins* v *Great Northern Railway Co* (7)] was that the owner of the ferry could not base an action against a private person who had diverted traffic from the ferry by constructing a bridge. The owner of a ferry is in a position closely analogous to that of a person who maintains a market, but the ferry owner has a better right to a monopoly than the owner of the market, and it is not even alleged before us that the respondent in this case would have been able to sustain an action for damages against a private person who started another market in the neighbourhood. It is, therefore, suggested that s. 24, cl. (3) refers to claims made by third parties, but, in my opinion, this view is negatived by the wording of the clause. This clause is part of the grammatical sentence which commences the section, and the person who sustains the damage can only be the person who in the second clause has a disinclination to part with the land. He cannot be changed into a person "other than the owner" without express words to that effect. I am unable to construe the section to mean anything else than that a person interested, including the person whose land is acquired, is not entitled to compensation for damages, which if caused by a private person would not have rendered that person liable to a suit. The damages in the present case are the loss caused to the respondent by the opening of a market in competition with his own market. Had he suffered that loss through the private enterprise of some other persons, he would have had no cause of action against him, therefore, he has no claim for compensation on this account from the Crown. It is true that in one English case, *In re Stockport Timperley and Altringham Railway Co.* (2) there is a suggested qualification of the English principle, and this has been followed with some hesitation in the *Essex case* (1) above quoted. But it must be remembered that the latter decision dealt with the case of a sewage farm, and a private person setting up a sewage farm in such a position as to destroy the value of his neighbour's land could hardly be immune from an action for damages. Moreover, there is no indication that the Indian Legislature intended to restrict the application of the general principle of the English Law in the manner adopted in one decision. The Act which has by the broad construction which we have been able to put on s. 23, enabled owners to obtain compensation for loss of profits elsewhere, caused by the use for which a portion of their land is acquired, has very clearly restricted the owners to cases in which a similar act by a private person would have been actionable. The Judge of the Court below suggests that the act of the private person might amount to trespass, but any attempt by a private person to use the land of another would be *ipso facto* actionable, and it is not the act of acquisition which is to be considered here, but the damage caused by opening a rival market.

I am, therefore, unable to agree with the lower Court in awarding damages for loss in respect of the earnings of the owner's other market and *parao*, and it is unnecessary for me to deal with the difficult problem of assessing these damages.

In my opinion the appeal should be allowed, and the compensation reduced to the amount allowed by the Collector.

By the Court.—We are not agreed on the question whether the respondents should receive compensation for injurious affection of their land other than the land compulsorily acquired. We refer the following question for decision by another Single Judge or Bench.

Under the circumstances of the present case described in the two judgments of the Judges of this Bench, are the respondents entitled to receive compensation for the alleged injurious affection of their other land, or are they barred from claiming such compensation under the third clause of s. 24 of the Land Acquisition Act?

When the opinion of the Third Judge or Bench is received we shall pronounce judgment, if necessary, on the amount of damages to be awarded to the respondents.

The file shall be laid before the Hon'ble Chief Justice for necessary action.

The Hon'ble Chief Justice delivered the following

OPINION.

Walsh, A. C. J. (*December 11, 1926.*)—In my judgment the third clause of s. 24 of the Land Acquisition Act is a bar to that portion of the claim, allowed by the District Judge, in respect of which this refer-

(9) (1867) 2 H. L. 175 at p. 187; 36 L. J. Q. B. 205; 16 L. T. 542; 15 W. R. 937,

ence has been made under s. 98 of the Civi Procedure Code.

The head of claim represents an attempt to capitalise the depreciation in the capital value of the land retained by the claimant, due to the legitimate future use of the land acquired, and to the loss of earnings liable to accrue to the claimant by reason of such user as a market; in other words, to legitimate competition. This is, no doubt, damage by reason of the possibility of the acquisition injuriously affecting the claimant's other property through his earnings. It is, no doubt, also true that it has been estimated at a capital sum at the time of the Collector's taking possession, representing the depreciation in capital value, caused by the fear likely to be entertained by hypothetical purchasers to-day of the diminution in future earnings. This would be legitimate enough if it were legal head of damage. But it is damage sustained by the claimant which, if caused by a private person, would not render such person liable to a suit in India, and the Court must not, therefore, take it into consideration. I cannot agree with my brother Mr. Justice Dalal that the "him" in this provision must be taken to relate to a third person. It can only relate "to the person interested", mentioned in the preceding clause; *i. e.*, the claimant.

I think it may possibly lead to misunderstanding to seek guidance from the English decisions, except in so far as it is necessary to explain ambiguous provisions of the Indian Statute, which seems to have been an attempt to codify the general principles laid down in England. But it is clearly wrong to follow an English decision, where doing so would involve doing violence to a statutory provision in the Land Acquisition Act. The effect of the English decisions seems to be to allow compensation where the user necessarily does physical injury, which would ordinarily amount to an actionable nuisance, such as a Railway passing so near to a Cotton Mill as to expose it to the risk of fire and an additional burden for insurance, or a sewage farm so situate as by smell and sentiment actually to affect the standard of comfort or enjoyment, and, therefore, the selling value of the land. There is no case like the present in which competition, consequent upon the acquisition, has been treated as actionable *per se*. To do so would be to compensate for the compulsory acquisition, which is a special head of damage otherwise provided for.

I think it necessary only to refer to the decisions in India which have been cited. I doubt whether I should agree with *Collector of Dinagepore* v. *Girja Nath Roy* (4). But the *ratio decidendi* of that case is put on another ground in the judgment of the Judges who decided *Rameshwa Singh* v. *Secretary of State for India* (5), *vide* page 485*, and the decision of the latter case, which was not cited before the Subordinate Judge in this case, is clearly an authority for the appellant, with which I agree. The decision in *Guru Das Kundu* v. *Secretary of State for India* (3) does not touch this case, though, if I may so, I entirely agree with it. It dealt with land retained by the claimant, which would be injuriously affected by the proximity of the sewage depot, amounting ordinarily to an actionable nuisance and also with compensation for severance. I think the appellant is right, and that this head of claim is excluded by s. 24, cl. (3).

After receiving the return the Division Bench delivered the following

JUDGMENT.

Dalal and Pullan, JJ. (*December 20, 1926.*)—Return has been received to the reference submitted by us to the Hon'ble Chief Justice. We hold according to his finding that the respondent is not entitled to any sum over and above the market value of the land awarded to him. The appeal is, therefore, decreed for Rs. 6,200. This sum shall be deducted from the award given by the District Judge. The appellant shall receive the costs of this Court which shall include fees on the higher scale.

A. N. A. *Appeal allowed.*

*Page of 31 C.—[*Ed.*]

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 594 AND 914 TO 933 OF 1925.

November 1, 1926.

Present:—Mr. Justice Ross and Mr. Justice Kulwant Sahay.

Musammat Bibi SAYEDATULNISSA AND OTHERS—APPELLANTS

versus

AMRIT MAHTO AND OTHERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 27, 30 (b), 35—Enhancement of rent—Tests of fairness of rent—Rise in price of staple food crops—Neglect of gilandazi.

Under s. 35 of the Bengal Tenancy Act when a rise in

the price of the staple food crops has been established, there ought, in the absence of special circumstances, to be a corresponding increase in the rent. A comparison of the incidence of the rent with the average outturn of the land is not the only way of determining fairness of rent. [p. 755, col. 1]

The fact that a landlord has neglected *gilandazi* is not, in itself, a ground for refusing enhancement of cash rent. [p. 755, col. 2.]

Appeal against the decision of the District Judge, Patna, dated the 26th March, 1925, reversing that of the Munsif, Barh, dated the 21st June, 1924.

Messrs. *Sultan Ahmed*, *B. C. Sinha* and *Hasan Jan*, for the Appellants.

Messrs. *N. C. Sinha* and *N. C. Ghosh*, for the Respondents.

JUDGMENT.

Ross, J.—These appeals arise out of suits for enhancement of rent. The learned Munsif decreed enhancement at the rate of 3-annas 6-pies in the rupee. He came to the conclusion that the increase in the price of *makai* came to 4-annas and 5 *dams* in the rupee and of paddy to 3-annas 10 *dams* in the rupee. It was pointed out before the learned District Judge that this was a miscalculation; that the enhancement for paddy land should, on the figures, be 4-annas 7-pies in the rupee; and that consequently the landlord was entitled to an all round enhancement at the rate of 4 annas 6-pies in the rupee. But the learned District Judge applying s. 35 of the Bengal Tenancy Act, held that in the circumstances of these cases no enhancement at all should be allowed. He stated the principle thus:

"In order to determine whether in any particular case an enhancement would be unfair or inadequate, it is always necessary to compare the present incidence of the rent with the average outturn of the land and there is no other way of determining the fairness of a rent."

Learned Counsel on behalf of the landlord who is the appellant contends that this proposition is too widely stated; that under s. 27 of the Bengal Tenancy Act the existing rent is to be presumed to be fair; and, if the price of the staple food crops has risen, the landlord is entitled to a corresponding enhancement of rent. In my opinion s. 35 does not bear the interpretation that the learned Judge has put upon it. When the rise in prices has been established, there ought, in the absence of special circumstances, to be a corresponding increase in the rent. The ground upon which the learned Judge has proceeded is that the existing rent which approximates to one-third of the gross produce is very high, and this opinion is entitled to every respect. But the conclusion has been arrived at on the basis that the land produced only *rabi* at the rate of 5 maunds a *bigha*. One of the objections raised by the tenants was that the landlord had neglected *gilandazi*; but this in itself would not be a ground for refusing an enhancement of cash rent. The learned Munsif held that the evidence of the defendants that only *rabi* crops were produced was falsified by their own witnesses. He referred to the village note which showed that the lands of this village are held at a rental of Rs. 6 to Rs. 10 a *bigha* and as these defendants mostly hold land at the rental of Rs. 6 a *bigha*, he thought that the existing rent was low. His opinion was, therefore, diametrically opposed to that of the learned District Judge; and it seems to me that the grounds of the judgment of the learned Munsif have not been altogether met by the Appellate Court. The evidence has been referred to; the learned District Judge has mentioned the partial admission of the defence witness No. 1, but it appears that three witnesses at least admitted that some paddy is still grown on the land. The evidence about the growing of paddy is contradictory, some witnesses saying that no paddy was sown while others said that paddy was still sown but was washed away. The evidence of two of the witnesses was that there had been no decrease in the produce of the land; from the evidence of defence witness No. 4 it appears that he had taken land at the rate of Rs. 50 a *bigha* but at present the lands are given on *ijara* at the rate of Rs 100 a *bigha*; and this would indicate anything but a decrease in the productivity of the land. With regard to the *rabi* produce the learned District Judge refers to the admission of the defendants that this is between 2 and 5 maunds a *bigha* and he has accepted 5 maunds as the outturn. But he thinks that the figures given by the defendants' witnesses are under-stated although he says that they are not under-stated to a greater extent than the figures given by the *Patwari* are over-stated. These figures are: paddy at 17 to 18 maunds a *bigha* and *paira khesari* at 9 to 10 maunds a *bigha* and, if all that can be said for the defence evidence is that the under-statement by

the tenants is no greater than the over-statement by the *Patwari*, the outturn of *rabi* should not be taken at the rate of 5 maunds a *bigha*. On the finding that the defence has under-estimated the produce, the finding of the District Judge as to the rate of rent based upon the defence evidence cannot be maintained. It is clear, therefore, that some enhancement in these cases ought to have been allowed, and the question is, what the enhancement ought to be. Learned Counsel for the appellant, while contending that he is entitled to 4 annas 6-pies in the rupee, is prepared, as a matter of concession to the tenants and for the sake of good-will, to accept 3-annas in the rupee. I think that this rate is fair except in the cases of Suits Nos. 597 and 598 where the rental at present is Rs. 7-15 0 and Rs. 6 15-0 respectively. In these cases the enhancement should be at the rate of 2 annas in the rupee.

The result is that the appeals are decreed to this extent that in all the suits except Nos. 597 and 598 the enhancement will be at the rate of 3-annas in the rupee and in these two suits only at the rate of 2-annas in the rupee. The appellants are entitled to their costs. We assess the hearing-fee at Rs. 105 which will be equally divided between the defendants.

The cross-objection is dismissed.

Kulwant Sahay, J.—I agree.

A. N. A. *Appeals allowed in part.*

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE No. 512 OF 1926.

February 3, 1927.

Present :—Sir Cecil Henry Walsh, Kt., Acting Chief Justice, and Mr. Justice Banerji

In the matter of MESSRS. DINA NATH HEM RAJ—APPELLANTS.

Income Tax Act (XI of 1922), ss. 64, 66—Assessment of firm—Business carried on in different places—'Principal place of business'—Tests—Dispute as to principal place of business—Procedure—Assessment before decision of dispute, illegality of—High Court's jurisdiction to require stating of case—Commissioner's power to question jurisdiction—Procedure—Objection, when to be raised—Winding-up of business, effect of, on jurisdiction to assess.

As a rule it is better in a statement of a case under the Income Tax Act to confine the case to findings of fact, and to the expression of the Commissioner's opinion upon the points raised, and not to burden the case with arguments, or in the case to question the jurisdiction of the Court to require a case to be stated. [p. 757, col. 1.]

An order for a case to be stated, is in the nature of what is known in Calcutta and in England as the issue of Rule *Nisi* to show cause on certain questions indicated in the order made by the High Court. The Commissioner, or other authority, in stating the case in effect shows cause against the contention of the other side, and in showing cause he is clearly at liberty, when he appears before the Court to argue the case, to take the objection that under the law there was no power to issue the Rule, or to direct the case to be stated, and that, therefore, the High Court had no jurisdiction to decide the question raised in the case. [p. 757, col. 2.]

In strictness the objection as to the jurisdiction of the High Court to require a case to be stated should be taken when the question of whether it was a fit case in which a case ought to be directed to be stated is considered by the Court. [*ibid.*]

Where a question as to which is the principal place of business of a Company arises, the Income Tax Officer cannot himself decide the question or act as though it had been determined in accordance with the provisions of s. 64 of the Act and if he proceeds to prejudge the issue or to act as though it has been determined and to assess a firm as though their principal place of business was in his own jurisdiction, in spite of the dispute being still undetermined, he acts illegally. [p. 759, col. 2.]

Where the question about the principal place of business is between places in more Provinces than one, it is to be determined by the Commissioners concerned and if they do not agree, by the Board of Inland Revenue. When such a question arises the Income Tax Officer should immediately communicate the fact of such question having arisen to his own Commissioner. [p. 759, col. 1.]

Where there is a total failure on the part of the Income Tax Authorities to apply the plain provisions of s. 64, and, on the other hand, an illegal assumption of authority by the Income Tax Officer in one of the places of business to assess the assessee, as though their principal place of business had been determined to be in such place, the existence of an alternative remedy under s. 64 (3) does not affect this case, and cannot be held to be a bar to the right of the appellant to have a case stated, and to the jurisdiction of the High Court to answer those questions in the way in which it holds they ought to be answered. [p. 760, col. 1.]

Ordinarily the principal place of business of a firm or Company is the place at which the persons directing the Company or firm do their business. [p. 761, col. 2.]

The fact that goods are manufactured in one place does not make that place necessarily the principal place of business; nor is the fact that the bulk of the practical business is conducted in a particular place a sole or indeed the important test in considering which is the principal place of business. [*ibid.*]

If business was being carried on in a particular place, the fact that the business has been stopped would not deprive the Income Tax Authorities of that place of their jurisdiction to assess. [p. 762, col. 1.]

Miscellaneous application under s 66 (1) and (3) of the Income Tax Act, XI of 1922.

Dr. *K. N Katju*, for the Appellants.

Mr *G. W. Dillon*, for the Crown.

JUDGMENT.—This is a case stated under s. 66 of the Income Tax Act of 1922,

The case has been stated by the Commissioner and printed, a matter of great convenience to the Court. The questions upon which the case was stated are set out on page 4 of the case, and are as follows:—

"6. The High Court has directed me to state a case with reference to the following points of law :—

"(1) Whether in view of the facts and circumstances as stated in this special case of the petitioner's business in connection with the purchase, sale, receipt and distribution of profit, of castor seeds delivered to the East Indian Railway at Manauri, the business was, during the material period, carried on in Cawnpore within the meaning of s. 64?

"(2) Whether if it is eventually found that the petitioner's business was carried on in Cawnpore, the Income Tax Authorities acted in accordance with the Act in assessing them by way of summary assessment while a *bona fide* dispute was going on as to whether they were liable to be assessed in Cawnpore at all?

"(3) Consequential upon the foregoing questions whether it was the duty of the Income Tax Authorities to obtain a decision under s. 64 (3), and

"(4) Whether having regard to the fact that the particular venture had come to an end, and the members of the partnership who had taken part in it were no longer carrying on business at all, the Income Tax Authorities at Cawnpore had jurisdiction to make the assessment upon the firm, even if it had carried on business at Cawnpore, such business no longer existing."

The Commissioner has requested permission to raise another question, which we will deal with in a moment, and which in substance challenges the jurisdiction of the High Court, to direct a case to be stated in this matter, owing to the provisions of s. 64.

Before dealing with this question of jurisdiction it is necessary to make two preliminary observations. As a rule it is better in a statement of a case to confine the case to findings of fact, and to the expression of the Commissioner's opinion upon the points raised, and not to burden the case with arguments, or in the case to question the jurisdiction of the Court to require a case to be stated. We would not, however, be taken to hold that the Commissioner, or any other body, in a case where the Act provides for a case to be stated, for the opinion of the High Court, has no right to question the jurisdiction of the Court in directing the particular case in question. In order to make our meaning clear, we would point out that an order for a case to be stated, is in the nature of what is known in Calcutta and in England as the issue of Rule *Nisi* to show cause on certain questions indicated in the order made by the High Court. The Commissioner, or other authority, in stating the case in effect shows cause against the contention of the other side, and in showing cause he is clearly at liberty, when he appears before the Court to argue the case, to take the objection that under the law there was no power to issue the Rule, or to direct the case to be stated, and that, therefore, the High Court had no jurisdiction to decide the question raised in the case.

The second observation is that in strictness the objection should have been taken at the time of the argument, namely, the 22nd of October, 1926, when the question of whether it was a fit case in which a case ought to be directed to be stated was discussed, and this Bench made the order. It so happens that in this particular instance the matter came before the High Court twice. Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth, sitting together on the 14th of July, 1926, issued notice to the Commissioner of Income Tax and to the Government Advocate, without directing a case to be stated, so that a further preliminary stage occurred when the Government Advocate appeared on behalf of the Commissioner of Income Tax before this Bench in October. In their order, the above-mentioned learned Judges stated that "it will be a further point of law whether the decision on the evidence, if any, could be arrived at all in these Provinces, without reference to the Commissioner of Income Tax of Calcutta." This was clearly directed to s. 64 (3), which is the sub section on which the Commissioner now relies ; and the third question of those, which this Bench ordered to be stated by their order in October, deals with the same sub-section. No objection was made in October, on behalf of the Commissioner that this sub-section concluded the matter and ousted the jurisdiction of the High Court under s. 66.

It appears to us that the Income Tax Officer of Cawnpore, who dealt with this matter in the ordinary course of his duty, wholly overlooked this provision, and that the Commissioner's attention was not drawn to it, and further that it is entirely owing to this oversight that the matter has got into the complicated condition in which we now find it.

The question which has arisen between the assessee and the Income Tax Authorities is really a perfectly simple one, namely, whether the partnership, or firm, formed for a special undertaking, being the assessee, had its principal place of business in Cawnpore or Calcutta. It is said that the facts of the case are intricate, but we do not agree. As will appear hereafter the facts relating to this particular business, which was only of a temporary character, are by no means uncommon, and according to the ordinary tests, which are applied in such cases, it ought not to be difficult to find as a fact where their principal place of business was, although the matter has now come before us really as a question of law, to decide whether the Income Tax Authorities had any evidence upon which, having regard to all the facts of the case, they could hold that the principal place of business was in Cawnpore. What is intricate is the legal tangle into which the simple issue, which arose, has been allowed to drift, and the unfortunate delay which has taken place in arriving at a final settlement of the question which became acute in October, 1924, and is still unsettled after a controversy of over two years. The initial mistake appears to us to have been the assessment of the firm by the Income Tax Officer in Cawnpore under s. 23 (4) of the Act, on December 8th, 1924, not of a branch business carried on in Cawnpore, or of the profits arising within the jurisdiction of Cawnpore, but upon the presumption that the principal place of business was in Cawnpore, when a question had arisen between the assessee and the Income Tax Authorities with regard to that very question, and had not been decided in accordance with the provisions of the Act, contained in s. 64 (3).

That a question had arisen within the meaning of s. 64 (3) there cannot be the slightest doubt. In a letter, dated September 8th, the Income Tax Officer expressed his intention of making the assessment in Cawnpore of the whole profit of the business in castor seeds, carried on in the former year in partnership. The assessee, the name of the firm being taken from the principal partner, namely, Messrs. Dina Nath-Hem Raj, 10 Cross Street, Calcutta, writing from Calcutta, on the 21st of October, informed the Income Tax Officer that Calcutta was the principal place of business of the partnership, and that they were prepared to prove that fact to the satisfaction of the Income Tax Officer. They stated that they had already filed an affidavit in Calcutta to that effect. On the 24th of October the Income Tax Officer answered that Calcutta could not be considered the principal place of business, and that no part of the business was carried on at Calcutta, and insisting upon his right to assess the profits of the whole business in Cawnpore, and informed the assessee that he had written to the Income Tax Officer at Calcutta to the same effect. Finally, the assessee on the 28th of October wrote from Calcutta regretting that they were unable to see eye to eye with the Income Tax Officer in this matter. They seem to have acted with circumspection in this matter except that the branch in Cawnpore failed to produce their books. They went on to say that although it did not matter much where the assessment was made, in Calcutta or in Cawnpore, they asked the Income Tax Officer to take into consideration the fact that it would cause serious inconvenience and loss to them if the assessment was made in Cawnpore, and they gave reasons for this contention, pointing out what is admitted to be correct, that the business relating to the castor seeds was done by the Calcutta firm with the East Indian Railway, and that the contract was entered into in Calcutta, and that, as a matter of fact, the Income Tax Officer in Calcutta was already arranging to take evidence upon the point. There may be some difference in the method of calculating profit in the different Provinces. This is a matter for the Income Tax Authorities. We were told that the payments by the East Indian Railway amounted to 14 lacs, and that the Calcutta Authorities had assessed the profit at one lac, while in Cawnpore it had been assessed at 3 lacs. In the former case a profit of one lac, upon an outlay of 13, would be nearly 8 per cent. In the latter case the outlay would be only 11, and the profit 3, equalling more than

26 per cent. but the latter was admittedly arrived at *ex parte* without any materials provided by the firm, which may account for the very large difference. The suggestion seemed to be made in argument, that the assessee had for this reason contended for Calcutta, and it is, therefore, right to emphasise that the question about the principal place of business arose before any assessment had been made, and that there is nothing in the case to show that they did not act *bona fide* in raising the question.

It is quite clear, therefore, that in October, 1924, a question had arisen within the meaning of the section. It is equally clear that both parties were either unaware of, or ignored s. 64 (3). This question having arisen, the Income Tax Officer, subject to a proviso, hereafter to be mentioned, had no jurisdiction to decide the question of the principal place of business, and certainly no jurisdiction to assume it, and no right to assess the firm on the profits of the whole business as though its principal business were in Cawnpore, a question which was still undecided. The Act provides that where the question about the principal place of business is between places in more Provinces than one, it shall be determined by the Commissioners concerned; and if they are not in agreement, by the Board of Inland Revenue, and that the assessee shall have an opportunity of representing his views. The Act does not go on to say who shall set the Commissioner in motion, but the reasonable inference to be drawn from the language used is that that is the duty of the Income Tax Officer. The sub-section itself contains a direct reference to the assessee and provides that the assessee shall have an opportunity of representing his views before the question is determined. An express provision of that kind seems to exclude an implied provision that the duty is thrown upon him of securing the determination of the question. On the other hand, the Income Tax Officer is the person who first becomes aware of the question which has arisen, and it seems reasonable to hold, and it certainly simplifies the working of the section that he should immediately communicate the fact of such question having arisen to his own Commissioner with whom he is in constant touch, and who is then in a position to exercise the function imposed upon him, as the case may be, giving the assessee an opportunity of representing his views. What is quite clear is that the Income Tax Officer cannot himself decide this question, or act as though it had been determined in accordance with the provisions of this section, and that if he proceeds to prejudge the issue, or to act as though it had been determined and to assess the firm as though their principal place of business was in his own jurisdiction, inspite of the dispute being still undetermined, he is doing something not authorised by the Act—in other words an illegality. It is quite true that the following sub-section, namely, sub-s. (4) provides that "notwithstanding anything contained in this section, every Income Tax Officer shall have all the powers conferred by or under this Act on him in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed." This means that he can proceed to assess a branch, as such, if he has the materials for so doing. What would be the result of such an assessment of the branch if the decision afterwards is that the principal place of business is in another Province we need not stop to enquire. It is perfectly clear from the language used by the Income Tax Officer throughout, and in the letters from which we have quoted, which are set out in full in the case, that he proceeded to assess the firm on December 8th, 1924, as though its principal place of business was in Cawnpore.

We now turn to the actual question raised by the Commissioner. The question is not stated in a very satisfactory manner. He asks "has the High Court power, under s. 66 of the Indian Income Tax Act of 1922, to overrule a decision of an Income Tax Officer concerning his power to assess in the face of the provisions of s. 64 of the Act, which lay down a special procedure and a special *forum* for the decision of disputes as to that power"? In one sense of that embarrassing question the answer must be *no*. The High Court indeed has no power to overrule anything done by an Income Tax Officer or the Commissioner. Where such a question, as we have indicated, arises as to the principal place of business, and such question has been determined by the Commissioner, or where the question is between places in more Provinces than one, by the Commissioners concerned, or by the Board of Inland Re-

venue, such decision is final. There is no right of appeal, and no power in the High Court to interfere with it, nor do the provisions of s. 66 give the assessee a right to require the Commissioner to refer to the High Court any question of law, or in the event of his refusal to apply to the High Court for a statement of the case, apply to a decision made under s. 64. No doubt, under s. 66 (1) the Commissioner may on his own motion refer a case to the High Court on any question of law arising in the determination of the question under s. 64, but this seems to be the only way in which the determination of such question can be brought before the High Court. On the other hand, the question put by the Commissioner applied to the circumstances of this case, appears to be misleading because it assumes that the High Court was asked to overrule a decision of the Income Tax Officer concerning his power to assess, a decision which in the face of the provisions of s. 64, he had no power to make, and it assumes also that the special procedure and special *forum*, under s. 64 had been adopted when it is admitted that it had not.

We are compelled to hold in this case that there being a total failure on the part of the Income Tax Authorities to apply the plain provisions of s. 64, and, on the other hand, an illegal assumption of authority by the Income Tax Officer in Cawnpore to assess the assessee, as though their principal place of businsss had been determined to be in Cawnpore, the existence of an alternative remedy under s. 64 (3) does not affect this case, and cannot be held to be a bar to the right of the appellant to have a case stated, and to the jurisdiction of the High Court to answer those questions in the way in which it holds they ought to be answered.

Owing to the disregard of the machinery provided by s. 64 (3) and to the wholly irregular proceedings, as they appear to us to have been, which have necessarily followed upon the action of the Income Tax Officer in Cawnpore, in assessing the profits of the firm or of this special business as though the principal place of business had been determined to be in Cawnpore, the subsequent proceedings appear to have been irregular in form and infructuous in substance. We need not dwell upon the intermediate proceedings, which took place between the order of the 8th of December, 1924, and the order of the Commissioner of the 23rd of December, 1926, refusing to state a case on a question of law, which question was, undoubtedly, raised in the course of the appeal, and discussed by the Commissioner in his order, and held by him to be a question of fact only. To refuse to answer the questions on the ground that the procedure by which this stage has been reached is irregular, would, in our view, be a denial of justice. The responsibility for the tangle, which has occurred, appears to us to lie almost, if not entirely, on the Income Tax Authorities, by which we mean the failure of the Income Tax Officer in Cawnpore to draw the attention of the Commissioner to the fact that a dispute had arisen about the principal place of business. The controversy having drifted away from the prescribed method or machinery for determining it, which is provided by the Act, and each of the parties to it having made up their minds that they were right, it is not surprising that both of them indulged in arguments and indeed in procedure, which appear to us, strictly regarded, to be irregular, and as things now stand to be irrelevant; but inasmuch as the whole trouble has arisen from the initial irregularity on the part of the Income Tax Authorities, and inasmuch as also the assessee has been assessed, in our view, with fundamental irregularity, and in any case in default by an *ex parte* decision, when, as a matter of fact, he has committed no default, and inasmuch as also, in our view, if the law is correctly applied to the evidence, the only proper inference which any Court of Law could draw from the facts is that the principal place of business is in Calcutta, and not in Cawnpore, it seems to us that it would be a denial of justice, either for us to refuse to answer the questions raised by the case, or for the Commissioner to deal with the matter finally, otherwise than in accordance with the answers which we now proceed to give.

In our previous order we endeavoured to make it plain how a mixed question of fact and law, or how a question, which is, no doubt, in one sense a question of fact may become a question of law, or in other words how it may be said that taking all the facts together there is no evidence upon which a Court of Law could come to any but one conclusion. The facts to be collected from the case are as follows:—(1) This firm, which was an unregistered partnership firm for a special venture for dealing with castor

seeds under a contract with the East Indian Railway for one year, in 1923-1924, consisted of three existing firms, one the firm of Dina Nath-Hem Raj of Calcutta, who held the lion's share, namely, 8 annas, and after whose name the temporary partnership was named, firm of Messrs. Dewan Chand and sons of Lahore, who held a 4-anna share and the firm of Narain Das of Cawnpore, who held the other 4-annas share.

(2) The Calcutta firm started and formed the partnership and clearly financed it. The inference may fairly be drawn that it would not have come into existence without their instrumentality. They might have succeeded in inducing other firms in Cawnpore, or Lahore, to join the partnership, but there is nothing to show that either the firm in Cawnpore, or the firm in Lahore, would have formed the partnership, or have become members of any such partnership if it had not been for the Calcutta firm. The Calcutta firm were, therefore, the moving spirit and apparently the financiers.

(3) The partnership was ultimately dissolved by deed in July, 1924, in Calcutta.

(4) The contract with the East Indian Railway was made in Calcutta.

(5) Payments for the seeds supplied, or distributed to the order of the East Indian Railway, were made in Calcutta.

(6) A banking account was kept in the Imperial Bank in Calcutta.

(7) The ordering and direction of the seeds, which were purchased and subsequently sold to the East Indian Railway and delivered at Manauri, took place at Cawnpore, and this, no doubt, was the centre of the work which has been carried out in compliance with the contract. It was not unlike a mill or factory in a country district, belonging to a firm with its head office in a neighbouring town.

(8) The firm in Cawnpore, who were partners carried on extensive operations as purchasers of the goods, which were to become the property of the whole partnership, and which were to form the source of profit.

(9) The correspondence with the East Indian Railway was conducted from Calcutta.

(10) There is correspondence from Cawnpore asking Calcutta for funds.

(11) There is correspondence, making reports to Calcutta of the work at the local centres or branches.

(12) There is correspondence asking Calcutta to make arrangements for loading waggons in Moradabad.

The test in such a matter may be given in language quoted from Mr. Sastri's excellent book on the Law and Practice of Income Tax: "Ordinarily the principal place of business of a firm or Company is the place at which the persons directing the Company or firm do their business." The fact that goods are manufactured in one place does not make that place necessarily the principal place of business. Where business is carried on in many places, or at different branches, it may be said that the business is carried on in each of those places, though neither of them may be the principal place of business. In our view the Income Tax Officer in particular, and to some extent the Commissioner, misdirected themselves by directing their attention to the fact that extensive business was carried on in Cawnpore. As a matter of law, we think the Commissioner has misdirected himself in relying upon the fact that an expert partner, whose importance was as great as that of any other partner, was doing the practical work in Cawnpore and that he was at least equal if not greater, in importance than the financing partner. We also think that he misdirected himself in the case in holding, as he appears to have held, that the fact that the Cawnpore firm were making purchases as far afield as Moradabad, affected the question whether theirs was the principal place of business. Although in the end he answers the first paragraph in the affirmative, he frames his finding on this point in language which is far from being convincing, saying that "it is not established that the business was not carried on in Cawnpore." He rather thinks that it is a fair inference that the business was conducted in Cawnpore. In the way in which these findings are stated, this is not a decision of the question at all. Undoubtedly a great deal, if not the bulk of the practical business was conducted in Cawnpore. But that is not the sole, or indeed the important test in considering, in a case like this, whether Cawnpore was the principal place of business.

Question (1) was intentionally framed so as to leave open the question whether the business was solely carried on in Cawnpore. But that question is now not open, and we have no hesitation in coming to the conclusion that on the facts stated in the case, there is no evidence upon which it can be held that

the principal business was in Cawnpore, and that if that had been found to be the fact, in a suit this Court would have been compelled on this evidence to overrule the finding as a question of law in second appeal.

The answer to question No. 2 is *no*. The matter should have been decided in accordance with s. 64 (3).

The answer to question No 3 is *yes*.

The answer to question No. 4 is now superfluous; but it is clear that if the business had been carried on wholly in Cawnpore, the fact that it no longer existed would not deprive the Income Tax Authorities in Cawnpore of jurisdiction to make the assessment.

We think that although the assessee has been somewhat hardly treated in this matter, he must have known that he had no business to destroy his books, while this important question of appropriate assessment was still outstanding. What effect that destruction may have been upon the ultimate decision arrived at by the Income Tax Authorities is a matter for them, but having regard to that circumstance we think justice will be done by ordering both parties to pay their own costs of these proceedings.

A. N. A. *Question answered.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1525 OF 1926.
January 4, 1927.
Present :—Mr. Justice Sulaiman.

SIWAN RAI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
LACHMI SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Arbitration—Award, order refusing to file—Award, whether can be enforced independently.

It is not necessary for the validity of an award that it should be filed in Court. The refusal of a Court to file an award does not vitiate it, but merely leaves it to have its ordinary legal effect.

Second appeal against a decree of the District Judge, Ghazipur, dated the 18th of August, 1926.

Mr. *Gadadhar Prasad*, for the Appellants.

JUDGMENT.—The only point raised in this case is that a certain award relied upon by the Courts below in favour of the plaintiffs was illegal and ineffectual inasmuch as no application for filing it had been made. The appeal, in my opinion, has no force whatsoever. It is not necessary for the validity of an award that it must be filed in Court. Under the old Code it was held by their Lordships of the Privy Council in the case of *Muhammad Newaz Khan* v. *Alam Khan* (1) that mere refusal to file an award did not vitiate it, but merely left it to have its ordinary legal effect. The same principle was followed in the case of *Kunji Lal* v. *Durga Prashad* (2). Even under the new Code it has been held by this Court that a party wishing to avail himself of an award in an arbitration effected without the intervention of a Court is not bound to apply to a Court to file the award [*Harakh Ram Jani* v. *Lakshmi Ram Jani* (3)]. Rule 20 of Sch. II merely uses the words 'may apply' which do not make it obligatory on the party to apply. In view of the authorities quoted above this appeal has no force and is dismissed under O. XLI, r. 11, Civil Procedure Code.

Z. K. *Appeal dismissed.*

(1) 18 C. 414; 18 I. A. 73; 15 Ind. Jur. 284; 6 Sar. P. C. J. 26; 70 P. R. 1891; 9 Ind. Dec. (N. S.) 276 (P. C.).
(2) 6 Ind. Cas. 127; 32 A. 484; 7 A. L. J. 425.
(3) 60 Ind. Cas. 626; 18 A. L. J. 960; 2 U. P. L. R. (A.) 310; 43 A. 108.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 137 OF 1927.
February 12, 1927.
Present:—Mr. Justice Dalip Singh.

DHARI MAL—SURETY JUDGMENT-DEBTOR—APPELLANT
versus
KANSHI RAM—DECREE-HOLDER AND AMIR CHAND—JUDGMENT-DEBTOR—RESPONDENTS.

Contract Act (IX of 1872), s. 135—Civil Procedure Code (Act V of 1908), s. 55 (4)—Bond for judgment-debtor applying for insolvency—Decree-holder granting time to judgment-debtor—Surety, discharge of—Construction of bond.

A surety bond executed under s. 55 (4) is one in favour of the Court though the ultimate beneficiary may be the decree-holder. Therefore, a surety under that section is not discharged under s. 135 of the Contract Act by the decree-holder granting time to the judgment-debtor. [p. 763, col. 2]

A surety bond ran as follows:—"*Agar mudyun darkhast diwalya na dewega aur adalat main hazar na hoga to main baqaya zare digri jis kadar*

digridar ka hoga bhar dunga." The judgment-debtor applied for insolvency but, with decree-holder's consent, time was given to pay up the debt and the application was withdrawn:

Held, that the surety was not liable under the bond as both the conditions under the bond had not been fulfilled. [p. 763, col. 2.]

Miscellaneous first appeal from an order of the Senior Sub-Judge, Amritsar, dated the 3rd January 1927.

Mr. *Nawal Kishore*, for the Appellant.

Mr. *M. L. Puri*, for the Respondents.

JUDGMENT.—The facts of this appeal are as follows:

On the 28th January, 1926, the judgment-debtor was brought to Court under an application for arrest. On that date under s. 55 (4) of the Civil Procedure Code a surety bond was executed on the condition that the judgment-debtor would apply for insolvency within one month. The judgment-debtor applied for insolvency on the 22nd February, 1926. On the 10th July, 1926, with the consent of the decree-holder the judgment-debtor was allowed three months in which to pay the decretal amount and the insolvency application was allowed to be withdrawn. There is nothing to show that all this took place with the knowledge or consent of the surety. On the 7th December, 1926, the decree-holder applied to Court asking that the surety be ordered to produce the judgment-debtor and that the decretal amount might be realised from the surety if he failed to produce the judgment-debtor. On the 22nd December, 1926, the surety failed to produce the judgment-debtor as ordered and accordingly the Court passed an order against the surety. The surety has come on appeal.

His Counsel contends that there were no proceedings under the decree pending at the time and that, therefore, the surety could not be called upon to produce the judgment-debtor on that date. The record, however, shows that the application for execution was still pending and I see no force in this contention.

Next, it is urged that by granting time to the judgment-debtor the decree-holder had altered the position of the parties to his own advantage and to the detriment of the surety and that, therefore, under s. 135 of the Contract Act the surety is discharged from obligation. There would be great force in this argument if s. 135 of the Contract Act could be held to apply. It seems to me, however, that when the Court acts under s. 55 (4) of the Civil Procedure Code the bond is in favour of the Court though the ultimate beneficiary may be the decree-holder. In this particular case the Court might have exercised a wise discretion in refusing to act on the application of the decree-holder against the surety, but I cannot hold that the Court was wrong in holding that the surety was not discharged by the action of the decree-holder.

It is next contended that the terms of the security bond are such that the surety has been released. The relevant portion is as follows: "*agar mudyun darkhast diwalya na dewega aur adalat main hazar na hoga to main baqaya zar-e-digri jis kadar digridar ka hoga bhar dunga.*" Counsel contends that the use of the word *aur* which is equivalent to 'and' shows that the surety was only liable if both the conditions were not fulfilled and that as the judgment-debtor had applied for insolvency within a month one of the conditions had been fulfilled and hence the surety was not liable. Counsel for the respondent urges that the intention of the parties is clear and that the Urdu idiom is different from the English and the word '*aur*' must be taken in the context as equivalent to English word 'or'. It seems to me that the argument of Counsel for the appellant is correct and though, ordinarily speaking I might have been willing to stretch the point in favour of the decree-holder, yet, in the circumstances of this case I am not prepared to make the surety liable if on the terms of the bond he is not liable. I, therefore, hold that the surety is not liable under the terms of the bond and I accept the appeal and set aside the order of the Senior Sub-Judge as against the surety. There will be no order as to costs.

R. L. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 384 OF 1924.

October 21, 1926.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

RAM GOPAL VAISH—PLAINTIFF—APPELLANT

versus

Munshi MAHANAND LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11—Attachment in execution—Objection by mortgagee—

Order for proclaiming mortgage—Suit by decree-holder for declaration that mortgage was null and void—Limitation—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 62, 63.

The plaintiff attached a house in execution of a decree but on the application of an objector an order was passed by the Court *ex parte* on 28th November, 1921, for proclaiming a mortgage as an incumbrance. The plaintiff objected to this order and an order was passed in his favour on 1st April, 1922, allowing a note of his objection to the application of the objector to be added to the proclamation. The plaintiff sued on 29th March, 1923, for a declaration that the mortgage was null and void:

Held, that the suit being really one under O. XXI, r. 63, Civil Procedure Code, for a declaration that the order of 28th November, 1921, was ineffective, limitation began to run from that order whether it be considered as one under r. 58 or under r. 62 of O. XXI, and that the suit was, therefore, barred under Art. 11 of Sch. I of the Limitation Act.

Second appeal from a decree of the Subordinate Judge, Mirzapur, dated the 26th January, 1924.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondents.

JUDGMENT.—The plaintiff-appellant brought a suit in which he asked that a certain mortgage-deed dated the 28th of April, 1921, should be cancelled and declared to be null and void and ineffectual as against the plaintiff, but he gave as the date from which his cause of action arose the 28th of November, 1921, which was the date on which the Court passed an order proclaiming that mortgage to be a burden on a house, which the plaintiff has attached in execution of a decree. From this it may be seen that the plaintiff's suit is really a suit for a declaration that that order is ineffective. The suit was not brought until the 29th of March, 1923, and it has been held by both the Courts below that it is barred by limitation. We must agree with this view. The plaintiff had no cause of action to have this mortgage set aside except in virtue of the order passed by the Court, for he had no interest in the property. If his suit has been brought as we must hold, to set aside the order of the Court passed on the 28th of November, 1921, it is certainly barred by limitation, because it must be held to be a suit instituted under r. 63, O. XXI, of the Civil Procedure Code. If authority is required for this finding we rely upon the ruling cited in the case of *Goberdhan Das* v. *Makundi Lal* (1) which is entirely relevant to this case. Seeing this difficulty the plaintiff added an alternative date from which his cause of action was said to arise, namely, the 1st of April 1922, the date on which, as he says, an order was passed against the plaintiff, but this is really a perversion of the facts. What actually happened is stated in the judgment of the lower Appellate Court. After the attachment of the house the opposite party made an application to have their mortgage notified, and the Court passed an order in their favour *ex parte* on the 28th of November, 1921. The plaintiff made an objection to this order on the 17th of December, 1921, and an order was passed, not against him but in his favour, on the 1st of April, 1922, allowing a note of his objection to the application of the opposite party to be added to the proclamation. In our view limitation must run from the order dated the 28th of November 1921, whether it be considered to be an order under r. 58 or under r. 62 of O. XXI. We find, therefore, that the lower Appellate Court was right in deciding that the suit was barred by Art. 11 of Act IX of 1908, and we dismiss the appeal with costs including in this Court fees on the higher scale.

A. N. A. *Appeal dismissed*

(1) 74 Ind. Cas. 1024; 21 A. L. J. 342; A. I. R. 1923 All. 435; 45 A. 438.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 214 OF 1923.

December 20, 1926.

Present:—Mr. Justice Sulaiman and Mr. Justice Boys.

Seth LACHHMI CHAND—PLAINTIFF—APPELLANT

versus

Musammat LACHHO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Surrender of estate to next reversioner—Reversioner's right to challenge improper alienations during widow's lifetime.

A reversioner to whom a Hindu widow surrenders her estate is not entitled, during the lifetime of the widow, to challenge transfers made by her before surrender which, though not binding on the reversioner, would have been good for the widow's lifetime but for the surrender. [p. 767, cols. 1 & 2; p. 768, col. 1.]

[Case-law discussed.]

First appeal against a decree of the Subordinate Judge, Dehra Dun, dated the 20th of December, 1922.

Messrs. *N. P. Asthana* and *Durga Prasad*, for the Appellants.

Dr. *K. N. Katju* and Mr. *M. A. Aziz*, for the Respondents.

JUDGMENT.

Boys, J.—This was a suit for sale on a hypothecation bond dated the 16th of February, 1910. It is unnecessary for the purposes of this appeal to set out the whole history of the case in detail. It is very carefully and fully set out in the judgment of the learned Subordinate Judge to be found at page 14 of the printed book. The facts may be stated briefly. Bakhtawar Lal, the owner of the estate, died leaving a widow Gangadei. Gangadei proceeded to squander the estate. Upon her death *Musammat* Lachho, her daughter, came into possession. For the purpose of challenging some of the transactions entered into by Gangadei, *Musammat* Lachho raised money by executing a simple mortgage of Rs. 5,000 on the 15th of February, 1910, in favour of Baldeo Singh of certain house property. On the 5th of November, 1917, *Musammat* Lachho surrendered her rights in the estate of her father in favour of her son Puranchand, the next reversioner. By that deed she stated "*I hereby relinquish all my life-interest* in the moveable property such as household goods and the immoveable property acquired and left by my father Lala Bakhtawar Lal deceased resident of Dehra Dun, and my son Puranchand, the reversionary heir, has, from this very time, *i.e.*, from the time of execution of this deed of relinquishment acquired all the rights and interests he would have acquired after my death." The document is printed in full at page 185 of the printed book.

In 1920 Lala Baldeo Singh died and his heir is Lachmi Chand, the present plaintiff. On the 14th of February, 1922, Lachmi Chand instituted the present suit for sale. The learned Subordinate Judge held that the bond was not executed for legal necessity; and that finding has not been challenged before us. At the very close of the case it was further urged before him, that assuming that the alienation was not for legal necessity, still a decree should be passed against the widow alone and the purchaser should be allowed to retain possession until her death. For the defendant in answer to this plea reliance was placed on paragraph 15 of the plaint wherein the plaintiff stated that *Musammat* Lachho had surrendered her life-estate in favour of Puran Chand defendant, and because he through his guardian, *i. e.*, his father, is a party to the bond in suit and is an heir to the estate left by Bakhtawar Singh and owner thereof, the plaintiff has a cause of action against him as well. Ths defendant contended that the surrender having been made, the widow's estate had been effaced. The learned Subordinate Judge held on this point that "the plaint clearly indicated that the life-estate was at an end" and that this prayer of the plaintiff could not be granted in face of the clear statements in the plaint. He added "if the suit had been properly framed it may have been possible that the plaintiff would get some decree, but as it is, the suit cannot succeed."

The only question seriously argued before us was whether the surrender by *Musammat* Lachho in favour of the next reversioner, Puran Chand, extinguished immediately the mortgage executed by *Musammat* Lachho in favour of Baldeo Singh assuming that it was not for legal necessity. A second suggestion made, for the respondent, was that even if ordinarily the mortgage would not be extinguished Baldeo Singh ought to be held estopped from enforcing his mortgage. The suggestion was not, however, and, in our opinion, could not be seriously pressed and the case was argued really only on the basis of what is the correct answer to the first question.

As to this first question we have heard lengthy arguments which have been of great assistance and we have had a large number of authorities quoted to us dealing variously with the effect of the death of a Hindu widow, of her re-marriage, of an adoption made by her, and finally, of surrender or relinquishment by her. The result at which I have arrived can, however, be stated with comparative brevity.

I am not satisfied that any of the authorities on the effect of death, re-marriage or adoption can help us very much when we are dealing with the effect of a surrender. There can be no question but that the effect of death, re-marriage and adoption is governed solely by considerations strictly of Hindu Law; while the doctrine of surrender owes its birth to judicial decisions. These propositions will not, I think, be disputed. I could not put it more forcibly than it is stated by Kumaraswami Sastriar, J., in *Vaidya Natha Sastri* v. *Savithri Ammal* (1). The learned Judge was there

(1) 42 Ind. Cas. 245; 41 M. 75 at pp. 96, 99; 33 M. L. J. 387; (1917) M. W. N. 653; 22 M. L. T. 275 6; L. W. 542 (F. B.).

considering the effect of adoption. At page 96* he said: "So far as reversioners are concerned their position is quite different from that of an adopted son" and at page 99* "Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate (and thereby accelerates the succession) cannot sue to set aside the alienation made by her till she dies. These cases have, in my opinion, no bearing or application to cases of adoption by the widow. The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of Justice on general principles of jurisprudence. An anticipation of interest involved by the theory of relinquishment or the defeasance of an ulterior interest by the intermediate acts on the part of the widow are hardly contemplated by the Hindu law givers. It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract."

There are many other points which readily suggest themselves which differentiate death from re-marriage, adoption or surrender; which differentiate death and adoption from re-marriage or surrender; and which differentiate adoption from surrender.

To allot to each of these differences its exact value would be an imppossible task. But the differences exist, and particularly in view of the further fact that the whole doctrine of surrender is the creation of juidical decision, I do not think it would be in the least degree safe to apply to surrender cases dealing with either of the other three incidents.

If the proposition which I have quoted above as stated by Kumaraswami Sastriar, J., is correct, and I accept it as correct, then it appears to me tnat the question of the effct of surrender has to be approached, firstly, from the standpoint of the ordinary law which would be applicable to persons who were not necessarily Hindus; while, secondly, the result arrived at must be controlled by any authoritative pronouncements that there may be by their Lordships of the Privy Council declaratory of the effect of a surrender by a Hindu widow.

As to the first aspect, it does not appear to me material whether we regard the doctrine of surrender, though imported, as now a part of Hindu Law or not. Assuming that it is now to be regarded as an integral part of Hindu Law, the principle has been imported by judicial decisions and there is no reason why a further complimentary principle should not be imported where such importation is vitally necessary to prevent in certain circumstances the law being made use of to perpetrate flagrant fraud.

Approaching the problem then, beyond doubt a difficult problem, in this way, the first question to be asked is "what would ordinarily be the effect of such a surrender?" Clearly the mortgagee's rights would remain intact. If certain rights exist in *A* and he detracts from those rights by granting for valuable consideration a portion of his rights to *B*, he clearly would not be allowed to transfer all his rights to *C* inclusive of the rights which he had already transferred to *B*. *B's* rights would survive.

Whatever early Hindu Law may have been, it is now clearly established by judicial decision that a Hindu widow, though her estate cannot be described as a life estate, can, apart from surrender, adoption or re-marriage, bind the estate in effect for her own life, even without necessity; in other words, a Hindu widow who makes a transfer for consideration, cannot repudiate that gift or transfer.

If she cannot repudiate, on what principle can it be held possible for her to defeat such an alienation by surrender?

It is important here to bear in mind steadily that the whole doctrine of surrender is the creation of judicial decision. It was unknown to the Hindu Law. Applying then again the principles of the ordinary law, on what principle can a reversioner, who, though, he, of course, takes as heir to the least male holder, *actually comes prematurely into his reversion by the act of the limited owner*, claim to reap the benefit of what must be regarded, if the mortgagee's rights are to be defeated, as the limited owner's immoral act?

It is clear that a grantee cannot ordinarily repudiate the prior act of his grantor in favour of another person. It is, of course, true that a Hindu widow surrendering the estate cannot be correctly described as the grantor of the estate to the reversioner. The reversioner succeeds not to the estate of the widow but to the estate of the last male owner. But the widow

*Pages of 41 M.—[*Ed.*]

is in the position of the benefactor of the reversioner. It is by her act that the reversioner comes prematurely into his estate, and her position is, as it appears to me, for the present purpose at least very analogous to that of a grantor.

So far then I would hold that the doctrine of surrender having been imported into Hindu Law by judicial decision, we are entitled in the absence of authority to the contrary to import the complimentary rule, essential to the prevention of fraud, that the widow cannot by making a surrender defeat rights created by herself and the creation of which was within her authority, and the reversioner cannot claim on the basis of the surrender to defeat such rights. This, however, does not conclude the matter. Left at this point, the result would have to be stated as follows. A widow has surrendered to the person, who was the next reversioner at the time of the surrender, the whole of the estate as it existed in her. Let us suppose that she received from the last male owner four villages A, B, C and D, of which she has kept intact three, A, B, C, while she has mortgaged the village D. *The whole estate existing in her* at the time of the surrender consists of the villages A, B and C and the equity of redemption only in D. This whole estate she surrenders and *thereby* wipes out the whole estate as existing in her. The next reversioner at the time of the surrender, let us call him *X*, receives then the whole of the villages A, B, C, but only the equity of redemption in the village D.

It is clear, however, that as the next reversioner inherits not from the widow but from, and the estate of, the last male owner, he must have a right to challenge the necessity for the mortgage. The questions then that call for determination are when does that right vest in the reversioner and is it exerciseable immediately it has vested or at what time?

The right to challenge is not a right which constituted any part of the widow's estate, and cannot be said to have been conferred on him by the widow. It is a right which owes its origin solely to the fact that he is the representative of the last male owner. That right must, therefore, vest in him immediately the widow has surrendered her whole estate to him, that is to say, on the date of the surrender. If we were to hold otherwise and that it only vested in the next reversione upon the death of the widow, it might be that the person who was the next reversioner at the date of the surrender, would not be the next reversioner at the date of the death of the widow, and if it were to be held that the right to challenge did not vest in the next reversioner at the date of the surrender, the result would be that the villages A, B, C and D, in the illustration which we have taken, would vest in the next reversioner at the date of the surrender, while the right to challenge the mortgage would vest in a different person who happened to be the next reversioner at the date of the widow's death. This would be obviously impossible and further in direct conflict with the proposition clearly established by judicial decision that the whole of the rights of the last male owner vest in the next reversioner at the date of the surrender. It would be impossible to hold that the inheritance was divided, some of the rights going to the next reversioner at the date of the surrender and other rights going to the next reversioner at the date of the death of the widow. It is clear, therefore, that the next reversioner at the date of the surrender has vested in him not only the rights in the villages A, B and C and the equity of redemption of the village D, but also the right to challenge the necessity for the mortgage.

How then are we to reconcile these two propositions, that the right to challenge the mortgage vests in the next reversioner at the date of the surrender, and, secondly, that the person, that is the next reversioner, at the date of the surrender, who had benefited by the act of the person surrendering, the Hindu widow, cannot claim to defeat the rights given to a third party by the person by whose act he himself prematurely comes into the estate?

They do not seem irreconcilable. It is in accordance with judicial principles to hold that a right though vested in a particular person at a particular date cannot for a particular reason be enforced by him immediately.

There is, therefore, nothing in conflict with judicial principles in holding that the right to challenge the mortgage vests in the next reversioner at the date of the surrender, but that, by reason of the fact that the accrual of that right prematurely is due to the action of the widow, he is debarred, until the death of the widow,

from challenging transfers made by the widow, which but for the surrender would have been good for the widow's life (leaving, of course, aside any question of remarriage or adoption).

I would, therefore, answer the question by saying that Puran Chand became entitled, so far as this case is concerned, to the estate of the last male owner, his grandfather Bakhtawar Lal; but that the mortgage in favour of Baldeo Singh will hold good till the death of *Musammat* Lachho, upon which occurring he will have the right to recover possession of the property, the question of absence of legal necessity having been already determined in his favour by the trial Court in this case and not having been challenged before us in appeal.

A corollary of this last proposition is that the plaintiff, Baldeo Singh, is entitled to enforce his mortgage as valid during the lifetime of *Musammat* Lachho.

Before concluding I would note that we have, of course, been referred to the case of *Rangasami Gounden* v. *Nachiapppa Gounden* (2). If I thought that case applicable to the facts before us, there would, of course, be an end of the matter; but there is not, in my opinion, in what I have said above, any departure from the rule laid down by their Lordships. Their Lordships laid down the rule that "the whole estate" must be regarded as vesting in the reversioner and that the widow must be regarded as "wholly effaced;" but the language used must surely be read in the light of the facts which their Lordships were considering. That was a case in which the widow had surrendered *only a portion of the estate which remained in her.* In that case the widow had not surrendered her whole estate and had not wholly effaced herself. In the present case she has surrendered her whole estate and has wholly effaced herself. She does not claim to have *any* rights remaining in her after the surrender; nor does anybody claim to have any rights through her created by her after the surrender.

Sulaiman, J.—The question whether a surrender by a Hindu widow in favour of the next reversioner can affect previous alienations by her is not free from considerable difficulty. In cases of ordinary limited owners or owners of life-estates, it is obvious that the surrender can only be of the interest which remains in the qualified owners after the alienations, and can, therefore, in no way affect those alienations so long as the limited or life-estates last. It would also appear unjust and highly inequitable that a limited owner should by her own voluntary act destroy the validity of her own alienations during her lifetime. Looked at from this point of view, it would seem at first sight that in spite of the surrender made by a Hindu widow, the reversioner who succeeds, cannot during her lifetime challenge alienations made by her on the ground of want of legal necessity.

On the other hand the estate enjoyed by a Hindu widow is not an ordinary limited estate and is in no sense a life-interest. Her position is distinctly peculiar and it is necessary to consider how far the analogy of surrenders by other limited owners can apply to her. It has been repeatedly stated in numerous cases that the widow's interest in her deceased husband's property is not a life-interest. I need only quote a passage from Lord Dunedin's judgment in *Rangasami Goundan* v. *Nachiappa Goundan* (2). "It has often been noticed before, but it is worthwhile to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English Law, applicable to what might seem analogous circumstances. Phrased in English Law terms, her estate is neither a fee, nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question become entangled in western notions of what a holder of one or other of these estates might do." When she holds no estate for life it would be incorrect to say that an alienation made by a widow holds good at least for her lifetime. There are many ways recognised by Hindu Law in which a widow's estate may terminate before her actual death. For instance, it terminates by her adopting a son or may terminate by re-marriage. The more correct way of stating the law would be that an alienation made by a Hindu widow holds good so long as her widow's estate subsists. That surrender is another mode by which a widow's estate can be terminated, must in view of the pro-

(2) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. C.) 66 (P. C.).

nouncement of their Lordships of the Privy Council be accepted without question in *Behari Lal* v. *Madho Lal Ahir Gayawal* (3). Lord Morris said: "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee." In this passage, however, her estate is called a "life-estate" and is said to be 'conveyed' and the reversioner, in whose favour the surrender took place, a "grantee". In the recent case of *Rangasami Goundan* v. *Nachiappa Gounden* (2), Lord Dunedin before quoting the above passage remarked: "It is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree, if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death." If surrender is one of the ways in which a widow's interest terminates—it would be difficult to say that although the estate has terminated previous alienations made by her continue to hold good so long as she is not actually dead. The act of surrender involves a total destruction of her entire interest. In the words of Lord Dunedin "it is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date". The effect of the surrender, therefore, is to open out the succession immediately. The reversioner in whose favour the surrender takes place is not really in the position of a grantee or transferee from the widow, but succeeds to the estate in his own right as the immediate heir, his succession having been accelerated by the act of the widow. He does not derive title from the widow but derives title from the last male owner though his inchoate right has become matured on account of the widow's act. He is under an obligation to the widow who has conferred a benefit on him by removing the obstacle of her own life, but the succession, once accelerated, has opened out to him by virtue of his position as the then heir. The logical result of this conclusion must be to place him in the same position for the purpose of challenging improper alienations as that of an ordinary reversioner who has succeeded on the death of a widow.

I find great difficulty in discovering any true basis for holding that though the reversioner in whose favour the surrender has taken place has succeeded to the estate of the last male owner and derives title from him, he is nevertheless estopped from challenging alienations made by the Hindu widow during her lifetime as if he were a grantee from her. A grantee undoubtedly cannot question the act of his grantor, but the reversioner is not in the true sense of the word a grantee at all. He is certainly not a grantee from the widow of any interest in the property which she has previously sold away, as no interest is left in her. If he were a grantee he would not only have been estopped from challenging the alienation during the lifetime of the widow but would also have been equally estopped from challenging it after her death. That admittedly cannot be the case. It seems to me that it would be inconsistent to say that the estate of the widow has been destroyed and the whole estate has become vested in the next reversioner, and yet in order to repudiate improper alienations this reversioner must wait till the widow has died. It would be saying in the same breath that the widow is civilly dead, and yet remains an obstacle in the way of the reversioner till she actually dies.

As Lord Dunedin remarked "there cannot be a widow who is partly effaced and partly not so." Her effacement must be complete and not partial. The whole estate must, therefore, vest in the reversioner entitled to succeed on the date of her effacement, that is to say, on the date of the surrender. Other reversioners who may be entitled to succeed on the death of the widow later on would have no *locus standi* to challenge her alienation, as no part of the estate would vest in them at all. The effect of the surrender involving the effacement of the widow and the extinction of her estate necessarily wipes out all the lines of reversioners and makes the immediate male reversioner a fresh stock of descent.

Now an alienation made by a widow is binding at least on her. It is, therefore, not possible to say that in spite of her own alienation she still retains a right

(3) 19 C. 236; 19 I. A. 30; 6 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 603 (P. C.).

to challenge it, which she may surrender to the next reversioner. No such right is retained by her at all. The right to challenge devolves on the reversioner not because of the surrender made by her but because of the position he occupies as the representative of the last male owner. I have, therefore, great difficulty in agreeing with what Sadasiva Aiyar, J., said in *Segu Chidambarama* v. *Sareddi Husainamma* (4), *viz.*, "that the absolute estate vested in her becomes by her alienation for her own purposes divided into two estates (1) a life-estate enjoyable by the purchaser *during her lifetime* and (2) a reversionary estate to be enjoyed *after her lifetime*, both of which estates or rather the total of which belonged to her husband at his death." I do not think that the effect of an alienation is to split the estate up into any such two parts, or to give to the alienee an interest necessarily co-extensive with her lifetime. The reversionary right to challenge it is no part of the widow's estate at all, and, therefore, could not be surrendered to the reversioner.

In view of the above remarks it is very difficult for me to find any sound basis for holding that the right to challenge the alienation which has devolved upon the reversioner on his succession remains in abeyance so long as the widow is alive. When this right has not been acquired by the reversioner from the widow it is difficult to see on what rule of equitable estoppel the reversioner cannot exercise his right to avoid the alienation.

Whether the foundation of the doctrine of surrender can be sought in certain texts of the Smritis or whether it is a judge-made law engrafted on the Hindu Law need not now be considered. Having become a part and parcel of the Hindu Law, the doctrine must be applied consistently with the other principles of that law, and not independently of them. Accordingly, if surrender really amounts to her civil death a destruction of her widow's estate and an effacement of the widow herself, alienations made by her, if improper, must also automatically become voidable at the option of the reversioner. This appears to me to be the only logical result of the reversioner's position. If the question were *res integra*, I would have unhesitatingly held so.

(4) 30 Ind. Cas. 101; (1915) M. W. N. 577 at p. 579; 2 L. W. 952; 29 M. L. J. 546; 18 M. L. T. 394; 39 M. 565.

One cannot, however, shut one's eyes to the fact that to allow voluntary surrenders by widows in favour of her own daughter, daughter's son, or other near reversioners to defeat all previous alienations by her, may be opening a wide door for fraud. In the case of *Sreeramulu* v. *Kristamma* (5) Bhashyam Ayyangar, J., remarked "a person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her lifetime" and would find himself defrauded if subsequent to the transfer the widow suddenly surrender the estate to her own daughter or daughter's son. In view of the notions which exist at present, this would certainly be so. The effect of holding that such surrenders can automatically put an end to previous alienations would be to revolutionise the conception which has at any rate so far prevailed. There is plenty of authority in support of the view that the surrender is subject to the previous alienations. In the case of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (6), Wallis, C.J., and Hannay, J., held that "it seems clear that a widow cannot, by relinquishing her widow's estate to the reversioner, affect the validity of alienations made by her before such relinquishment which, though not binding on reversioner, were binding on her for life." Similarly another Bench of the Madras High Court in the case of *Kottapalli Subbamma* v. *Jatavallabhula Subramanyam* (7) held that "a surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations, which were made by her prior to the surrender and which though not binding on the reversioner were binding on her for her life". In this last mentioned case Sadasiva Ayyar, J., based his decision mainly on the observations of Bhashyam Ayyangar, J., in *Sreeramulu* v. *Kristamma* (5), and the judgment of Wallis, C. J., and Hannay, J., quoted above. Napier, J, however, treated the widow as an assignor and the reversioner as an assignee and held that the theory that the surrender by an assignor could invalidate legal rights obtained by an assignee was contrary to equity and good conscience. He held that alienation for life should enure, and the rest of the estate merged into the rever-

(5) 26 M. 143 at p. 155; 12 M. L. J. 197.

(6) 26 Ind. Cas. 1; (1914) M. W. N. 735; 1 L. W. 687.

(7) 32 Ind. Cas. 813; 39 M. 1035; 30 M. L. J. 260.

sioner and declined to accept any extension of the reversioner's right beyond this. The case of *Sreeramulu* v. *Kristamma* (5) was a case of adoption and was dissented from by the Bombay High Court in *Ram Krishna* v. *Tripurabai* (8), was doubted at Allahabad in *Sahdeo Singh* v. *Ramnandan Singh* (9) and has since been overruled by the Madras High Court itself in *Vaidyanatha Sastri* v. *Savithri Ammal* (1). I am unable, as Napier, J , did, to treat the position of the reversioner as that of an assignee of the estate from the widow. The doctrine of estoppel based on the principle of grant is, therefore, not applicable. But even in the Madras Full Bench case Wallis, C. J., felt considerable reluctance in differing from the judgment of Bhashyam Ayyangar, J., because he thought that there was much to be said for the "view that a Hindu widow should not be permitted, when in the exercise of such powers of disposition she has alienated for consideration her interest in whole or in part, to abridge the interest which she has parted with and derogate from her grant by the subsequent exercise of a power of adoption which she is not under legal duty to exercise." Kumaraswami Sastriar, J., at page 99* in distinguishing cases of surrenders put the whole argument in forceful and terse language:—"The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of Justice on general principles of jurisprudence..... ..... It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract.....To a voluntary relinquishment by the widow based on no considerations of duty to her husband or his spiritual benefit, Courts have very properly refused to annex the right to defeat alienations made by her which would enure longer but for her voluntary act. As between the widow, the prior alienee, and the reversioners claiming title under a subsequent surrender the alienee has a clear equity to retain possession and the fruits of his purchase till at least the widow dies."

The attempt to invoke the principles of equity is not, however, laid on sure foundation. For if the law is once made clear, any one who chooses to take property from a qualified owner without valid necessity, takes it subject to the risk of losing it if the widow's estate terminates, earlier than he expected, in any of the ways recognised by law. It is difficult to see why equity should help a man who enters into such an uncertain transaction with his eyes open.

The only other case in which this question arose directly is the case of *Prafulla Kamini Roy* v. *Bhabani Nath Roy* (10). Walmsley, J , and Page, J., differed in their views, the former holding that a gift by a Hindu widow in spite of a surrender of the estate would hold good for the widow's life, the latter holding that the reversioner immediately after the surrender became entitled to recover possession from the donee. Although much of the reasoning adopted by Page,, J appeals to me and is in accord with my personal opinion, I feel reluctant, in the face of the other authorities to the contrary, to extend the power of the widow to invalidate her own alienations by a voluntary act of her own for which there is no religious obligation on her. The position of a widow who has surrendered the estate is not quite analogous to that of a widow who has adopted a son or who has re-married. Adoption when directed by her husband is considered to be a religious obligation, the performance of which is conducive to conferring a spiritual benefit on the deceased and to perpetuate his line. A re-marriage, when not permitted by custom, takes the widow out of her husband's family altogether and deprives her of the privileges to which she may have been entitled. A surrender, however, is a purely voluntary act and it may be with or without consideration. It would, therefore, by no means work any hardship if a condition is imposed (though I am afraid, with a certain amount of inconsistency) by Courts, which have engrafted this doctrine on Hindu Law, that surrenders must be subject to previous alienations made by her. The reversioner who persuades the widow to efface herself may be allowed to take the estate which remains in her possession immediately, and then after her death to avoid alienation which would have been voidable at the instance of a reversioner succeeding in natural course.

In view of the last considerations I am not disposed to differ from the conclusion arrived at by my learned brother.

(8) 1 Ind Cas. 647; 33 B. 88; 10 Bom. L. R. 1029.
(9) 4 A. L. J. 354; A. W. N. (1907) 148.
(10) 91 Ind. Cas. 897; 52 C. 1018; A. I. R. 1926 Cal. 121.

*Page of 41 M.—[*Ed.*]

By the Court.—Allowing the appeal and setting aside the decree of the lower Court, in lieu thereof we grant the plaintiff a decree under O. XXXIV, r 4, against the defendants Nos. 1 and 2 for Rs. 15,000 with 6 per cent. interest from the date of suit and costs of both Courts.

The defendants will have the usual six months from this date for payment of the said amount and in default of payment the mortgaged property will be sold subject to the right of Puranchand and his heirs to recover possession upon the death of *Musammat* Lachho.

A. N. A. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 138 OF 1926.

January 21, 1927.

Present:—Mr. Hallifax, A. J. C.

SUKHDEO—DEFENDANT—APPELLANT

versus

UJAL—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 107—Lease under s. 107—Contract in name of one person—Consideration contributed by others—Rights and liabilities of latter against former.

When any person takes in his own name a contract, with money belonging to himself and others, the rights of those others against him are not affected by his omission to mention their names, whatever their rights and liabilities in respect of the other party to the contract may be.

This principle is not inapplicable to leases granted compulsorily under the provisions of s. 107 of the C. P. Land Revenue Act.

Appeal against a decree of the Additional District Judge, Raipur, dated the 3rd December, 1925.

Mr *S. K. Ghosh*, for the Appellant.

JUDGMENT.—When any person takes in his own name a lease in perpetuity, or indeed any other lease or any other contract, with money belonging to himself and others, the rights of those others against him are not affected by his omission to mention their names whatever their rights and liabilities in respect of the other party to the contract may be. This is ordinarily understood when, for instance, the manager of a joint Hindu family takes a perpetual lease of a village in his own name. It is, however, frequently imagined, as was done in the lower Appellate Court in this case, that there is some difference when the lessor does not grant the lease voluntarily but is compelled to do so under the provisions of s. 107 of the Land Revenue Act.

The case can hardly be said to have been conducted with much care in the Courts below. It seems more than probable that the fields in question in the suit of 1902 could easily have been proved to be the same as those in question here, but no attempt to do this was made. Also the only documentary evidence of the length of possession of this land by Sukhdeo and his father Hari was a note made by the *Patwari* on the certified copy of the entry in the *jamabandi* for 1924-25 to the effect that that possession had been continuous since the Settlement of 1906 07. That is a note made on the copy, not a copy of a note made in the *jamabandi*, but even if it were a note in the *jamabandi* it would be of no use whatever as that *jamabandi* was not written till the very end of the year 1924, if not after it, and the present suit was filed on the 15th of September of that year.

The note is, however, a very clear indication of further evidence in earlier *jamabandi* entries, which nobody took the trouble to produce. Copies of the entries for each year from 1907-08 to 1924-25 have been tendered in evidence in this Court. They are necessary for the decision of the question of fact, left undecided in the lower Appellate Court, of whether the defendant Sukhdeo held the fields in dispute under an arrangement with the other co-sharers in the *theka* which is binding on them, which can be proved or disproved by the length of his separate possession of them. The certified copies have been accepted in evidence for reasons that need not be further stated.

These *jamabandi* entries show Sukhdeo's father Hari in possession from 1907-08 till 1921-22, when he died and Sukhdeo himself thereafter. They go a long way to establish the allegation that that separate possession had lasted for the last 40 years, which Sukhdeo supported by his own deposition and the depositions of several witnesses and the plaintiff Ujjal did nothing at all to contradict, even by appearing as a witness himself, beyond making the false statement in his plaint that Sukhdeo had quite lately taken wrongful possession of the land of which he had no knowledge till five months before he filed the suit.

It is anyhow beyond all doubt that the defendant held peaceful separate possession of this land for sixteen years, and nothing more is required to prove that he held it by an arrangement with the plaintiff and any other co-sharers there may be that he should do so. The position is not only analogous or similar to that of a co-owner of a village holding *sir* land separately; it is exactly the same. It is only by a misunderstanding of the provisions of the Land Revenue Act that there appears to be any difference. The law there laid down would have been the same on this point without the first proviso to cl. (*a*) of s. 109 (1), which is only explanatory, but the necessity of explanation is the more evident when the section is misunderstood in spite of it.

The decree of the lower Appellate Court will be set aside and that of the first Court dismissing the suit will be restored. The plaintiff-respondent will pay the whole of the costs of both parties in all three Courts. The Pleader's fee in this Court, where the respondent did not appear, will be twenty-five rupees.

G. R. D. *Decree set aside.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2865 OF 1922.
November 18, 1926.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice Agha Haidar.

CHET SINGH—DEFENDANT—APPELLANT

versus

TARLOCHAN AND OTHERS—PLAINTIFFS AND DESU AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom (Punjab)—Alienation—Payment of antecedent creditor—Necessity—Necessity for small item not proved—Procedure.

Payment of an antecedent debt constitutes a valid necessity.

A Court will not set aside an alienation merely because necessity for a small item of consideration has not been proved.

Second appeal from a decree of the District Judge, Gurdaspur, dated the 28th June, 1922.

Mr. *H. D. Kumar*, for the Appellant.

Mr. *Muhammad Amin*, for the Respondents.

JUDGMENT.—On the 14th March, 1919, one Desu a Rajput of the Gurdaspur District, mortgaged the land in dispute to Dharam Singh for Rs. 1,400. The plaintiffs who are the reversioners of the mortgagor, have brought the present action for the usual declaration that the alienation shall not affect their reversionary rights of succession after his death.

The question for consideration is whether necessity for the alienation has been established. Now, the Courts below have concurred in holding that Rs. 650 were due to the plaintiffs themselves on the basis of two prior mortgages, and to that extent the alienation has been upheld.

The mortgagor also owed Rs. 600 to Kirpa Ram in whose favour he had executed a mortgage-deed on the 18th May, 1918. *Prima facie* the debt due to Kirpa Ram should be regarded as an antecedent debt, and the payment of the antecedent debt constitutes a valid necessity. It is to be observed that this suit was brought for a declaratory decree in respect of only the mortgage in favour of Dharm Singh; and though the plaint is badly drafted, there can be no doubt that the plaintiffs could not, in the same suit, obtain a declaratory decree with respect to the earlier mortgage. Indeed, Mr. Muhammad Amin for the plaintiffs admits that the suit must be treated as one brought for a declaratory decree in respect of the mortgage in favour of Dharm Singh, and it is, therefore, clear that the debt due to Kirpa Ram was an antecedent debt. The learned Counsel for the plaintiffs is unable to invite our attention to any evidence which would show that Kirpa Ram was identified with Dharm Singh and could not be regarded as an antecedent creditor.

The result of the above discussion is that not only Rs. 650 due to the plaintiffs but also Rs. 600 due to Kirpa Ram must be held to constitute a valid necessity for making the alienation in question. As to the balance of consideration for the mortgage, we find that Rs. 26 were the cost of registration, and Rs. 124 were paid or promised to be paid to the mortgagor. It is true that no necessity for Rs. 124 has been established, but the amount is less than one-tenth of the total consideration, and we do not think that we should interfere with the transaction simply because necessity for a small item has not been proved.

For the aforesaid reasons we accept the appeal and dismiss the plaintiffs' suit with costs throughout.

A. *Appeal accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1217 OF 1924.
December 23, 1926.
Present:—Mr. Justice Dalal and Mr. Justice Pullan.

FIRM HARDEO DAS-NANAK CHAND —PLAINTIFF—APPELLANT
versus
FIRM RAM PRASAD-SHYAM SUNDER LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 30—Wager—Collateral contract—Principal depositing money with agent as security—Suit to recover deposit—Defence of illegality.

A person employed as an agent in connection with a wager cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent money deposited by the principal with the agent by way of security.

Bhola Nath v. *Mul Chand* (3), followed.
Chhanga Mal v. *Sheo Prasad* (1), not followed.
Dayabhai Tribhovandas v. *Lakhmichand Panachand* (2), distinguished.

Second appeal against a decree of the Additional District Judge, Meerut, dated the 3rd of May, 1924.

Mr. *S. C. Das*, for the Appellant.
Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—The finding of the lower Appellate Court is that the defendant was an agent of the plaintiff to carry out wagering contracts. There was no evidence of the defendant having derived any profit under those contracts and so the plaintiff's suit as to profits was rightly dismissed. The question, however, remains regarding the recovery of Rs. 400 deposited by the plaintiff with the defendant by way of security. The lower Appellate Court dismissed this portion of the suit also, referring to a Single Judge case of this Court, *Chhanga Mal* v. *Sheo Prosad* (1). We are not in agreement with that decision. It rested on a ruling of the Bombay High Court, *Dayabhai Tribhovandas* v. *Lakhmi Chand Pana Chand* (2). The Bombay case was decided on the basis of a special Act, Bombay Act III of 1865, which has no operation in these provinces. As far back as 1903, a Bench of this Court held that an agent, who has received money to the use of his principal on a legal contract between him as such agent and a third party, cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received *Bhola Nath* v. *Mul Chand* (3). Recently, another Bench of this Court has construed s. 30 of the Indian Contract Act. According to that decision the provisions of the section did not prevent a person who is employed as an agent in connection with a wager from recovering the sums due to him by his principal. The present is a converse case. Rupees 400 is due to the principal from the agent and the agent cannot plead the illegality of the contract. The lower Appellate Court admitted that the agent would have to pay any profit made by him under such a contract. There is the greater reason for asking the agent to refund any sum received by him from the principal to carry out such a contract

We decree the appeal for Rs. 400. The rest of the appeal is dismissed. Parties shall receive and pay costs of all Courts according to their success and failure.

A. N. A. *Appeal allowed.*

(1) 55 Ind. Cas. 965; 18 A. L. J. 513; 42 A. 449.
(2) 9 B. 358; 5 Ind. Dec. (N. S.) 238.
(3) 25 A. 639; A. W. N. (1903) 161.

LAHORE HIGH COURT.

MISCELLANEOUS PETITION No. 549 OF 1926.
February 3, 1927.
Present:—Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

MESSRS. KHUSHI RAM-KARAM CHAND—PETITIONER
versus
THE COMMISSIONER OF INCOME TAX, PUNJAB—RESPONDENT.

Income Tax Act (XI of 1922), ss. 23, 66—Assessment under s. 23 (4), legality of—Question of law—Reference to High Court.

Whether an Income Tax Officer has proceeded legally in assessing a person under s. 23 (4) is a question of law and where this question is involved no appeal lies to the Assistant Commissioner of Income Tax and the High Court will direct the Commissioner to refer the case for the opinion of the High Court under s. 66, Income Tax Act.

Petition, under s. 66 (3) of the Indian Income Tax Act, praying that this Hon'ble Court be pleased to ask the Commissioner of Income Tax, Punjab, to state the case to this Court as certain points of law as detailed in this petition are involved in the case.

Mr. *Mehr Chand Mahajan*, for the Petitioners.

Mr. *D. C. Ralli*, for the Respondent.

ORDER.—These are two petitions under s. 66 (3) of the Indian Income Tax Act, praying that the Commissioner of Income Tax be required to refer the question whether the assessment of the petitioner was under s. 23 (4) or one under s. 23 (3) and whether the Income Tax Officer was under the circumstances justified in proceeding under s. 23 (4). The petitioner was called upon to submit a return of his income. He complied with this order and submitted a return but according to the Income Tax Officer he failed to show the income received by him from the Firm of Banarsi Das-Dina Nath which it has been held is owned by the assessee. The latter denied that the firm existed or that it had been carrying on business during the period in respect of which the assessment was made. No accounts relating to the income of the firm were, therefore, produced by him. Thereupon the Income Tax Officer proceeded to assess the firm under s. 23 (4). An appeal to the Assistant Commissioner was dismissed on the ground that no appeal lay in the case of an assessment made under s. 23 (4). An application to the Commissioner under ss. 33 and 66 of the Income Tax Act was rejected. At this stage it is unnecessary for us to decide whether under the circumstances the Income Tax Officer was justified in proceeding under s. 23 (4) of the Act. In order to decide that question it will probably be necessary to have fuller facts before us. We are distinctly of opinion that there is a question of law involved in this case and that is whether the Income Tax Officer legally proceeded to assess the petitioner under s. 23 (4) and, therefore, no appeal lay to the Assistant Commissioner. We direct the learned Commissioner of Income Tax to refer the case for the opinion of the High Court under s. 66 of the Indian Income Tax Act. There will be no order as to costs of these proceedings.

R. L. *Order accordingly.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1431 OF 1924.

January 21, 1927.

Present:—Mr. Justice Dalal and Mr. Justice Pullan.

Babu BADAL SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEBI SARAN DHAR DUBE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage-decree—Sale subsequently set aside—Purchase-money, refund of—Personal decree, application for, whether maintainable—Limitation.

Where a sale held under a mortgage-decree is set aside and the mortgagee is directed to return the purchase-money to the auction-purchaser, he is entitled to maintain an application for a personal decree under r. 6 of O. XXXIV of the Civil Procedure Code and limitation for such an application begins to run from the date on which the purchase-money is refunded to the auction-purchaser. [p. 776, col. 1.]

Second appeal from a decree of the Subordinate Judge, Basti, dated the 21st of August, 1924.

Mr. *P. L. Banerji*, for the Appellants.

Mr. *Shankar Saran*, for the Respondent.

JUDGMENT.—The plaintiff in this suit is a mortgagee who obtained a decree on a mortgage executed by one Debi Saran in the year 1913 and in execution of that decree put the mortgaged property to sale and obtained full satisfaction on 22nd April, 1919. At this point the mortgagor's grandson came forward and obtained a decree to the effect that the whole proceedings, including the mortgage and the sale, were void against him. As a result of that decree the auction-purchaser of the property demanded the return of his money and obtained the return of his money on the 22nd February, 1923. This application has been made under r. 6, O. XXXIV, of the Civil Procedure Code for a personal decree against the mortgagor. The application was allowed by the Court of first instance but disallowed on appeal by the Subordinate Judge on two grounds. In the first place he holds that r. 6, O. XXXIV, has no application to this case, and, secondly, that even if such an application could be made it is barred by the 3 years' rule of limitation provided by Art. 181 of the Limitation Act. Rule 6, O. XXXIV, provides for a case in which the net proceeds of sale are insufficient to pay the amount due to the plaintiff. Now in the present case the net proceeds of the sale were sufficient to

pay the amount due. But when in consequence of an order of the Court the plaintiff was compelled to refund to a third party the whole amount received by the sale, it must be held that the net proceeds of the sale were nil and, therefore, insufficient to pay the amount due. The lower Court has followed the authority of *Parbhu Narain Singh* v. *Baldeo Misra* (1). In that case there had been no sale and it was on this account that the learned Judge of this Court distinguished an earlier ruling in *Kedar Nath* v. *Chandu Mal* (2). In our opinion the ruling in *Kedar Nath* v. *Chandu Mal* (2) is more in point than the ruling in *Parbhu Narain Singh* v. *Baldeo Misra* (1) and we refer in particular to the passage of the judgment of Mr. Justice Aikman on page 27* where he says: "It appears to me that on this state of facts it would be in the highest degree inequitable to refuse him a decree by which alone he can recover from his judgment-debtors the unpaid balance of money which they owed him."

We would also remark that the Oudh Court at least has not followed the ruling reported in *Parbhu Narain Singh* v. *Baldeo Misra* (1), even in cases which were exactly parallel, see the judgment of Mr. Sundar Lal reported in the case of *Ram Raghubir* v. *Imami Begam* (3) and that of Mr. Evans reported in the case of *Sheo Din* v. *Bhawani Bakhsh* (4). Thus, in our opinion, r. 6, O. XXXIV, does apply, to this case.

The second point to decide is that of limitation. The period of limitation under Art. 181 of the Limitation Act begins to run from the date when the right to apply accrues. The lower Court finds that the right to apply accrued from the 14th August, 1919, when the decree for setting aside the auction-sale was passed. But that decree did not in itself take away from the present applicant the purchase-money which he still continued to hold in execution of his decree, and we consider that his right to apply only accrued from the 2nd of February, 1923, when the auction-purchaser recovered the money. On this finding the present application is within time. We, therefore, allow this appeal with costs and restore the order of the Court of first instance. Costs in this Court will include fees on the higher scale.

Z. K. *Appeal allowed.*

(1) 29 A. 260; 4 A. L. J. 157; A. W. N. (1907) 69.
(2) 26 A. 25; A. W. N. (1903) 179.
(3) 9 Ind. Cas. 403; 14 O. C. 217.
(4) 9 Ind. Cas. 752; 14 O. C. 62.

*Page of 26 A.—[*Ed.*]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 243 OF 1924.
November 29, 1926.
Present:—Mr. Justice Ramesam and Mr. Justice Wallace.

MULLAPUDI SATYA NARAYANA BRAHMAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAGANTI SEETHAYYA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 14—Suit on promissory note—Limitation—Prior suit by defendant to declare note void—Exclusion of time—Equitable grounds for suspension of time, whether can be recognised—Principle of dependent judgments.

No equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. So long as there is no legal impediment to the filing of a suit earlier, no time can be excluded. [p. 777, col. 2; p. 778, col. 1]

The pendency of a suit for a declaration that a promissory note is void as having been obtained by the exercise of undue influence and coercion does not suspend the cause of action for a suit by the payee on the promissory note in the absence of any injunction or order of stay restraining the payee from filing the suit within the period of limitation. [p. 778, col. 1.]

Putti Sethu Rao v. *Seetha Lakshmi Ammal* (4) and *Nrityamoni Dasi* v. *Lakhan Chunder Sen* (2), followed.

Second appeal against a decree of the Court of the Subordinate Judge, Kistna, at Ellore, in A. S. No. 338 of 1922, presented against the decree of the Court of the Principal District Munsif, Ellore, in O. S. No. 74 of 1922.

FACTS.—The defendant had executed a promissory note on 5th September, 1918, for Rs. 1,500 in favour of the plaintiff in consideration of some assistance rendered by the plaintiff in getting at an important document for the purpose of some litigation of the defendant's father.

On 25th September, 1918, the defendant sued the plaintiff in O. S. No 674 of 1918, District Munsif's Court, Ellore, for a declaration that the pro-note was obtained by undue influence and coercion and was, therefore, void. This suit was dismissed by the Appellate Court on 9th December, 1921. The plaintiff brought the present suit on 12th December, 1921. The defend-

ant pleaded that the suit was barred by limitation and that the pendency of the proceedings in the former suit did not suspend limitation.

The Court of first instance held that the pendency of the prior suit did not suspend limitation there being no injunction or stay restraining the plaintiff from filing a suit.

On appeal the learned Sub-Judge held that it was only after the Appellate Court reversed the decision of the first Court that the plaintiff could come to Court and relying on the decisions in *Lakhan Chandra Sen* v. *Madhusudan Sen* (1), *Nrityamoni Dasi* v. *Lakhan Chunder Sen* (2) and *Muthu Korakki Chetty* v. *Mahammad Maddar Ammal* (3) held that the period of limitation was suspended and that the suit was in time.

The defendant appealed to the High Court.

Mr. *V. Suryanarayana*, for the Appellants.

Mr. *K. Venkatarama Raja*, for the Respondents.

JUDGMENT.—In the former suit there was no prayer for an injunction nor did the Court give an injunction. Therefore, there was nothing in the decree of the District Munsif, the obedience to which involved a restraint on the present plaintiff preventing him from filing the suit earlier. In this respect this case resembles the decision in *Futti Sethu Rao* v. *Seetha Lahshmi Ammal* (4). It is unnecessary to repeat the reasons given in that case to which one of us was a party. It is true that the decision in the *Secretary of State for India* v. *Zemindarni of Vegayammapeta Estate* (5) has since been reversed by the Judicial Committee on the intimation of the parties "that the Secretary of State for India in Council has now decided not to contest the appeal." Their Lordships allowed the appeal "without making any pronouncement on the merits of the judgment of the High Court." The Secretary of State was unwilling to retain tax wrongly collected by relying on the plea of limitation. The Subordinate Judge relies on *Nrityamoni Dasi* v. *Lakhan Chunder Sen* (2). Though the High Court has stated that s. 14 of the Act did not apply and though the Privy Council agreed "generally" with the High Court for holding that there was no limitation, that case was meant to be decided under s. 14. After the decree of Henderson, J., in the first suit and until its reversal, the descendants of Madub Sen must be taken to have been *bona fide* prosecuting a claim for partition in the first suit. They got a decree for partition and attempted to support the decree in appeal and could not have then filed a suit of their own during the pendency of the appeal.

But whatever view may be taken of the decision in *Nrityamoni Dasi* v. *Lakhan Chunder Sen* (2), two points are now clear (*i*) no such principle of a dependent judgment as was once laid down in *Jogesh Chunder Dutt* v. *Kali Churn Dutt* (6), now exists [see *Bommadevara Naganna Naidu* v. *Ravi Venkatappuyya* (7)], (*ii*) no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. We agree with the explanation of *Ranee Surno Moyee* v. *Shoshee Mookhee Burmonia* (8), given by Walmsley and Mukerjee, JJ., in *Sarat Kamini Dasi* v. *Nagendra Nath Pal* (9), and generally with the view taken by Mukerji, J. of various decisions particularly of *Bassu Kaur* v. *Dhum Singh* (10), which has been relied on before us. The decisions in *Huro Pershad Roy* v. *Gopaul Das Dutt* (11) and *Muthuveerappa Chetty* v. *Adikappa Chetty* (12), belong to the same group as *Ranee Surno Moyee* v. *Shoshee Mookhee Burmonia* (8). The case

(1) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

(2) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(3) 54 Ind. Cas. 66; 43 M. 185 at p. 210; 26 M. L. T. 459; 38 M. L. J. 1.

(4) 89 Ind. Cas. 938; 21 L. W. 716; A. I. R. 1925 Mad. 1188.

(5) 59 Ind. Cas. 98; 12 L. W. 334.

(6) 3 C. 30; 1 C. L. R. 5; 1 Ind. Dec. (N. S.) 611.

(7) 76 Ind. Cas. 594; 46 M. 895; (1923) M. W. N. 554; 21 A. L. J. 726; A. I. R 1923 P. C. 167; 33 M. L. T. 262; 45 M. L. J. 657; 25 Bom. L. R. 1290; 18 L. W. 913; 28 C. W. N. 568; 39 C. L. J. 312; 50 I. A. 301 (P. C.).

(8) 12 M. I. A. 244; 2 B. L. R. P. C. 10; 11 W. R. P. C. 5; 2 Sar. P. C. J. 424; 2 Suth. P. C. J. 173; 20 E. R. 331; 1 Ind. Dec. (N. S.) 489 (P. C.).

(9) 89 Ind. Cas. 1000; 43 C. L. J. 155; 29 C. W N. 973; A. I. R. 1926 Cal. 65.

(10) 11 A. 47; 15 I. A. 211; 5 Sar. P. C. J. 260; 12 Ind. Jur. 450; 6 Ind. Dec. (N. S.) 458 (P. C.).

(11) 9 C. 255; 12 C. L. R. 129; 9 I. A. 82; 6 Ind. Jur. 546; 4 Sar. P. C. J. 363; 4 Ind. Dec. (N. S.) 820 (P. C.).

(12) 59 Ind. Cas. 472; 43 M. 845; 12 L. W. 240; (1920) M. W. N. 505; 39 M. L. J. 312.

in *Kunhi Kuttiali* v. *Kunhammad* (13) is like *Nrityamoni Dasi* v. *Lakhan Chunder Sen* (2). The facts of *Kartar Singh* v. *Bhagat Singh* (14) are obscure but that case cannot help the plaintiff.

There is nothing in the present case to prevent the filing of the suit on 5th September, 1921. It may be that the District Munsif would have dismissed the suit following his finding in the earlier case on the question of consideration and undue influence. But, on appeal, it would have been reversed along with the other appeal and plaintiff would have got his decree. So long as there was no legal impediment to the filing of the suit earlier, no time can be excluded. The third column of Art. 73 operates.

We allow the appeal and restore the District Munsif's decree with costs here and in the lower Appellate Court.

V. N. V. *Appeal allowed.*

(13) 73 Ind. Cas. 139; 44 M. L. J. 179; A. I. R. 1923 Mad. 347.

(14) 64 Ind. Cas. 454; 2 Lah. 320; 4 U. P. L. R. (Lah.) 25.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 405 OF 1923.

November 23, 1926.

Present :—Mr. Justice Lindsay and Mr. Justice Sulaiman.

Hon'ble Lala SUKHBIR SINGH—PLAINTIFF—APPELLANT

versus

MANGEISAR RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law — Adoption — Adoption of orphan —Custom—Burden of proof—Custom, whether exists in Gwalior State—'Tawarikh Jagirdaran'—Recognition of adoption by Government, effect of—Succession to jagirs and to other properties—Conflict of laws—Migration—Law applicable to emigrant—Presumption—Personal law.

Under the Mitakshara an orphan cannot be validly adopted. [p. 779, col. 2.]

If a custom is proved under which such adoptions do take place, they would have to be held valid. [*ibid.*]

Ramkishore v. *Jainarayan* (2), relied on.

The burden of proving such a custom lies heavily on the person setting it up. [p. 780, col. 1.]

A custom by which an orphan can be validly adopted does not exist among the common residents of the Gwalior State. [p. 781, col. 1.]

The rules contained in the '*Tawarikh Jagirdaran*' (History of the *Jagirdars*) of Gwalior State are rules laid down by the *Darbar* for regulating the succession to *jagirs*. They in no way embody the record of any particular custom which prevails in Gwalior generally. Those rules are restricted to the *jagirs* and *jagirdars* and are not applicable to the people in Gwalior in general. [p. 780, col. 2; p. 781, col. 1.]

There is no inconsistency in the succession of an alleged adopted son to a *jagir* being recognised by the State and his not being a valid adopted son regarding other properties, the devolution of which does not depend on the State's sanction. [p. 781, col. 1.]

When a person migrates from one country to another there is a presumption that he carries with him his personal law and unless there is something to show that he has adopted the law of his new domicile he must be deemed to be still governed by the old law. [*ibid.*]

First appeal from the decree of the Subordinate Judge, Saharanpur, dated the 27th of August, 1923.

Dr. *K. N. Katju*, Messrs. *G. Agarwala*, and *S. D. Sinha*, for the Appellant.

Messrs. *P. L. Banerji* and *S. B. Johari*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of a house situated at Hardwar which has been acquired by the plaintiff under a sale-deed, dated 27th October, 1914, from one Madho Rao. The plaintiff's case is that this house along with certain *jagirs* situated in the Gwalior State belonged to one Nil Kanth Rao who died sometime before 1913. His widow, *Musammat* Anandi Bai, with the permission of the *Darbar*, adopted Madho Rao as her son. It is an admitted fact that at the time when Madho Rao was adopted, namely in 1913, he was a married man having several children and his parents were dead. He, therefore, either gave himself in adoption or he was given in adoption by the *Prohit* who performed the ceremonies. Among the contesting defendants was Ganga Prasad who is in actual possession of the house and who denied the validity of the alleged adoption. Defendant No. 5 is *Musammat* Anandi Bai, who has since this adoption repudiated it and adopted another son. Defendants Nos. 1, 2 and 3 are sons of Madho Rao who has since died.

The learned Subordinate Judge, after considering the entire evidence in the case, came to the conclusion that it had not been established that there was a custom under which an orphan like Madho Rao could have been validly adopted. He has accordingly dismissed the suit. The plaintiff comes up in appeal and the question of custom is strongly pressed before us.

It may be mentioned at the outset that prior to the institution of the suit, the plaintiff had first instituted another suit on the

basis of the aforesaid sale-deed for possession of this very house. In the plaint of that suit there was no clear mention as to the way in which Madho Rao had succeeded to the estate of Nil Kanth Rao. It was, therefore, felt that the plaint was defective. On 1st June, 1916, an application was made for permission to withdraw that suit on account of the flaw with liberty to bring a fresh suit. This permission was granted and the suit withdrawn. It might, therefore, have been expected that the present plaintiff before filing his new plaint would take care to formulate the alleged custom which is the basis of his claim. The only paragraph in the present plaint which mentions this custom is para. 2 which states that defendant No. 5, namely, *Musammat* Anandi Bai "according to the practice in the Gwalior State and with the permission of the said State" adopted Madho Rao, and by virtue of which he became the owner of and entitled to the estate of Nil Kanth Rao. This statement amounts to an assertion that there is a territorial custom prevailing in the Gwalior State not necessarily confined to any particular family, and that in addition thereto the permission of the Darbar has some efficacy. The issue which was framed by the trial Court on this question was Issue No. 2 which ran as follows :—

"What is the custom or law of adoption obtainable in Gwalior State?"

It is, therefore, obvious that no special family custom governing the particular family of Nil Kanth Rao was put forward but a general custom prevailing in the Gwalior State was asserted. Nil Kanth Rao was an old resident of Vengrula in Ratnagiri District in the Bombay Presidency. His ancestors had migrated to Gwalior about 100 years ago and were granted some *jagirs* by the *Darbar*. They also acquired some property in British India.

On the death of Nail Kanth Rao, his widow, undoubtedly, applied to the *Darbar* for permission to adopt Madho Rao. In her application she clearly stated that Shankar Rao (which was the former name of Madho Rao) was 40 years old and was literate, and he had little boys. There was, however, no express mention that Shankar Rao was an orphan and his parents were dead, and that his adoption would take place in the old *Svayam Datt* form. The permission was duly granted to her and there can be no doubt that she did, in fact, adopt Shankar Rao who was given the name of Madho Rao after his adoption in 1913. The *jagir* of Nil Kanth Rao devolved on Madho Rao and he was recognized by the Gwalior *Darbar* as his rightful successor at a subsequent stage. *Musammat* Anandi Bai subsequently appears to have changed her mind and repudiated this adoption as stated above. She adopted another son in his stead. In spite of the objection raised by *Musammat* Anandi Bai for herself and as guardian of this second adopted boy, Madho Rao was able to obtain a Succession Certificate from the High Court in Gwalior in the year 1915. It is, therefore, quite clear that so far as the Gwalior State is concerned, his adoption was duly recognised and acted upon by the *Darbar*. It is also an undoubted fact that Madho Rao got the *jagir* in the Gwalior State. In 1917 Madho Rao brought a suit against *Musammat* Anandi Bai in the High Court of Bombay on the allegation that he was the adopted son of Nil Kanth Rao and was entitled to all his assets, and that his widow, *Musammat* Anandi Bai, had removed a box containing valuable ornaments from Gwalior. This suit was tried in the Bombay High Court. We are not at present concerned with the reasonings adopted in the judgment. It is sufficient to state that the learned Judge of the High Court came to the conclusion that the custom alleged by Madho Rao should not be accepted. This judgment was affirmed in appeal.

There can be no doubt that the family of Nil Kanth Rao, when it resided in the Bombay Presidency, was governed by the Mitakshara Law as modified by the Mayukha Law. Under that law there can be no question that an orphan, *i. e.*, one whose parents are not alive to give him away in adoption cannot be validly adopted. That this is the well-recognised Mitakshara Law admits of no doubt. We may refer to a case recently decided by the Privy Council, *Dhanraj Joharmal* v. *Soni Bai* (1). At the same time it cannot also be doubted that if a custom is proved under which such adoptions do take place, they would have to be held to be valid. A case in point

(1) 87 Ind. Cas. 357; 23 A. L. J. 273; A. I. R. 1925 P. C. 118; 2 O. W. N. 335; L. R. 6 A. (P. C.) 97; 27 Bom. L. R. 837; 21 N. L. R. 50; 52 C 482; 49 M. L. J. 173; (1925) M. W. N. 692; 52 I. A. 231; 30 C. W. N. 601 (P. C.).

is the case of *Ramkishore* v. *Jainarayan* (2) where the adoption of an orphan was held valid under a custom by their Lordships of the Privy Council. Every case, therefore, must depend on its own circumstances and evidence. The burden lies on the plaintiff heavily to prove a special and unusual custom set up by him. We have, therefore, examined the evidence which is relied upon in support of that custom. A number of witnesses have been produced who have stated generally that married persons and orphans can be adopted in Gwalior, but when pressed further in cross-examination, they had to admit that the only instance that they could state of an orphan having been adopted was that of Lakshmi Maharaj, the father of witness Basdeo Maharaj. A number of cases of married men having been adopted have, however, been mentioned. We shall discuss this evidence later on. The circumstance on which the strongest reliance has been placed on behalf of the appellant is that under the rules which are in force in the Gwalior State, there is no prohibition against the adoption of an orphan. A book called "*Tawarikh Jagirdaran*" (History of the *Jagirdars*) with the rules has been produced before us, and a translation of an extract from it is printed at pages 81 to 83 of the paper-book. It appears that the *Majlis Khas* of Gwalior has power to modify the rules which are in force and the rules so modified in 1917 are quoted at length on the pages mentioned above. They provide a strict order of relations who can be taken in adoption. In each case the sanction of the *Darbar* is necessary. They do mention that if the person who stands first in order of preference refuses to be adopted or his father himself shows his unwillingness to give him in adoption, then he shall not be adopted. The learned Advocate for the appellant contends that this indicates that a grown-up person may be adopted or he may refuse to give himself in adoption. Certainly there is nothing in these rules which expressly prohibits the adoption of a grown-up married man whose parents are dead. The one instance which has been quoted by many witnesses and has been particularly referred to by the witness Wasdeo Maharaj, is the adoption of his father. This instance has been accepted by the Court below as correct. When the father of Wasdeo Maharaj was adopted, his parents were dead and his paternal aunt was taken to be in the position of a parent. His adoption also has remained unquestioned, and he has duly succeeded to the *jagir*. On behalf of the plaintiff this instance is strongly relied upon. On the other hand, the learned Advocate for the respondents urges that this adoption took place in accordance with the rules in force in the *Darbar* which regulate the succession to *jagirs* and is not a true instance of the enforcement of the alleged custom. Undoubtedly not a single witness has been able to cite any instance where a person who was an orphan was adopted and succeeded to the property other than *jagirs*. As regards the *jagirs*, it appears that the main thing is the permission of the *Darbar*. Apaji Rao Sitole, who was the Revenue Member of Gwalior, stated that at the time when sanction is asked for, permission is generally granted in accordance with the Hindu Law, but permission is also granted in a special way. Wasdeo Maharaj also admitted that among the *jagirdars* no adoption can take place without the permission of the *Darbar*. Similarly Khan Bahadur *Munshi* Aulad Muhammad, Senior Member of the Court of Wards, stated that a person whom the *Darbar* wants is adopted and that if in the application for permission to adopt, any *jagirdar* mentions the name of any particular boy whom he wants to adopt, it depends upon the choice of the *Darbar* either to see him or not before granting such permission. Ordinarily if the rules laid down by the *Majlis Khas* are complied with, permission is granted, though perhaps on payment of some *nazrana*; but in special cases permission may even be granted though the adoption is not in strict accordance with those rules. Furthermore, it is quite clear that those rules can be modified by the decision of the *Majlis Khas*. Under these circumstances we are of opinion that the rules which are contained in the *Tawarikh Jagirdaran* are the rules laid down by the *Darbar* for regulating the succession to *jagirs*. They in no way embody the record of any particular custom which prevails in Gwalior generally. Those rules are restricted to the *jagirs* and *jagirdars* and are not applicable to the

(2) 64 Ind. Cas. 782; 49 C. 120; 17 N. L. R. 163; 15 L. W. 144; (1922) M. W. N. 125; 30 M. L. T. 144; 42 M. L. J. 80; A. I. R. 1922 P. C. 2; 26 C. W. N. 881; 20 A. L. J. 857; 48 I. A. 405 (P. C.).

people in Gwalior in general. When these rules were in force, it is not surprising that the father of Wasdeo Maharaj was accepted as the adopted son although his parents were dead at the time of his adoption. He was a *jagirdar* and succeeded to the *jagir* in the Gwalior State. That instance, therefore, is by no means conclusive as to the existence of a general custom prevailing in Gwalior. Every instance of a married man having been adopted is not really an instance of the alleged general custom, for we have not only to see whether the fact that Madho Rao was a married man was an impediment in the way of his valid adoption, but we have also to see whether in the absence of any proper person to give him in adoption he could have been adopted. Many of the witnesses who stated generally that a custom of adoption of orphans prevailed had to admit in cross-examination that whatever they stated about the adoption of an orphan and married persons was concerned with the *jagirs* only. We may refer to the evidence of Baji Rao Kante, Sardar Nana Sahib and *Munshi* Aulad Muhammad Khan.

In our opinion there is no inconsistency in the succession of Mahdo Rao to the *jagir* being recognised by the Gwalior Darbar and his not being a validly adopted son regarding other properties the devolution of which does not depend on the State's sanction, One might quote the analogy of the Oudh Estates Act under which *taluqdari* estates would devolve according to the rule of succession and adoption laid down by that Act, whereas succession to the non-*taluqdari* estates may be governed by the personal law of the deceased.

We, therefore, agree with the view of the Court below that there is no satisfactory evidence before us to show that a custom by which an orphan can be adopted exists among the common residents of Gwalior as was alleged in para. 2 of the plaint. No special custom of the family has been set up or proved. It is, undoubtedly the law that when a person migrates from one country to another, there is a presumption that he carries with him his personal law and unless there is something to show that he has adopted the law of his new domicile, he must be deemed to be still governed by the old law. No previous act in the history of the family is forthcoming to show that it gave up the Mitakshara Law under which it was governed in Ratnagiri and adopted any special law prevailing in Gwalior. The mere fact that the family accepted the *jagir* from the *Darbar* would not of itself be sufficient to show that the personal law was necessarily changed. Having regard to all these circumstances we are of opinion that it is impossible to interfere with the finding or decree of the Court below.

The appeal is accordingly dismissed with costs.

A. N. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 497 OF 1926.

July 16, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

AHAMUDDIN AND OTHERS—PETITIONERS

versus

BANKU BEHARY DUTT AND OTHERS—OPPOSITE PARTY.

Calcutta Rent Act (III of 1920), s. 15—Decision fixing standard rent—Judgment in rem—*Subsequent tenants, whether can re-open—Certificate under s. 15, granting of.*

A decision fixing the standard rent attaches to the premises and not to the person or parties to the suit; it is a judgment *in rem* and not *in personam*. An order passed by a Rent Controller cannot, therefore, be re-opened on the application of a subsequent tenant. [p. 782, col. 1.]

Chapsi Umersi v. *Keshavji Damji* (1) and *King* v. *York* (2), followed.

Where a Rent Controller refuses to re-open the question of standard rent on the ground that it has once been decided, he is not bound to issue a certificate to the applicant under s. 15 of the Calcutta Rent Act. [p. 782, col. 2.]

Rule against an order of the Rent Controller, dated the 10th of April, 1926.

Babu *Hira Lal Ganguli*, for the Petitioners.

Babu *Sushil Chandra Sen*, for the Opposite Party.

JUDGMENT.—This Rule was issued upon the opposite party to show cause why the order of the Rent Controller in Standard Case No. 3 of 1926, dated the 10th April, 1926, should not be set aside or such other order made as to this Court might seem fit and proper. The facts relevant to the present case are that the premises belonged to the opposite party representing the estate of one Raj Narain Dutt, deceased,

The present petitioner became the tenant under the opposite party in 1925 in respect of the premises No. 29/1, Phear Lane. These premises were in the occupation of tenants previously and in 1921 one of the sub-lessees applied for standardization of rent to the Rent Controller against his sub-tenant and the rent was fixed at a certain figure under the Rent Act. In the present case the petitioner applied to the Rent Controller for fixing the standard rent in the presence of the landlord. The Rent Controller was of opinion that the rent of these premises being once fixed, the matter cannot be re opened and he has rejected the petitioner's application.

It is argued before us in support of the Rule that the order of the Rent Controller fixing the standard rent in 1921 was not passed in the presence of the landlord (the opposite party in the Rule) and, therefore, it was not binding on him or any of his tenants or sub-tenants It has been held that a decision fixing the standard rent attaches to the premises and not to the person or parties to the suit and, therefore, such a decision is a judgment *in rem* and not *in personam*. See the cases of *Chapsi Umersi* v. *Keshavji Damji* (1) and *King* v. *York* (2). The passage in the English case above quoted is: "The Act applied to houses, and not to persons. The Act operated *in rem*, not *in personam*. It stereotyped the rent of a house." The order passed by the Rent Controller in 1921, it does not matter on whose application, was an order which affected the house and it is, therefore, one which operates as a judgment *in rem* and the question cannot be re-opened on the application of a subsequent tenant. The proposition passed before us on behalf of the petitioner that a decision fixing the standard rent may be re-opened, if accepted, will lead to disastrous results. Any new tenant who from time to time happens to be on the premises may apply for standardization of rent of premises of which standard rent might have been fixed by the Rent Controller. Such a state of things cannot be tolerated. The present petitioner came to be a tenant of the opposite party four years after the standard rent had been fixed by the Rent Controller on the application of the then occupier of the premises. We have been referred to several sections of the Calcutta Rent Act to show that the standard rent can be altered or varied. There is no doubt that it can be done under certain circumstances, for instance, when there has been any alteration in the premises or an additional burden has been cast upon the landlord or similar circumstances. That does not show that the judgment fixing the standard rent is not a judgment *in rem* and that it can be re-opened at any subsequent time.

Lastly, it is argued that the application of the petitioner having been made before the Rent Controller under s. 15 of the Calcutta Rent Act, he was bound to fix the standard rent, even at the figure which was fixed in 1921 and to issue a certificate to the applicant which would enable him under s. 18 of the Rent Act to go to the President of the Tribunal to revise the order. Section 15 of the Calcutta Rent Act contemplates a decision of the Rent Controller fixing the standard rent. If on an application by a party the Rent Controller fixes the standard rent, he should issue a certificate certifying the rent so fixed by him and under cl. (5) of that section a certified copy of the order should be affixed to a conspicuous part of the premises to which it relates: and under cl. (6) any person affected by any order of the Controller shall be entitled to be furnished with a copy thereof. There is no doubt that what the section means is that if the standard rent is fixed by the Controller he shall issue a certificate to that effect and affix a copy thereof in some conspicuous part of the premises and also furnish a copy thereof to any person affected by it. In the present case the Controller has fixed no standard rent. He says that he cannot re-open the question, the standard rent having already been fixed in 1921. The petitioner, if he thinks that he is entitled to it, may apply for a copy of the standard rent fixed in 1921.

In this view of the matter the application fails and the Rule is discharged with costs three gold *mohurs*.

A. N. A. *Rule discharged.*

(1) 60 Ind. Cas. 960; 45 B. 744; 23 Bom. L. R. 133.
(2) (1919) W. N. 59; 88 L. J. K. B. 839; 35 T. L. R. 256.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1421 OF 1926.

January 27, 1927.

Present :—Mr. Justice Addison.

LABH SINGH—DEFENDANT—APPELLANT

versus

GURBAKHSH SINGH—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (2) (vi)—Compromise of suit—Dismissal of suit in pursuance of compromise—Compromise not recorded—Registration of deed, necessity of—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.

Even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under the provisions of O. XXIII, r. 3 of the Civil Procedure Code, the deed is not exempt from registration under s. 17 (2) (*vi*) of the Registration Act. [p. 784, col. 1.]

Second appeal from the decree of the District Judge, Jullundur, dated the 12th February, 1926, affirming that of the Sub-Judge, Third Class, Jullundur, dated the 17th June, 1925.

Mr. *Behari Lal*, for the Appellant.

JUDGMENT.—Gurbakhsh Singh, the son of Lal Singh, and *Musammat* Indi, his mother, sued Lal Singh on the 19th November, 1923, for half of 75 *kanals* of land on the allegation that the mother wanted to live separately from her husband along with her son and that they required that amount of land as their maintenance. They also started a criminal case against Lal Singh. On the 7th February, 1924, Gurbakhsh Singh, the son of Lal Singh appeared before the Court with his Pleader and put in a compromise signed by himself and his father and dated 4th February, 1924, to the effect that the father had given 1/3rd of the land, and also fixed maintenance for his wife, and, therefore, the plaintiff withdrew from the suit. The father, Lal Singh, was summoned for the 19th February, 1924. He denied that he had executed any such compromise, but admitted that he had compromised the criminal case. It had been promised that the civil suit will be withdrawn, but he had not effected any compromise giving up any part of his land. He had come to know that the plaintiffs had put in such a compromise, upon which his signature must have been obtained by fraud. The Court enquired into the matter and came to the conclusion that there had been a compromise but as the effective terms of the compromise were that the plaintiffs withdrew from the suit, he dismissed the suit in accordance therewith.

The plaintiff, Gurbakhsh Singh, then instituted the present suit against his father Lal Singh, on the strength of the above mentioned compromise for possession of 1/3rd of his father's land. It was admitted in the plaint that though it was stated that the land had actually been given in fact this had not been done and he, therefore, sued for possession. The father again denied entering into the compromise and stated that it was fraudulent. The trial Court decreed the suit and the appeal was dismissed by the learned District Judge. Against his decision this second appeal has been preferred.

This case is not very different from that reported in *Ghulam Mustafa Khan* v. *Ghulam Nabi* (1). There a compromise was made in writing and tendered to the Court which held that as the suit was in respect of one village only and the compromise dealt with the land of the parties in five villages a decree could not be passed in accordance with the terms of the compromise and ordered that the record of the case be consigned to the record room in accordance with the compromise." The agreement itself was not recorded, nor was a decree passed in accordance therewith. It was held in a subsequent suit that the Court should have recorded the whole of the compromise under O. XXIII, r. 3 of the Code of Civil Procedure and then passed a decree in accordance with so much of the compromise as related to the subject-matter of the suit. It was further held that as the compromise had not been recorded by the Court the exception provided in sub-s. 2 (*vi*) of s. 17 of the Registration Act in respect of any decree or order "of a Court" was not applicable and the deed of compromise being unregistered was consequently inadmissible in evidence. This ruling followed the Privy Council ruling *Hemanta Kumari Debi* v. *Midnapore Zemindari Co., Ltd.* (2) and certain other rulings. In the Privy Council ruling their Lordships observed as follows:—

"A perfectly proper and effectual method

(1) 75 Ind. Cas. 461; 4 Lah. 263; A. I. R. 1923 Lah. 581.

(2) 53 Ind. Cas. 534; 47 C. 485; 37 M. L. J. 525; 17 A. L. J. 1117; 24 C. W. N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 22 Bom. L. R. 488 (P. C.).

of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This, in fact, is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents."

In the present case though the suit was dismissed in accordance with the compromise that compromise was never recorded under the provisions of O. XXIII, r. 3 of the Code of Civil Procedure. If there was an agreement as held, to give the son 1/3rd of the father's property, that was an agreement regarding property valued at more than Rs. 100 and the document was not admissible in evidence for want of registration. The suit should have been dismissed on these grounds.

I accept the appeal *ex parte* and, setting aside the order of both the Courts dismiss the plaintiff's suit with costs in the trial Court to the defendant-appellant.

A. N. A. *Appeal allowed.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 380 OF 1926.
February 22, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.

Pundit RAM PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Pundit SANT DIN—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Letter by general agent of debtor at the desire of debtor, whether acknowledgment.

A letter written by a general agent of the debtor at the desire of the debtor before the period of limitation has expired acknowledging the debt is sufficient to save limitation under s. 19 of the Limitation Act, 1908.

Appeal against the judgment and decree of the Subordinate Judge, Rae Bareli, dated the 2nd August, 1926, in Civil Appeal No. 40 of 1926, affirming that of the Munsif, Dalmau, dated the 10th March, 1926, in Regular Suit No. 350 of 1925.

Mr. *Ali Zaheer*, for Mr. *Radha Krishna*, for the Appellant.

Messrs. *Niamat Ullah* and *Salig Ram*, for the Respondent.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Rae Bareli, dated the 2nd of August, 1926, affirming the decree of the Munsif of Dalmau, dated the 10th of March, 1926.

The plaintiffs' suit has been dismissed by both the Courts below as barred by limitation. They have held that the Article applicable to the plaintiffs' claim is Art. 62 of the First Schedule of the Indian Limitation Act, 1908.

At the hearing of this appeal before us the learned Counsel for the plaintiffs admitted that the appropriate Article was Art. 62. He argued, however, that the time under that Article began to run against his clients on the 26th of August, 1922, when the defendant received a cheque for the sum of money in question from the Court, the money being in deposit and in the custody of the Court.

There is no doubt that the time began to run from the date just now specified and not earlier. The suit *prima facie* is barred even if time is counted from the 26th of August, 1922, but with a view to save limitation reliance is placed upon a letter (Ex. 7) dated the 1st of September, 1922, addressed by the defendant to the plaintiffs as an acknowledgment within the meaning of s. 19 of the Indian Limitation Act, 1908. There is evidence to prove the letter and there is also evidence to prove that it was written by a general agent of the defendant at the desire of the defendant. So the requirements of an acknowledgment have been established in this case and from the date of the letter it is clear that it was made before the period of limitation prescribed by Art. 62 had expired. We must, therefore, hold that the plaintiffs' suit is not barred by limitation.

* * * * * *

We allow this appeal, set aside the decrees of the Courts below and grant a decree to the plaintiffs for sum of Rs. 565-10-0 against the defendant. The parties will bear their own costs all along.

G. H. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 129 OF 1926.
January 18, 1927.
Present:—Mr. Hallifax, A. J. C.
SIDHGOPAL—PLAINTIFF—APPELLANT
versus
TARA—DEFENDANT—RESPONDENT.

Custom (Central Provinces)—Grazing of cattle—Tenant of one mahal, *whether has right to graze cattle in waste land of another* mahal *of same village.*

A tenant in one of the *mahals* in a village has no right of *nistar*, *viz.*, right of free grazing of his agricultural cattle, in the waste land situated in another *mahal* though included in the same village. [p. 785, col. 2.]

Appeal against the decree of the District Judge, Chhindwara, dated the 16th December 1925, in Civil Appeal No. 108 of 1925.

Messrs. *Atmaram Bhagwant* and *S. A. Ghadgey*, for the Appellant.

Mr. *V. R. Dhok*, for the Respondent.

JUDGMENT.—The plaintiff claimed payment for the defendant's cattle having grazed in his *malguzari jangal*, and much time was wasted over the futile and disingenuous plea that there was no *jangal* in the village, but only *banjar*. There was never any question about the land to which the claim referred, and indeed it seems that it could be properly described neither as *jangal* nor *banjar* but as *bir*.

The claim against the respondent, Tara Teli, was in respect of twenty head of cattle that had grazed on the plaintiff's land, each in one year of the last three. For this the plaintiff claimed one rupee a head, and the defendant admitted the rate to be correct but denied that any cattle of his ever grazed on the plaintiff's land. The plaintiff further claimed Rs. 3-8 for each of the defendant's cattle which had been put in his *kotha* at night and, as he alleged, supplied with grass by him. The total of the sums claimed was Rs. 90.

The plaintiff filed another suit against one Munnilal which is precisely the same in all respects except that the number of the cattle is sixteen, and the total claimed is Rs. 72. The suits were dismissed in the first Court, and the plaintiff's appeals to the Court of the District Judge were also dismissed. He has filed two appeals in this Court, and that in the suit against Munnilal (Second Appeal No. 130 of 1926) will be considered along with that in the suit against Tara Teli.

The findings of both the Courts below are these. The defendants' cattle did graze on the plaintiff's land, but only for a portion of the year, after the grass on that land had been cut and sold. "Such grazing is ordinary village *nistar* and no grazing dues should be charged for it". There was no agreement that fodder should be supplied by the plaintiff at night, and if he "of his own accord or through his grazier gave grass he must be held to have done so as a free gift". There is also a finding that no damages could be awarded, but that has no more connection with the case than the finding that there is no forest in the village; if the cattle grazed on the plaintiff's land at all it was with his consent.

After an examination of the evidence (made apparently for the first time at the hearing of the appeal here and at the suggestion of the Court) the claim in respect of fodder supplied has been withdrawn. The whole of the evidence on that point in the two cases combined is as follows. Gorelal Ahir, the grazier in charge of the cattle said in Tara's case (P. W. No. 2):—"I never supplied grass to the cattle at any time". In the same case Nanhu Ahir (P. W. No. 3), another servant of the plaintiff's said: "I supply grass to the cattle", and in cross-examination he said: "Grass is supplied to the cattle in Gowar out of charity at the instance of the plaintiff." A third witness Satoba Gond (P. W. No. 4) said: "Nanhu supplied grass to the cattle." In the other case Nanhu did not appear as a witness, Satoba (P. W. No. 4) did not mention this matter, and Gorelal (P. W. No. 2) said: "Plaintiff's cattle (*sic*) supplies grass to cattle but I don't know to whose and what cattle he supplies grass." It was hardly necessary then to go into the question of agreement and to deduce from the absence of one that if the plaintiff did supply fodder to the cattle he did it "out of charity."

In respect of the amount claimed as payment for grazing, the outstanding fact governing the whole case, mentioned in the plaint and at the beginning of both judgments, has been left out of sight. That is that neither defendant is a tenant in the *mahal* in which the land in question is situated. The *mahal* in which they are tenants happens to be contiguous, being indeed included in the same village, but that gives them no more right to *nistar*

than if it were ten miles away. They must undoubtedly pay for having grazed their cattle on the plaintiff's land, and they have both admitted that one rupee a head for each year is a proper charge.

The decree of the lower Appellate Court will accordingly be set aside and in its place a decree will issue ordering the defendant Tara Teli to pay the plaintiff the sum of Rs. 20 with interest at 1 per cent. per mensem from the date on which the suit was instituted (the 14th of July 1925) till the date of payment, and also all the costs incurred by him in all three Courts. The Court-fee paid by him was Rs. 5-4 in excess of what he would have had to pay on a claim of Rs. 20, but that is more than counter-balanced by the ridiculous Pleader's fee of Rs. 4-8 allowed in each of the Courts below, and the rest of the costs would have been the same even if he had claimed no more than Rs. 20. The Pleader's fee in this Court will be twenty rupees.

G. R. D. *Decree set aside.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 707 OF 1926.

February 1, 1927.

Present.—Mr Justice Addison.

NABI BAKHSH—OBJECTOR—PETITIONER

versus

UDHO RAM—DECREE-HOLDER,

ALAF DIN AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—Decree against estate of deceased person—Person impleaded as having intermeddled with estate of deceased, whether 'party' to decree—Objection to attachment, whether falls within s. 47 or O. XXI, r. 58—Appeal.

A creditor sued the widow and the brothers of his deceased debtor on a bond executed by him. The widow was impleaded as the legal representative of the debtor and the brothers were impleaded on the ground that they had intermeddled with the deceased's estate. Though the brothers at first denied that they had in any way intermeddled with any property of the deceased, they joined the widow in consenting to the passing of a decree against the estate of the deceased. The creditor attached certain property in the hands of one of the brothers as belonging to the deceased's estate. The latter objected on the ground that the property was his:

Held, that the brothers having consented to the passing of a decree against the estate, were parties to the decree and the objection came within the purview of s. 47 of the Civil Procedure Code.

Petition for revision of an order of the Senior Sub-Judge, Gurdaspur, dated the 28th July, 1926, reversing that of the Sub-Judge, Fourth Class, Gurdaspur, dated the 20 March 1926.

Mr. *Mehr Chand Mahajan*, for the Petitioner.

Mr. *C. L. Gulati*, for the Respondent.

JUDGMENT.—One Udho Ram obtained a bond from Fazal Din and shortly after Fazal Din's death sued his widow and his two brothers, Nabi Bakhsh and Alaf Din, for Rs. 120 due on the bond. The widow was impleaded as the representative of the deceased Fazal Din, while the two brothers were impleaded as having intermeddled with the deceased's estate.

It was specifically stated in the plaint that they had taken possession of certain property belonging to the deceased. At first the brothers denied that they had any property of the deceased. Later, all three defendants made a statement to the effect that they were willing that a decree should be passed for Rs. 120 against the estate of the deceased Fazal Din. This was accepted by the plaintiff and a decree in these terms was given.

The decree-holder, having attached the property which, as stated in the plaint, had been taken possession of by the two brothers, applied to sell it. An objection was preferred by one of the brothers to the effect that the property was his. The trial Court upheld the objection and ordered the release of the property from attachment. On appeal the Senior Sub-Judge held that the property belonged to the deceased Fazal Din and he accepted the appeal and directed the property to be sold in execution of the decree. Against this decision this revision has been preferred here.

The only question argued was that no appeal lay to the Senior Sub-Judge, as the objection was under O. XXI, r. 58, of the Civil Procedure Code, and the decision of the Executing Court was final, to a regular suit being instituted by the decree-holder. The question in fact is whether the objector was a party to the suit, and, therefore, these proceedings were governed by s. 47 of the Code, or whether he was exonerated by the decree and thus these proceedings were under O. XXI, r. 58, of the Civil Procedure Code. It seems to me that, when all three defendants confessed judgment and agreed to a decree being passed against the estate of the deceased Fazal

Din this meant that the widow as the proper legal representative of the estate confessed judgment completely and that the two brothers confessed judgment to the extent that they had intermeddled with the estate, *i. e*, to the extent that they had taken possession of the property of their deceased brother. This being my view, it follows that the objector was a party to the suit and that an appeal lay to the Senior Sub-Judge. It is true that the decree of the trial Court might have been expressed more clearly, but I hold that the proper interpretation of the decree is as given by me above. An appeal, therefore, lay to the Senior Sub-Judge, and I dismiss this revision, but leave the parties to bear their own costs.

A. *Petition dismissed.*

OUDH CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 49 OF 1926.

March 4, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge and Mr. Justice Hasan.

Syed KASHIF HUSAIN—JUDGMENT-DEBTOR—OBJECTOR—APPELLANT

versus

B. GANGA BAKSH SINGH—DEFENDANT.—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 69, 90—Execution sale—Adjournment—Omission to issue fresh proclamation—Material irregularity—Setting aside of sale, when justified.

Where a sale held on a fixed date is not concluded on that day and the officer conducting the sale adjourns it and intends to hold it again on another date, the sale cannot be held and concluded without a fresh proclamation. An omission, however, to issue a fresh proclamation, though a material irregularity is not a ground for setting aside the sale where substantial injury has not been caused thereby.

Appeal against the order of the Subordinate Judge, Partabgarh, in Miscellaneous Regular Suit No. 80 of 1926, dated the 7th August 1926.

Mr. *Zahur Ahamd*, for the Appellant.

Mr. *Niamat Ullah*, for the Respondent.

JUDGMENT.—This is the judgment-debtor's appeal in execution proceedings from the order of the Subordinate Judge of Partabgarh, dated the 7th of August, 1926. The judgment debtor's immoveable property has been sold in execution of the decree held by the respondent, Ganga Bakhsh Singh, against him. The proceedings were before the Court below for confirmation of the sale. The judgment-debtor objected to the confirmation by an application dated the 3rd of June, 1926. The objections were overruled by the learned Subordinate Judge and the sale confirmed by the order under appeal.

It is argued that the sale held on the 20th of May, 1926, was not concluded on that day; that it was adjourned within the meaning of O. XXI, r. 69, of the Code of Civil Procedure and that consequently it could not be held without a fresh proclamation.

It is agreed that no fresh proclamation was issued and on the evidence we are satisfied that the officer conducting the sale, who was a Deputy Collector in the District of Partabgarh, did adjourn the sale and intended to hold it again on the 20th of the following month. That being so the argument that the sale could not be held and concluded without a fresh proclamation is right. The omission, however, to issue a fresh proclamation was an irregularity which might also be a material irregularity. But that alone is not sufficient to justify an order for setting aside the sale. As provided by r. 90 of O. XXI of the Code of Civil Procedure the sale shall not be set aside on the ground of irregularity unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity. Upon the facts proved in this case we are not so satisfied. In an adjudication between the parties the value of the property, which has been sold, was fixed at Rs. 36,500 and this value was entered in the sale proclamation under which the sale was initiated. The last bid which was the decree-holder's bid under the permission obtained from the Court was for the sum of Rs. 32,371. The difference between the two figures does not, in our opinion, amount to substantial injury, nor can it be directly connected with the irregularity mentioned above.

We accordingly dismiss the appeal with costs.

G. H. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 663 OF 1926.
February 1, 1927.
Present:—Mr. Justice Addison.

SHOP GULAB RAI-BHOLA RAM GURAYA RAM THROUGH THARA LAL —PLAINTIFFS—PETITIONERS

versus

FARID—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVII, r. 3 —Plaintiff ordered to appear as witness—Non-appearance—Dismissal of suit for default, legality of—Procedure.

A Court cannot dismiss a suit under O. XVII, r, 3, Civil Procedure Code, merely because one of the plaintiffs who has been ordered to appear as a witness and to give evidence on a particular day fails to appear on that day; it should take the other evidence in the case and decide the suit on the merits.

Petition for revision of an order of the Sub-Judge, Second Class, Multan, dated the 17th June, 1926.

Mr. *Sain Das*, for the Petitioner.

JUDGMENT.—The plaintiff firm sued one Farid for Rs. 100 alleged to be due on *bahi* account. The plaintiff firm led some evidence and on the 17th May, 1926, the Court ordered that Gulab Rai, one of the plaintiffs, should come on the 17th June, 192 , with the *bahis* of Tikan Mal's firm in order to give evidence. This Gulab Rai did not appear on the 17th June, 1926, but Guraya Ram, a member of the firm, who had been conducting the suit throughout, was present. Because Gulab Rai did not appear in accordance with the Court's order the Court dismissed the suit under O. XVII, r. 3, of the Civil Procedure Code. Against this order this revision petition has been preferred.

It is obvious that O. XVII, r. 3, of the Code of Civil Procedure, does not apply. Time was not granted to any party in this suit but the Court itself ordered Gulab Rai to be present with certain *bahis* in order to give evidence. If he did not appear the Court should have heard the other evidence in the case and then decided the suit on the merits. Even if O. XVII, r. 3, had applied, it was still necessary for the Court to decide the suit on the merits upon such evidence as was before it. The order of the trial Court was totally illegal and I accept this revision and set aside its order dismissing the suit. I further direct it to be proceeded with the hearing of the suit, first giving the plaintiff an opportunity to produce the evidence he desires and thereafter hearing the evidence which the defendant wishes to lead. I make no order as to costs as the respondent has not appeared.

A. *Revision accepted.*

OUDH CHIEF COURT.

RENT APPEAL No. 25 OF 1926.
February 8, 1927.
Present :—Mr. Justice Hasan.

GANDA PRASHAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

B. MAHADEO BUX—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 140—Settlement Court decree—Decree for under-proprietary rights—Cash allowance granted to under-proprietor from zemindar*—Suit for rent—Plea of payment by under-proprietor in shape of cash allowance—Set-off.*

A decree of a Settlement Court granted under-proprietary rights to the defendant on payment of a rent of Rs. 32 per annum and at the same time allowed him an annual cash allowance of Rs. 33 and odd in the same rights against the *zemindar*. In a suit by the *zemindar* for rent the defendant pleaded payment of the rent inasmuch as the plaintiff had not paid the *nankar* due to him:

Held, (1) that the decree for cash allowance and for the lands being interdependent and the cash allowance having practically reduced the rent of the under-proprietary tenure, the *zemindar* was not entitled to recover rent; [p. 789, col. 2.]

(2) that the plea of the defendant was not one of set-off and was not, therefore, barred by s. 140 of the Oudh Rent Act. [*ibid.*]

Rent appeal against a decree of the District Judge, Rae Bareli, dated the 18th March, 1926, reversing that of the Assistant Collector, First Class, Rae Bareli, dated the 30th September, 1925.

Mr. *H Husain*, for the Appellant.

Mr. *Radha Krishna*, for the Respondent.

JUDGMENT.—This is the defendants' appeal from the decree of the District Judge of Rae Bareli, dated the 18th of March, 1926, reversing the decree of an Assistant Collector of First Class of the same place, dated the 30th of September, 1925.

The case is a very simple one but has been complicated by unnecessary introduction of the plea of estoppel as against the plaintiff's claim. The nature of this so-called plea of estoppel will be more apparent as this judgment proceeds.

The claim, out of which this appeal arises, was laid for the recovery of rent under cl. 2 of s. 108 of the Oudh Rent Act,

1886. The defendants in para. 7 of their written statement pleaded payment and the manner in which the payment was made is described in the same paragraph. They claimed under-proprietary rights in the lands in respect of which the rent was claimed.

The Court of first instance found that the defendants had never paid rent for these lands and the plaintiff in consideration thereof had never paid a certain *nankar* due from him to the defendants. In this view of the case the suit for arrears of rent was dismissed.

On appeal by the plaintiff the plea of estoppel was introduced as if the Court of first instance had held that the plaintiff was estopped from bringing his suit for the recovery of arrears of rent. A good portion of the judgmeat of the lower Appellate Court is devoted to the discussion of reasons in support of the view that the plaintiff was not so estopped.

According to my judgment the defendants never raised any plea of estoppel and the judgment of the Court of first instance in dismissing the plaintiff's suit is not founded on that plea either. The gravamen of the defence was the payment of rent for which the claim was made. I am of opinion that that defence has well been established. The Counsel for the parties and the learned Judges of the Courts below are all agreed that the defendants have never paid the rent for which the lands they hold are liable. It is further agreed that the *nankar* or cash allowance payable by the plaintiff to the defendants has also never been paid by the former to the latter. This takes me back to the origin of the two rights involved in the consideration of the plea of payment.

From a perusal of Exs. A1, A2, A3, A4 and A5, which are orders and decrees of the First Settlement Courts, it is abundantly clear that a decree for 5 *bighas* 3 *biswas* and 17 *biswansis* of land was made in favour of the predecessor-in-interest of the present defendants and it was in under-proprietary right. The actual words used in these documents are "inferior rights". The rent for these lands was fixed at Rs. 32 per annum. This conclusion is supported by the entry in the *wajib-ul-arz* (Ex. A6) and by the entries in the revenue papers of the village since the Regular Settlement up to the present day. By the same order the defendants further obtained a decree for a sum of Rs. 33-5-3 annually as cash allowance in the same rights, that is under-proprietary right, against the *zemindar*. In Mr. Mac Andrew's order of the 29th of April, 1853, it was observed that the cash allowance granted under the decree of the Court could best be expressed by reducing the rent of the under proprietary tenure. The decree for the lands and the decree for the cash allowance were made interdependent and they were to be held by the defendants' predecessor-in interest in the same right. I would, therefore, hold that the plea of payment has been established in this case.

In support of the decree of the Court below the learned Pleader for the respondent argued that the defence raised in this suit was one of set-off and as such was excluded by the provisions of s. 140 of the Oudh Rent Act. This way of looking at the pleadings has been the source of all the confusion in the case and I decline to entertain the argument even for a moment. To my mind there is no plea of set-off. As already stated, it is a plea of payment though the manner in which the payment has been made is peculiar in this case.

It was further argued on behalf of the respondent that the cash *nankar* was decreed as against the entire *zemindary* body of the village and that the respondent only holds a 14-annas share in that village. The answer to this argument is furnished by the judgment under appeal. The under-proprietary lands have in their entirety been thrown into the plaintiff's share at the recent partition and as I have already held that the liability for the cash *nankar* is inseparable from the under-proprietary tenure in the lands it follows that the plaintiff must bear the entire liability.

I accordingly allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs all through.

G. H. *Appeal allowed.*

A.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 300 OF 1926.
January 13, 1927.
Present:—Mr. Justice Iqbal Ahmad.
Musammat BASANTI—JUDGMENT-DEBTOR—APPELLANT
versus
FIRM SIRDAR MAL-HARDAT RAI—DECREE-HOLDER—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Application for execution—Suspension of proceedings — Subsequent application — Revival — Limitation — 'Striking off' execution case, effect of.

An execution case was ordered to be 'struck off,' on 19th March, 1918. On 21st March, 1918, the judgment-debtor filed an application praying that satisfaction of the decree may be recorded. The application was allowed by the First Court but the Court of Appeal on 7th July, 1920, decided in favour of the decree-holder and rejected the application. The judgment-debtor filed a second appeal which was dismissed on 3rd November, 1921. The decree-holder applied for execution on 9th July, 1924:

Held, that the application, having been filed more than three years after 19th March, 1918, and even more than three years after 7th July, 1920, when all bar to the execution of the decree had been removed, was barred by limitation. [p. 791, col. 1.]

An application for revival of former proceedings in execution must be made within 3 years from the date on which those proceedings were suspended. [*ibid.*]

Chattar Singh v. *Kamal Singh* (1), followed.

Execution second appeal against a decree of the Additional Judge, Cawnpore, dated the 6th of January, 1926.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Saila Nath Mukerji*, for the Respondent.

JUDGMENT.—This is a judgment-debtor's execution second appeal and arises under the following circumstances:—

The decree now under execution was obtained by the decree-holder firm on the 11th of January, 1915. An application for execution, before the application giving rise to the present appeal, was filed on the 27th of February, 1918, and it is admitted on all hands that that application was issued to the judgment-debtor but was not served on her, and on the 14th of March, 1918, the Execution Court directed the decree holder to take appropriate steps for the service of notice on the judgment-debtor till the 19th of March, 1918. This was not done by the decree-holder within the time allowed. The case was put up before the Court on the 19th of March, 1918. On that date the judgment-debtor, though not served with a notice of the application for execution, appeared and filed an application to the effect that she had paid the entire decretal amount. On that date the Execution Court ordered the execution case to be struck off.

Two days later, *viz.*, on the 21st of March, 1918, an application was filed by the judgment-debtor praying that satisfaction of the decree be certified in accordance with the provisions of O. XXI, r. 2, Civil Procedure Code. This application was opposed by the decree-holder but was allowed by the First Court on the 11th of May, 1918. On appeal by the decree holder the decision of the First Court was reversed by the Court of first appeal on the 7th of July, 1920, and the application of the judgment-debtor filed by her on the 21st of March, 1918, was rejected. Against the decision of the Court of first appeal the judgment-debtor filed an appeal in the High Court which appeal was dismissed on the 3rd of November, 1921. The present application for execution was filed by the decree-holder on the 9th of July, 1924.

The Court of first instance held, that the contention of the decree-holder that in computing the period of limitation she was entitled to exclude the time intervening between the 21st of March, 1918, the date on which the application was filed by the judgment debtor, and the 3rd of November, 1921, the date of the decision of the High Court, was not well founded. It pointed out that there was no bar to the execution of the decree after the 7th of July, 1920, when the Court of first appeal decided that the payment alleged by the judgment-debtor had not been made. In this view that Court held that the application for execution was time-barred.

The decision of the Court of first instance has been reversed by the lower Appellate Court. The lower Appellate Court while agreeing with the Court of first instance that there was no bar to the execution of the decree by the decree-holder after the 7th of July, 1920, has held that the order dated the 19th of March, 1918, striking off the execution case should be treated as an order simply directing the record of the case to be consigned to the record room and has further held that the present application for execution filed by the decree-holder should be treated as an application asking for the revival of the former proceedings and that, if the present application is so treated, it is not barred by time. I am

unable to agree with the decision of the lower Appellate Court,

Even if the time between the 21st of March, 1918, and the 7th of July, 1920, be excluded in computing the period of limitation, the present application was filed more than 3 years after the order of the Execution Court dated the 19th of March, 1918, striking off the execution case. After the 7th of July, 1920, when the Court of Appeal rejected the application of the judgment-debtor, there was no bar to the execution of the decree and the present application was filed even more than 3 years after that date, even if by the order dated the 19th of March, 1918, the Execution Court did not intend to dismiss the application for execution altogether and did intend merely to consign "the case to the record room pending the decision of the judgment-debtor's objection" the present application for execution having been filed more than three years after the date of that order, and even more than 3 years after the 7th of July, 1920, when all bar to the execution of the decree was removed by the decision of the Appellate Court, was barred by limitation. It has been held by a Full Bench of this Court in the case of *Chhattar Singh* v. *Kamal Singh* (1) that an application for revival of former proceedings in execution must be made within 3 years from the date on which those proceedings were suspended. For these reasons the decision of the Court of first instance was perfectly correct and ought to be restored.

The learned Counsel for the respondent has relied on the case of *Yakub Ali* v. *Durga Prasad* (2). That case has no bearing on the present case. In that case it was held that frivolous objections to the execution of a decree on the part of a judgment-debtor with a view to delay the execution of the decree amount to "fraud" within the meaning of s. 48 (2) (*a*) of the Civil Procedure Code. That is a question that obviously does not arise in the present case.

I set aside the decree of the Court below and restore that of the Court of first instance. Under the circumstances I direct the parties to bear their own costs.

A. N. A. *Appeal allowed.*

(1) 100 Ind. Cas. 692; A. I. R. 1927 All. 16 (F. B.)
(2) 65 Ind. Cas. 877; 20 A. L. J. 185; 44 A. 319; A. I. R. 1922 All. 145.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL MISCELLANEOUS APPEAL No. 6 OF 1921.

February 14, 1922.

Present:—Mr. Kennedy, A. J. C.

HIRANAND MULCHAND—APPELLANT

versus

OFFICIAL RECEIVER—RESPONDENT.

In the matter of INSOLVENCY OF JETHANAND GOVERMAL.

Provincial Insolvency Act (V of 1920), ss. 63, 64—Declaration of dividend—Claims subsequently proved, priority of—Final dividend, declaration of—Notice, form of.

Creditors who prove their claims after declaration and payment of any dividends, do not rank *pari passu* as between themselves, but, are, under the provisions of s. 63 of the Provincial Insolvency Act, entitled to payment in full in the order of their proving their respective claims so long as there are funds left in the hands of the Official Receiver liable for distribution The claim of any such creditor cannot, therefore, be held up until the claims of all such creditors are decided. [p. 792, col. 2.]

The notice under s. 64 of the Provincial Insolvency Act for the declaration of the final dividend should be one not calling upon the public to notify claims but one calling upon such of the creditors as have already notified their claims to prove their claims within a fixed time. [p. 792, col. 1.]

Appeal against an order of the Official Receiver, dated the 21st November, 1921.

Mr. *Kundanmal Dayaram*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for the Respondent.

JUDGMENT.—These proceedings arise out of the order of the Official Receiver in Insolvency Application No. 32 of 1920, dated 14th February, 1922. It appears that one Jethanand Govermal became insolvent and his estate vested in the Official Receiver. The Official Receiver proceeded to frame a schedule of creditors and get in the estate. On the 26th September, 1921, the schedule had claims to the extent of four thousand rupees and had a balance of about Rs. 4,800 to the credit of the estate. The Official Receiver thereupon declared a dividend of eight annas in the rupee to scheduled creditors. On the 3rd November, the Official Receiver contemplated a further dividend and directed notice to be issued in the Sind Official Gazette calling upon creditors to *prove* their claims. The said notification, however, does not run in the way required by the order of the Official Receiver but requires creditors to *file* their claims on or before the 22nd November, 1921. One Verhomal turned up on the 22nd and notified his claim which was admitted and

the name of Verhomal was entered on the schedule on the 28th. In the meantime, on the 26th, the present appellant Hiranand turned up and notified his claim. This claim was, however, summarily rejected by the Official Receiver on the 28th. The appellant comes here in appeal against that order.

I do not think that the procedure of the Official Receiver was correct. The order for notice of the 3rd November apparently contemplates a final dividend in which case under s. 64 the correct notice is a notice not calling on the public to notify claims, but a notification calling on such of the creditors as have already notified their claims to prove their claims within a fixed time.

It is clear from s. 33 of the Act that any creditor may put in his claim to be entered in the schedule at any time upto the date of the discharge of the insolvent, and the Court must before deciding on that application issue notice to the insolvent and to the other creditors who have proved their debts. The notification, therefore, in the form as issued was an unnecessary and an invalid notice and may be disregarded. These two people *viz.*, Verhomal and the appellant and any one else who may have appeared in consequence of that notification may be considered to have appeared under s. 33. As far, therefore, as the order of the Official Receiver rejecting the appellant's application to be put on the schedule goes, I set it aside and direct the Official Receiver to dispose of that application according to law.

As I say the appellant may now be able to get his name on the schedule if he wishes. What the appellant wants is, however, something more than that. As I understand under the provisions of s. 63 the rights of creditors are these:—At the time of the distribution of the dividends all creditors already on the schedule rank equally. Any creditor appearing after that distribution or after the declaration of that dividend, should he succeed in proving his claim, is entitled if there are any unassigned assets in the hands of the Official Receiver, to be paid, to the extent of these assets, a dividend at the same rate as that already paid or declared to the scheduled creditors. The law does not say precisely what is to happen if several creditors appear after such declaration and at such short intervals that their appearances are made before there has been a pronouncement on the validity of the claims of any of them. This is what has happened here. Verhomal's claim was admitted on the 28th, the appellant's claim which has not yet been decided on was presented on the 26th. What the appellant apparently wishes is that the payment to Verhomal should be held up untill there has been a decision on his claim so that if there is a favourable decision on his claim he will rank equally for dividend with Verhomal. I cannot read any such instructions in the words of s. 63 and it seems to me that s. 63 contemplates payment in full to each succeeding creditor who comes in after the framing of the schedule in the order of his proving his claim as long as there are any funds left in the hands of the Official Receiver liable for distribution. This, of course, is the procedure in execution and to hold otherwise would be, it seems to me, to enable any evil disposed person to hold up distribution of the dividend by notifying his claim but not proceeding to prove it. No doubt, such attempts would be frustrated when the time came to make a final dividend as there is a provision in s. 64 that he must either prove his claim within the time fixed in the final notice or must forfeit it. As far, therefore, as I can understand the law the present appellant is not entitled to hold up the dividend until such time as the validity or otherwise of his claim is pronounced on.

While, therefore, I set aside the order of the Official Receiver summarily rejecting the claim of the appellant to be placed on the schedule, I also set aside the *interim* order of this Court prohibiting the Official Receiver from making a distribution. No order as to costs.

P. B. A. *Order set aside.*

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 311 OF 1925.

April 13, 1926.

Present :—Mr. Justice Raza.

KUNWAR BAHADUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAIB—PLAINTIFF, RAM SARUP—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Finding of fact—Evidence not considered—Interference.

There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact.

The fact that evidence, including documentary evidence, has not been properly considered is not, therefore, a ground for second appeal.

Appeal from a decree of the Subordinate Judge, Bara Banki, dated the 24th February, 1925, upholding that of the Munsif, Fatehpur, dated 24th April, 1924.

Mr. *Girja Saran Lal*, for the Appellants.

Mr. *Wasi Hasan*, for the Respondent No. 1.

JUDGMENT.—This is an appeal from a decree of the learned Subordinate Judge, Bara Banki, dated the 24th February, 1925, affirming a decree of the learned Munsif, Fatehpur, dated the 24th April, 1924.

The dispute in this case relates to grove No. 186 in village Zainabad, *Pargana* Satrikh, District Bara Banki. Both the lower Courts have found that the plaintiff has a half share in the grove in suit and that he has been in possession within limitation. The plaintiff was dispossessed only in August 1922. The present suit was instituted in November 1922.

I have heard the appellants' learned Counsel. He has attempted to show that the evidence in this case (specially the documentary evidence) was not properly considered by the lower Courts. So far as I see there is no force in this appeal. The findings in question are findings of fact based upon admissible evidence and cannot be impugned in second appeal. It should be borne in mind that there is no jurisdiction to entertain a second appeal on the ground of even an erroneous finding of fact. The weight or value of the evidence is not the subject for discussion in second appeal. The evidence produced by the parties has been duly considered by the lower Courts and their findings must be accepted in second appeal.

The plaintiff has filed cross-objections. So far as I see there is no substance in the cross-objections also. The respondent's learned Counsel relies on oral evidence principally but that evidence has been duly considered by the learned Munsif. He was not satisfied with the evidence produced by the plaintiff to show that the trees which had been cut from time to time were the defendant's trees and not the plaintiff's trees. I am not prepared to disagree with the finding of the lower Courts on that point also.

Hence I dismiss the appeal and also the cross-objections with costs. The decree of the lower Appellate Court is confirmed in all respects.

A. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS CIVIL PETITION No. 456 OF 1926.

(CIVIL APPEAL CASE No. 616 OF 1926).

January 18, 1927.

Present:—Mr. Justice Dalip Singh.

BIRU RAM—PETITIONER

versus

RODA MAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 9 —Dismissal in default—Restoration—'Sufficient cause —Misjudgment of Counsel as to when case will be taken up.

Misjudgment on the part of a Counsel as to when his case was probably going to be taken up, where there is no statement that he was engaged in some other case, is not a sufficient ground for his absence when a case is taken up. [p. 794, col. 1.]

Mohar Chand v. *Habib* (1), distinguished.

Petition under O. XLI, r. 19 Civil Procedure Code for restoration of the Appeal Case No. 616 of 1926 dismissed in default of Mr. Justice Jai Lal on the 29th June, 1926.

Original Insolvency Case No. 5 of 1925, decided by the District Judge, Jullundur, dated the 8th January, 1926.

Mr. *Lal Chand Mehra*, for the Petitioner.

Messrs. *Jagan Nath Aggarwal* and *Duni Chand Gupta*, for the Respondents.

ORDER.—This appeal was dismissed for default on the 29th of June, 1926. On the 3rd of July, 1926, an application was put in for restoration. An affidavit accompanied the application, and in this the petitioner stated that the petitioner's Counsel was present in Court on the 29th of June. The first case in the Court was not finished till 1 o'clock and the petitioner's Counsel thought that his case which was No. 4 on the list would not come up till after lunch and so went away. In the meantime, the case was called on and was dismissed in default. The fourth ground stated that the petitioner did not attend because the case had not been put in the weekly list. This last point is incorrect and Counsel for the respondents has shown me that the case was in the weekly list on the 15th of June, 1926. There is nothing to show why this application to restore was not put in on the same date when Counsel for the petitioner came to know of the dismissal in default. Counsel for the petitioner has cited *Mohar Chand* v. *Habib* (1),

(1) 89 Ind. Cas. 795; A. I. R. 1925 Lah. 617.

but in that case the facts are quite different. I do not see that a misjudgment by the petitioners' Counsel, who does not state that he was engaged in some other Court, of the length of time that a particular case would take is any ground for absenting himself, and I, therefore, dismiss the application to restore with costs.

R. L. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 189 OF 1926.
February 2, 1927.
Present:—Mr. Findlay, J. C.
D. ROZARIO—DEFENDANT—APPLICANT
versus
HARBALLABH ONKARJEE—PLAINTIFF—NON-APPLICANT.

Stamp Act (II of 1899), s. 2 (5) (22)—Instrument, attested and not payable to order or bearer, whether bond or promissory-note—Oral evidence as to interest, whether admissible—Evidence Act (I of 1872), s. 92, proviso 2.

If an instrument whereby a person obliges himself to pay money to another is attested by a witness and the amount due thereunder is not payable to order or bearer, it is a bond as defined in s. 2 (5) of the Stamp Act, and not a promissory note as defined in s. 2 (22) of the Act.

In the absence of any stipulation as to interest in a bond, oral evidence is admissible to prove a separate agreement about it under s. 92, proviso 2, of the Evidence Act; the evidence must, however, be very satisfactory and strong in order to establish such a separate oral agreement when the bond is silent about it.

Application for revision of decree of the Judge, Small Cause Court, Nagpur, dated the 23rd March 1925, in Small Cause Court Suit No. 2342 of 1925.

Mr. *S. K. Ghosh*, for the Applicant.

ORDER.—The first point in this case is whether the instrument (P. 1) is a bond or a promissory note as defined in s. 2, cls. (5) and (22) respectively, of the Indian Stamp Act. Undoubtedly, the instrument in question would have been a promissory note but for the fact that it was attested by a witness The note in question is not payable to order or bearer, and, in those circumstances, I think the lower Court was correct in treating it as a bond.

The next question is whether, in spite of the silence of the bond as to interest, there was any agreement to pay interest at Rs. 2 per cent. per mensem.

I so far agree with the lower Court that oral evidence was permissible under s. 92, proviso (2), Evidence Act, to prove a separate agreement as regards interest, but I am not satisfied with the evidence produced on this point in the present case. In a document like the present, where no mention of interest is made, very satisfactory and strong evidence is, in my opinion, essential in order to establish any such separate agreement as is alleged to have been arrived at orally in the present case. It is significant that Naidut, the attesting witness, says that Rs. 50 prospective interest was already included in the bond and that no other agreement *re* interest was come to. Of the two witnesses who support the plaintiff, one is a fellow-Railway servant and presumably in a position subordinate to the plaintiff, and I am not satisfied, on the evidence of Jagannath (P. W. No. 3) as to the genuineness of the plaintiff's claim in this connection. I, therefore, decline to allow interest in the present case.

On a third point, however, I find it necessary to remand the case to the lower Appellate Court. I saw cause to admit in this Court a memorandum (A. 1) professing to come from the plaintiff-non-applicant to the defendant-applicant, dated 11th August (year not stated) asking for payment of certain money. This letter, it is alleged on behalf of the applicant, shows that the debt in suit was re-payable by instalments. On the other hand, the plaintiff-non-applicant has filed an affidavit to the effect that this letter relates to a previous loan of Rs. 10 taken in the year 1922; the non-applicant's statement in this connection has been recorded by me and, on the other hand, the applicant has sworn before me that he never took any such loan of Rs. 40 in 1922 or in any other year. This is a matter which, in my opinion, should be elucidated by taking further pleadings and, if necessary, evidence in the lower Court and I remand the case to that Court for a finding on the following issue:—

Did the applicant Rozario take a loan of Rs. 40 from the non-applicant Hariballabh Onkarjee Trivedi in 1922 or in any other year and, if so, does the memorandum (N. P. 1) refer to the said loan of Rs. 40 or to the loan evidenced by P. 1?

The lower Court will take what further pleadings and evidence may be necessary on this issue and will submit its finding

to this Court by 11th April, 1927. Thereafter, 15 days will be allowed for filing of objections thereto and the case will be finally heard on 27th April 1927. Costs will abide the result.

A. N. A. *Case remitted.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2468 OF 1926.

January 24, 1927.

Present:—Mr. Justice Addison.

FIRM SUNDAR SINGH-JIT SINGH—PLAINTIFF—APPELLANT

versus

FIRM GULAB SINGH-KALYAN SINGH THROUGH KIRPA RAM—DEFENDANT RESPONDENT.

Contract Act (IX of 1872), s. 107—Right of re-sale—Consignment through Railway—Property in goods, when passes to purchaser—Re-sale, right of, how to be exercised—Reasonable notice to purchaser.

It is settled law that goods cannot be re-sold at the risk of the purchaser under s. 107 of the Contract Act until the property in them has passed to him. [p. 797, col. 1.]

Gulab Rai-Sagar Mal v. *Nirbhe Ram-Nagar Mal* (2), followed.

Where goods are sent through Railway and the Railway receipt is addressed to the consignor himself, to be delivered to the purchaser only on the receipt of the price for the goods, the property in the goods does not pass to the purchaser till the price is paid. [*ibid.*]

Ram Prasad Babu v. *Paul Brothers* (1), followed

A vendor who elects to exercise the right of re-sale given to him by s. 107, Contract Act, is bound to wait for a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling. [*ibid.*]

Prag Narain v. *Mul Chand* (3) *Firm Abdul Hakim-Muhammad Sadik* v. *Joho Jautzen* (4), followed.

First appeal from a decree of the Sub-Judge, Fourth Class, Amritsar, dated the 6th February, 1926.

Mr. *J. G. Sethi*, for the Appellant.

Mr. *Fakir Chand*, for the Respondent.

JUDGMENT.—The firm Gulab Singh-Kalyan Singh (hereafter to be styled firm *A*) agreed to supply sugar to the firm Sundar Singh-Jit Singh (hereafter to be styled firm *B*) and an indent was written by the former firm on the 12th March, 1924, in the following terms:—

"Firm *A* has received Rs. 550 as earnest money on account of 55 bags of No. 1 Partalpore sugar which firm *A* has agreed to sell to firm *B* at Rs. 20-8-0 per maund mill delivery. Firm *A* has agreed to make delivery in the month of March. It will hand over the Railway receipt when it receives it on payment of the balance money by firm *B*. Firm *B* will be liable for interest if it fails to accept the Railway receipt within one day. Firm *A* will allow interest on the earnest money of Rs. 550 from the date of the indent."

On the 24th June, 1924, firm *A* sued firm *B* in the Small Cause Court, Amritsar, for Rs. 92-1-6 on the allegation that firm *B* had refused to take the goods and pay the money though notice was given to it on the 22nd April, and on the 30th April, the last notice also stating that the goods would be re-sold at the risk of firm *B* if it did not complete the contract. Accordingly on the 3rd May the goods were re-sold, the loss amounting to Rs. 92-1-6 after setting off the earnest money of Rs. 550.

On the 1st July, 1924, firm *B* sued firm *A* in the Court of the Sub-Judge, Fourth Class, Amritsar, for refund of the earnest money of Rs. 550 together with Rs. 20 incidental expenses, on the ground that firm *A* committed a breach of the contract. According to this plaint the agreement was that Railway receipt would be given to firm *A* by firm *B* when firm *B* paid the balance to firm *A* and that after the Railway receipt was offered then firm *A* could charge interest provided the money was not paid. Firm *A*, however, never informed firm *B* of the arrival of the goods or asked for the balance and refused to complete the contract when firm *B* gave notice to it on the 16th June, 1924.

Both suits were sent to the Sub-Judge Fourth Class, for trial. The plaint in the one suit was taken as the pleadings in the other suit. The Sub-Judge, Fourth Class has decreed the suit of firm *A* for Rs. 92-1-6 with costs and dismissed the suit of firm *B* with costs. Against the decree awarding firm *A* Rs. 92-1-6 firm *B* presented a revision petition in this Court and it was admitted to a hearing. Later the appeal by firm *B* in the Court of the District Judge against the dismissal of their suit for Rs. 570 was transferred to this Court, to be heard with the revision petition. This judgment will dispose of both the appeal and the revision.

It has been proved that it was not till the 28th March, 1924, that firm *B* informed firm *A* where they wanted the sugar to be sent to. Firm *A* had contracted in Janu-

ary with Begg Sutherland & Co. to get this particular sugar from them. Immediately after the 28th March whem firm *B* told firm *A* that it wanted the sugar sent to Amritsar steps were taken to have it consigned there and notice came from Begg Sutherland & Co. on the 22nd April, 1924, that the Railway receipt was available. Though, therefore, the terms of the indent were for March delivery it must be held that the goods arrived in time, as they were sent immediately after firm *B* told firm *A* on the 28th March that the goods should be consigned to Amritsar.

There is some evidence to the effect that firm *B* was told on or about the 22nd April that the Railway receipt had reached the Office of Begg Sutherland & Co. in Lahore. The broker P. W. No. 1 has said that firm *B* promised to get the Railway receipt from Lahore. It was argued, however, that firm *B* could not have so promised as the indent is clearly to the effect that firm *A* agreed to hand over the Railway receipt to firm *B* on payment to firm *A* of the balance money. There is, no doubt, that that was the contract and unless very good evidence was given that the parties later agreed to modify it, it must be held that it was the duty of the firm *A* to offer the Railway receipt to firm *B* in Amritsar on payment of the balance money. The evidence is not good enough to establish this. Admittedly the Railway receipt was never offered to firm *B* at Amritsar. It would, therefore, follow that firm *A* committed the breach of the contract.

One witness, P. W. No. 10 has stated that when he purchased goods from Begg Sutherland & Co. he paid money to them at Lahore. This does not establish any custom. Besides, it is not clear from the statement of this witness whether he dealt direct with Begg Sutherland & Co. or through someone else. His evidence, therefore, proves nothing.

P. W. No. 12 is the agent at Amritsar of Begg Sutherland & Co. He is closely connected with firm *A* which contracted to supply firm *B* with the sugar in question. According to him the usual practice was that the money for goods was paid to the Company at Lahore. His statement is not sufficient to establish any custom. Besides, though that might be the custom when the agent contracted to supply persons direct, it does not follow that it was the custom when any other person than the agent contracted to supply the goods. On the evidence, therefore, no such custom as was alleged, namely, that firm *B* should have gone to Lahore to Begg Sutherland & Co. and obtained the Railway receipt there has been established and further the contract itself is quite clear that it was the duty of firm *A* to get the Railway receipt and offer it to firm *B* on payment of the balance. As this was not done by firm *A* it must be held to have committed the breach.

Firm *B* had to pay in all Rs. 2,818-12 from which had to be deducted Rs. 550 the earnest money. It had thus to pay Rs. 2,268-12 when the Railway receipt was offered to it by firm *A*. Now firm *A* had only to pay Begg Sutherland & Co. Rs. 2,612-8 of which it had already paid Rs. 660 as earnest money. Firm *A* could, therefore, get the receipt from Begg Sutherland & Co. at Lahore on payment of Rs. 1,952-8-0 whereas firm *B* had still to pay firm *A* Rs. 2,268-12. It is impossible to believe in these circumstances that it was meant that firm *B* should go to Lahore and obtain the Railway receipt on paying the balance due to Begg Sutherland & Co. Counsel for firm *A* has been unable to show me in what manner such an arrangement could have been carried out.

On the finding above that the breach was committed by firm *A* in not obtaining the receipt according to the indent and offering it to firm *B* both the revision petition and the appeal must be accepted. There are, however, certain other matters in connection with these cases which must be mentioned. It has been proved that firm *B* was given notice on the 30th April that, if it did not take the goods and pay the money, firm *A* would re-sell them at their risk. Firm *A* then proceeded to Lahore on the 2nd May and got from Begg Sutherland & Co., the Railway receipt probably on the morning of the 3rd May. Its representative returned to Amritsar on the 3rd May and that very day that is the day when the Railway receipt was obtained by it, firm *A* sold the goods. The suit as brought was under s. 107 of the Contract Act for the loss incurred by the re-sale. In *Ram Prasad Babu* v. *Paul Brothers* (1) it was held that where goods were

(1) 90 Ind. Cas. 381; A. I. R. 1926 Oudh 46.

sent through Railway, the Railway receipt being addressed to self to be delivered through a Bank to the purchaser only on the receipt of the price for the goods, the property in the goods did not pass to the purchaser till the price was paid. In the present case the Railway receipt was addressed by the consignor to himself. Until, therefore, the price was paid by firm *B* the property in the goods did not pass to it. A similar view was taken in *Gulab Rai-Sagar Mal* v. *NirbheRam Nager Mal* (2). It is settled law that goods cannot be re-sold at the risk of the purchaser under s. 107 of the Contract Act until the property in them has passed to him. It, therefore, follows that even there had been a breach the suit should only have been for damages to be measured by the difference of the rate between the contract price and the rate on the date of the breach and the present suit was incompetent. There is evidence about the rates of Java and other kinds of sugar but none of Partalpore sugar. For this reason also the suit by firm *A* should have failed.

Again it was held in *Prag Narain* v. *Mul Chand* (3) which has been followed in *Firm Abdul Hakim-Muhammad Sadik* v. *Joho Jautzen* (4) that if a vendor on a breach of contract by non-payment of the purchase-money elects to exercise the right of re-sale given to him by s. 107 of the Indian Contract Act, not only is the vendor bound to wait for a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling but he is also bound to exercise his right of re-sale within a reasonable time after the date of the breach. In the present case notice of re-sale was given on the 30th April before the Railway receipt was with firm *A* and on the 3rd May, that is, the very day, firm *A* obtained the Railway receipt the goods were re-sold. There could thus have been no proper steps to advertise the goods and to see that the best possible price was obtained. In these circumstances firm *A*, even if the breach had been committed by firm *B*, would only have been able to claim damages on the difference of rates and not on the loss on re-sale.

(2) 79 Ind. Cas. 194; A. I. R. 1924 Lah. 239; 4 Lah. 423.

(3) 19 C. 535; A. W. N. (1897) 150; 9 Ind. Dec. (N. S.) 346.

(4) 72 Ind. Cas. 772; A. I. R. 1924 Lah. 319.

I accordingly accept the revision and dismiss the suit of Gulab Singh-Kalyan Singh with costs throughout. I also accept the appeal and grant the firm Sundar Singh-Jit Singh a decree for Rs. 550 with costs throughout.

R. L. *Revision accepted.*

A. N. A.

CALCUTTA HIGH COURT.

(APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 81 OF 1926.

July 2, 1926.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Panton.

PRAN KUMAR PAL CHAUDHURY—APPELLANT

versus

DARPAHARI PAL CHAUDHURY—RESPONDENT.

Letters Patent (Cal.), 1865, cl. 13—Probate proceedings, whether 'suit'—Transfer—Jurisdiction of High Court—Order of Single Judge—Appeal.

Proceedings for the grant of Probate which are contested come within the meaning of the word 'suit' in cl. 13 of the Letters Patent of the Calcutta High Court. [p. 799, col. 1.]

The High Court has, therefore, jurisdiction to order the transfer of such proceedings from a subordinate Court to itself. [p. 800, col. 1.]

In the goods of Colonel John Shelton (2), followed.

An order passed by a Judge of the High Court sitting on the Original Side, for transfer of Probate proceedings from a District Court to the High Court under cl. 13 of the Letters Patent, is not appealable. [p. 798, col. 1.]

Khatizan v. *Sonairam Daulatram* (1), followed.

Appeal from the judgment of Mr. Justice Gregory, dated the 23rd March, 1926.

Mr. *N. N. Sircar* (with him Mr. *B. K. Ghose*), for the Appellant.

The Advocate-General (with him Mr. *S. R. Das*) for the Respondent.

JUDGMENT.

Sanderson, C. J.—This is an appeal by Pran Kumar Pal Chaudhury against the judgment of my learned brother Mr. Justice Gregory, delivered on the 23rd of March, 1926.

It appears that certain Probate proceedings were pending in the Court of the learned District Judge of Barisal in which the appellant was the plaintiff and the respondent was the defendant.

A Rule had been granted by a learned Judge, sitting on the Original Side of this Court, calling upon the appellant to show cause why the Probate Suit No. 2 of 1925

pending in the Court of the District Judge of Barisal should not be removed from the said Court at Barisal to this Court for trial of the same by the Hight Court.

That Rule was heard by Mr. Justice Gregory and, on the merits, he came to the conclusion that, for the purpose of justice and on considerations of convenience, it was proper that the Probate case pending at Barisal should be removed and tried and determined in the High Court. He, therefore, made the Rule absolute and, in the exercise of the power conferred by cl. 13 of the Letters Patent, he directed that Probate Case No. 2 of 1925 then pending in the Court of the District Judge of Barisal should be removed from that Court and should be tried and determined in the High Court.

The facts which it is necessary for me to mention are as follows:—

The testator died at Faridpur in March 1925, and it was alleged that he made a Will, dated the 9th of August, 1907. On the 26th of August, 1925, the appellant, who had been appointed executor under the Will, applied for Probate in the Barisal Court. On the 9th of September, 1925, the widow of the testator filed a caveat objecting to the granting of Probate. The respondent, who is the minor son of the testator, filed a written statement on the 28th of October, 1925, and the ground of his objection to the Will was that the Will was a forgery, and it was alleged that the deceased man had been of unsound mind since the year 1903. The proceedings in the Barisal Court were headed "Probate Suit No. 2 of 1925."

The grounds upon which the learned Judge decided this appli ation have not been investigated in this Court, because the learned Advocate, who appeared for the appellant, stated that, if the learned Judge had jurisdiction under cl. 13 of the Letters Patent to direct that the case should be tried in the High Court on the ground that the proceedings were a "suit" within the meaning of cl. 13 of the Letters Patent, he was bound by the decision of the late Mr. Justice Mookerjee and another learned Judge of this Court in the case of *Khatizan* v. *Sonairam Daulatram* (1) that there was no appeal in such a case.

The point on which the learned Advocate relied was not taken before the learned Judge on the Original Side. Shortly stated, it was as follows:—

The argument was that the learned Judge had no jurisdiction, because the proceedings in the Barisal Court were not a "suit" within the meaning of cl. 13 of the Letters Patent.

Clause 13 is as follows:—"And we do further ordain that the said High Court of Judicature at Fort William in Bengal, shall have, power to remove, and try and determine, as a Court of extraodinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court."

The argument presented on behalf of the appellant was that the Letters Patent contemplated an application for a grant of Probate and the proceedings in connection therewith as something different from a civil suit such as was contemplated by cl. 13, and the main ground for the argument was that cl. 34 of the Letters Patent conferred a jurisdiction on the High Court "in relation to the granting of Probates of last Wills and testaments, and Letters of Administration of the goods, chattels, credits, and all other effects whatsoever of persons dying intestate, whether within or without the said Bengal Division."

It was argued that cl. 34 was headed "Testamentary and Intestate Jurisdiction" and that it was the intention of the Letters Patent that the proceedings in connection with the grant of Probate or Letters of Administration should be treated as being different from a "suit" which is referred to in cl. 13, which clause was contained in that part of the Letters Patent which related to "Civil Jurisdiction of the High Court."

In my opinion, the object of cl. 34 was to confer jurisdiction upon the High Court with regard to the matters which are mentioned in that clause, and the fact that Probate and administration proceedings were dealt with in a separate clause of the Letters Patent is not sufficient to show that the proceedings in connection therewith could not be a suit within the meaning of cl. 13.

(1) 60 Ind. Cas. 963; 47 C. 1104.

In the first place, I propose to consider what is the nature of the proceedings in connection with an application for a grant of Probate. There is a no doubt that in such proceedings the question of title to property does not arise. The question is whether one or other of the parties to the proceedings is entitled to represent the estate. But, when the proceedings are contested, as in this case, the Court has to try an issue which arises between the parties and which involves the question whether, the plaintiff is entitled to have a grant of Probate or whether the person, who has entered a caveat and who has become a defendant, has substantiated and proved the defence which he has set up.

I refer to a passage in Sir John Woodroffe's book on the Code of Civil Procedure, second Edition, at page 44, which is as follows:—"Contentious proceedings for the grant of Probate were held to be a suit, as an order granting Probate, though spoken of in the Probate Act as an order, is for the purposes of the Code a decree, because, so far as the Court granting the Probate is concerned, it decides not only a right to have the Probate granted, but also the defence set up against the grant."

The learned Chief Justice in the case of *In the goods of Colonel John Shelton* (2), described Probate proceedings as follows:—"A contest for Probate is a suit to try the question of testacy or intestacy, and that administration is a matter of civil right."

In my opinion, these passages correctly describe the nature of the proceedings for the grant of Probate which are contested: and in the ordinary acceptation of the word, there is no doubt that proceedings for the grant of Probate, which are contested, would come within the meaning of the word "suit":

The Letters Patent of 1865 of this Court were, dated the 28th December, 1865. In March, 1865, an Act which is called the Indian Succession Act (X of 1865) had been passed. Under that Act, jurisdiction was given to District Judges to grant and revoke Probates and Letters of Administration in all cases within their Districts. That jurisdiction was given by s. 235 of the Succession Act of 1865.

Section 236 of that Act provided: "The Distict Judge shall have the like powers and authority in relation to the granting of Probate and Letters of Administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court."

Section 238 provided: "The proceedings of the Court of the District Judge in relation to the granting of Probate and Letters of Administration shall, except as hereinafter otherwise, provided, be regulated, so far as the circumstances of the case will admit by the Code of Civil Procedure;" and s. 261 provided: "In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for Probate or Letters of Administration, as the case may be, shall be the plaintiff, and the person who may have appeared as aforesaid to oppose the grant shall be the defendant."

Those provisions were in force at the time when the Letters Patent of this Court were issued, and those who were responsible for the Letters Patent must have known of the provisions of the Succession Act of 1865.

It appears from those provisions that proceedings in connection with an application for the grant of Probate did not acquire the character of a "suit" until a caveat had been entered: or, to put it in another way, when a caveat had been entered and a written statement had been filed, in my judgment, the Probate proceedings reached the stage of contentious suit: and the words which I quoted from the judgment of the learned Chief Justice in *In the goods of Colnel John Sheltan* (2) are peculiarly applicable. The proceedings have then become "a suit to try the question of testacy or intestacy and that administration is a matter of civil right"

The sections of the Indian Succession Act, to which I have referred, have been reproduced in the Probate and Administration Act of 1881. I do not propose to read the sections. The material ones are ss. 51, 53, 55 and 83.

The learned Advocates, who argued this case on behalf of the appellant, have not convinced me that Probate proceedings, which are contested and which have taken the form of a suit by reason of the statutory provisions to which I have referred, do not come within the meaning of the word "suit" in cl. 13 of the Letters Patent.

(2) Montriou's Rep. 167 at page 173; 1 Ind. Dec. (o. s.) 589.

In my judgment, when my learned brother Mr. Justice Gregory was called upon to adjudicate in respect of the Rule, which had been granted, and had to consider whether the Rule should be made absolute, the proceedings in the Barisal Court had become a "suit" within the meaning of cl. 13 of the Letters Patent and he had jurisdiction to make the transfer.

There is nothing more for me to say except that in an unreported case which was headed, *In the goods of Nirpendra Chandra Basak*, this point was specifically raised before my learned brother Mr. Justice C. C. Ghose and the judgment was delivered on the 1st of June 1925. The learned Judge decided that he had jurisdiction to transfer the proceedings, which were contested testamentary proceedings in a subordinate Court, to the High Court. The matter came on appeal to this Court and was heard by my learned brother Mr. Justice Buckland and me. It was dismissed on the ground that the appeal did not lie, the Court relying upon the decision in *Khatizan* v. *Sonairam* (1). It is only material to notice that the point, which had been taken before the learned Judge (Mr. Justice C. C. Ghose) on the Original Side was not raised at the hearing of the appeal in this Court.

For these reasons, in my judgment, this appeal should be dismissed with costs.

Panton, J.—I agree.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 68 OF 1927.
(FORMERLY CIVIL APPEAL No. 1558 OF 1926).

January 19, 1927.

Present:—Mr. Justice Addison.

RADHA KISHAN—DECREE-HOLDER—PETITIONER

versus

HARI SINGH—JUDGMENT-DEBTOR AND OTHERS—AUCTION-PURCHASERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 85, 86, 92—Executing Court, jurisdiction of, to set aside sale after confirmation—Order setting aside confirmation of sale, whether appealable—Time for payment of balance of purchase-money—Court's power to extend time with consent of parties.

The Executing Court has no jurisdiction to set aside a sale after it has been confirmed. [p. 801, col. 1.]

An order setting aside the confirmation of a sale on the ground that the balance of the auction-money was not paid within 15 days, and remitting to the tribunal constituted under the Sikh Gurdwaras Act an issue as to whether the property under attachment belongs to a particular Gurdwara, is not an order under s. 47, Civil Procedure Code, and is, therefore, not open to appeal. [*ibid.*]

The time prescribed by O. XXI, r. 85, Civil Procedure Code, for payment of the balance of the purchase-money can be extended with the consent of all the parties concerned. [*ibid.*]

Varankkotillath Subramanyam Nambudri v. *Vykunda Kammathi* (1), followed.

Petition for revision of an order of the Sub-Judge, First Class, Lahore, dated the 25th May, 1926.

Mr. *Des Raj Sawhney*, for the Petitioner.

Messrs. *Tirath Ram* and *M. L. Puri*, for the Respondents.

JUDGMENT.—On the 15th July, 1925, a decree-holder had a one-half share of five shops, alleged to belong to his judgment-debtor, auctioned for Rs. 11,100. One-quarter of the sale-money, namely, Rs. 2,775 was deposited by the auction-purchaser. In the meanwhile, Indar Singh and Waryam Singh sued for a declaration that the property was *waqf*. This suit was dismissed. It would also seem that Jaswant Singh son of the judgment-debtor, instituted a suit about this property which was dismissed. Pending these suits, it was agreed that the balance of the purchase-money should not be paid in by the auction-purchaser. After the suits were decided the matter again came before the Executing Court on the 5th March, 1926. On that date the objection of the judgment-debtor under O. XXI, r. 90, Code of Civil Procedure, was dismissed. The auction-purchaser had, however, died and his sons asked for a little further time to pay in the balance of the purchase-money as they were finding difficulty in realising the assets of their father, lying in a Bank and other places. The sons of the auction-purchaser stated that they would pay in the money within the time granted. Accordingly, time was given and the sale was confirmed under O. XXI, r. 92 of the Civil Procedure Code. Against the decision no appeal was ever instituted.

In the meantime, in the interval between the confirmation of the sale and the time given to the sons of the auction-purchaser to pay in the balance of the purchase-money, the Shromani Gurdwara Prabandhak Committee presented an application

to the Court stating that the sale had been confirmed but in spite of this the confirmation should be set aside as the auction-purchaser had not deposited the remaining sale-money within 15 days. The Committee further asked that proceedings should be taken under ss. 21 and 32 of the Sikh Gurdwaras Act as they claimed that the property belonged to the Gurdwara Shahid Ganj, Bhai Taru Singh, which had been declared to be a Sikh Gurdwara under the Act. On the 25th May, 1926, the Executing Court, in spite of the fact that the sale had been confirmed, set aside the confirmation of the sale on the ground that the balance of the auction-money had not been paid within 15 days and remitted to the tribunal constituted under the Sikh Gurdwaras Act an issue as to whether the property under attachment belonged to the Gurdwara Shahid Gunj, Bhai Taru Singh. The application of the Committee purported to be under ss. 31 and 32 of the Sikh Gurdwaras Act.

Against this decision the decree-holder has presented this appeal. It was contended that no appeal lay as it could not be said to be a matter arising under s. 47 of the Civil Procedure Code and as appeal was not provided by O. XLIII, r. 1 (*j*). This contention is correct but in the special circumstances of this case I allowed the appeal to be argued as a revision.

It is quite clear that the Executing Court had no jurisdiction to set aside a sale, which had once been confirmed An appeal lay from its order confirming the sale and it had no further jurisdiction after the confirmation of the sale. Obviously the Shromani Gurdwara Prabandhak Committee could not be allowed at that stage to present an application under O. XXI, r 58, of the Civil Procedure Code. Time can be extended for payment of the balance of the purchase-money with the consent of all the parties concerned. This consent was given in the present case. This has been laid down in *Varankkotillath Subramanyam Nambudri* v *Vykunda Kammathi* (1). There was thus no illegality in the circumstances described above in extending the time for the payment of the purchase money.

Counsel for the auction-purchaser stated before me that the representative of the auction-purchaser had no objection paying the balance of the purchase money, provided that the decree-holder should not take the money out of Court until he had given security to the satisfaction of the Court to refund the money in case any suit or proceeding under the Sikh Gurdwaras Act at the instance of the Shromani Gurdwara Prabandhak Committee was successful. This was accepted by the decree-holder. Counsel for the Committee asked that the position of the Committee should be safeguarded and stated that if this was done, he had no objection to the revision being accepted. In my opinion the Executing Court had no jurisdiction to entertain the application of the Committee after having confirmed the sale. No appeal having been preferred against that order, the application of the Committee should have been dismissed *in limine* on that ground. Of course the Committee has still power to institute a suit or to take proceedings under the Sikh Gurdwaras Act if it so desires.

I accordingly accept this revision and set aside the order of the Executing Court, dated the 25th May 1926, in its entirety. The representatives of the auction-purchaser will now pay into Court the balance of the purchase-money and, if this is not done, the Court has full power to see that it is collected. The decree-holder will, however, not be allowed to take the auction-money out of Court until he has given security to the satisfaction of the Executing Court to refund the money if in any suit or proceeding under Sikh Gurdwaras Act the property is declared to belong to the Gurdwara Shahid Ganj Bhai Taru Singh. The Shromani Gurdwara Prabandhak Committee can, if it so desires, institute a suit in connection with the property auctioned or take such proceedings before the Sikh Gurdwara tribunal as are competent. The last named Committee will pay the costs of the petitioner in this Court.

The records now go back to the executing Court to continue the execution in accordance with law.

R. L. *Revision accepted.*

(1) 69 Ind. Cas. 1001; 16 L. W. 319; 43 M. L. J. 477; (1922) M. W. N. 707; 31 M. L. T. 363; A. I. R. 1922 Mad. 48.

OUDH CHIEF COURT.

SECOND CIVIL APPEAL No. 215 OF 1926.
February 21, 1927.
Present:—Sir Louis Stuart, KT., Chief Judge, and Mr. Justice Hasan.
Saiyed AL NABI AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat HABIBUNNISA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Death of defendant-respondent—Application to bring legal representatives on record made within time—Mistake as to names—Failure to implead some of the heirs—Procedure—Abatement.

There is nothing in the rules of procedure to compel a party to give exact information as to the names, addresses and other particulars of the persons supposed to be the legal representatives of a deceased party within any prescribed limit of time. All that the law requires is that he should make a *bona fide* reasonable application within the time allowed by law. [p. 803, col. 1.]

Second appeal against the decree of the Subordinate Judge, Rae Bareli, dated the 31st March, 1926, modifying that of the Munsif, Dalmau, dated the 28th April, 1924.

Mr. *H. Husain*, for the Appellants.
Mr. *Zahur Ahmad*, for the Respondents.

JUDGMENT.—This is the defendants' appeal from the decree of the Subordinate Judge of Rae Bareli, dated 31st of March, 1926, modifying the decree of the Munsif of Dalmau, dated the 28th of April, 1924.

The plaintiffs-respondents laid claim in the suit, out of which this appeal arises, for redemption of a mortgage, dated the 11th of November, 1892. Their case was that the profits of the mortgaged property in the possession of the mortgagees, that is the defendants, were far in excess of the interest due to the mortgagees under the terms of the mortgage and that on an account being taken in respect of the profits of the mortgaged property it would be found that the mortgagees had realised more than what was due to them. They, therefore, asked for a decree for redemption without any payment in favour of the mortgagees. They also agreed to pay in the alternative any sum of money which the Court might deem fit to order to be paid.

The Court of first instance on the interpretation of the deed of mortgage came to the conclusion that the mortgagees were under no liability to account and a decree for redemption in favour of the plaintiffs was made conditional on payment of a sum of Rs. 3,915-5-1 within the period prescribed by the decree of that Court and in the event of default foreclosure was to follow. The plaintiffs appealed from the decree and the learned Subordinate Judge, who heard the appeal, came to the conclusion that the deed of mortgage provided for accounting between the parties on the redemption of the mortgage. Consequently, he remitted an issue to the Court of first instance for the purpose of taking accounts and arriving at a finding in respect of the claim of the plaintiffs and of the defendants on the basis of those accounts. The Court of first instance accordingly went into the accounts of the profits of the mortgaged property. According to the finding of that Court the plaintiffs were credited with certain items of money as against the defendants and the defendants were credited with other items of money as against the plaintiffs. The learned Subordinate Judge on the return of the finding confirmed the finding of the Court of first instance on many items of accounts but differed on certain other items. The defendants have filed the appeal now being decided and the plaintiffs have filed cross-objections, which were also heard at the hearing of the appeal.

There is one preliminary matter which must be disposed of first. During the pendency of the appeal in the lower Appellate Court one of the respondents, Aulad Ali, in the ranks of the defendants died. Within the time prescribed by law an application was made on the 13th of September, 1924, to bring the legal representatives of the deceased respondent on the record of the appeal. Two such representatives were mentioned in the application: One a son and the other a daughter of the deceased respondent. The other respondents to the appeal filed a written objection, saying that the name of the son of the deceased Aulad Ali was not Ali Jafar as mentioned in the application of the 13th of September, 1924, but that his name was Aftab Husain and that the name of the daughter of the same respondent was not Buta as mentioned in the same application but Bani Fatima. This petition of objections further disclosed the fact that the deceased respondent, Aulad Ali, had left besides the two persons mentioned above, another daughter, *Musammat* Kauseri Begam as one of his legal representatives. By an application dated the 24th

of November, 1924, the mistakes in the names were corrected and the second daughter was also sought to be impleaded. The Court made the corrections and brought on the record of the appeal all the three legal representatives of the deceased respondent, Aulad Ali.

In the appeal now before us it was argued, as it was argued in the lower Appellate Court, that the proceeding taken by the Court below in bringing the legal representatives of the deceased respondent, Aulad Ali, on the record of the appeal was not justified by the rules of procedure and that consequently the appeal in that Court must be held to have abated at least in respect of the share of the second daughter in the estate of her deceased father, Aulad Ali.

We are of opinion that there is no substance in the contention raised before us. The rule of procedure applicable to the case is one which is provided by r. 4 of O. XXII of the Code of Civil Procedure. The rule is to the following effect:—

"Where within the time limited by law no application is made under sub-r. (1) the suit shall abate as against the deceased defendant." Within the term 'defendant' we must read the word 'respondent' as well if a respondent in an appeal dies. Now it is agreed that within the time limited by law an application was made under sub-r. (1). The suit shall, therefore, not abate. The argument leads to somewhat absurd results. It may frequently happen that an opposite party who is to make an application, is wholly a stranger to the family of the deceased party and has no knowledge as to who are precisely the legal representatives of the deceased party. He would naturally in the circumstances make inquiries. This will take time. After having made an application intimating that death has taken place in the rank of the opposite party, he would be quite within his rights to give exact information as to the names, addresses and other particulars of the persons supposed to be the legal representatives of the deceased party within a reasonable period of time. There is nothing in the rules of the procedure to compel a party to take such steps within any prescribed limit of time. All that he is required to do is to make a *bona fide* reasonable application within the time allowed by law. Having done that, the obligation which law imposes on him is discharged. We accordingly overrule the contention.

[*Note.*—The rest of the judgment deals with the merits and is not material for the purposes of this report.—*Ed.*]

G. H. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1320 OF 1926.

January 14, 1927.

Present:—Mr. Justice Dalip Singh.

UDHAM SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JOWALA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom (Punjab)—Alienation—Necessity—Mortgage by daughter-in-law in lieu of father-in-law's debt, validity of.

A mortgage by a daughter-in-law for her father-in-law's debt is one for necessity and binding on the reversioners. [p. 804, col. 2; p. 805, col 1.]

Chando v. *Buta* (1), *Bhambul Devi* v. *Narain Singh* (2) and *Sunta Singh* v. *Waryam Singh* (8) followed.

Second appeal from the decree of the Additional District Judge, Amritsar, dated the 16th December, 1925, reversing that of the Subordinate Judge, Second Class, Amritsar dated the 27th June, 1924.

Mr. *Mehr Chand Mahajan*, for the Appellants.

Mr. *Din Dayal Khanna*, for the Respondents.

JUDGMENT.—Plaintiff in this case brought a declaratory suit to the effect that the mortgage by defendant No. 1 in favour of defendant No. 2 could not affect their reversionary rights after the death of defendant No. 1. The trial Court framed various issues and held that the land was ancestral but also pointed out that as the alienation was by a widow it was immaterial whether the land was ancestral or not. It also held that this mortgage was made by defendant No. 1 in lieu of certain decretal debts due from her father-in-law Jiwan Singh the last male holder of the estate. Defendant No. 1 is the widow of the predeceased son of Jiwan Singh. It held that as these decrees were against Jiwan Singh merely as a surety, defendant No. 1 was not justified in mortgaging the ancestral estate for the money due from Jiwan Singh as surety. It held that there was legal necessity to the extent of Rs. 305 which was an actual debt of Jiwan Singh

and gave a decree that the mortgage would not affect the reversionary rights of the plaintiffs beyond Rs. 350, Rs. 45 being the registration expenses.

In appeal the learned Additional District Judge held that the payment of her father-in law's debt by the daughter-in-law was a necessity justifying the alienation made by her. He relied on *Chando* v. *Buta* (1) a Division Bench ruling, which supports his view. He also relied on *Bhambul Devi* v. *Narain Singh* (2) where it was held that an alienation by a widow for a deceased husband's debt was justifiable and that such property is liable to be attached in the hand of the widow.

In second appeal Counsel for the appellants urges that *Chando* v. *Buta* (1) is bad law, in that it goes counter to the principle enunciated in *Jagdip Singh* v. *Bawa Narain Singh* (3). He contends that there is no legal obligation on a widowed daugter-in-law to discharge her father-in law's debt. The widow represents her husband the predeceased son. The property, if not charged, would not be liable in the hands of the son, and, therefore, would not be attachable in the hands of his widow. The widow is under no moral obligation to discharge her father in-law's debt, and, therefore, there is no necessity for the alienation. He distinguishes *Bhambul Devi* v. *Narain Singh* (2) because in that ruling it was held that a widow represents her husband for all purposes and her estate is a sort of extension of the husband's estate. The principle of that ruling, therefore, according to him is not applicable to a widowed daughter-in-law. The Counsel for the respondents contends that *Chando* v. *Buta* (1) is good law, and cited Art. 63, Rattigan's Digest in support of the proposition that an alienation for a debt due from the father in-law was justifiable. That Article refers to ancestral debts but Counsel for the respondents was unable to give me any ruling directly dealing with ancestral, debts. The Counsel for the appellants, however, very properly drew my attention to two rulings, one *Thakuri* v. *Ganda Mall* (4) and the other *Ram Karan* v. *Hukman* (5) where it was held that an alienation by a son to pay his father's debt was a justifiable necessity. Counsel for the appellants contends, however, that these rulings were prior to the Full Bench ruling reported in *Jagdip Singh* v. *Bawa Narain Singh* (3) and are no longer good law. Counsel for the respondents was given time by me to see if he could find any ruling bearing on that point, but the only ruling he has referred me to is *Fattu* v. *Nur Mohammad* (6) where a Single Judge of this Court held that an alienation by a mother for her son's debt was good.

The matter is by no means free from difficulty. I do not think that it is possible to lay down a principle that in all tribes custom would recognise an alienation for a debt due from a previous holder of the land as a justifiable necessity. The rulings to which my attention has been drawn and which were referred to above do not give any definite reasoning on the point. Logically from the principle enunciated in *Jagdip Singh* v. *Bawa Narain Singh* (3) and followed in *Choghatta* v. *Aso Mal* (7) it would follow that there was no legal obligation on a son of a previous male holder of ancestral land to pay the debt due from such previous male holder nor could the pious obligation imposed by Hindu Law on a son to discharge his father's debt be imported into the Customary Law which might vary from tribe to tribe. If the matter were *res integra* I would be inclined to hold that the case should be remanded for enquiry as to whether by custom in this particular case the alienation was justifiable or otherwise but in *Santa Singh* v. *Waryam Singh* (8) which was approved in *Raja* v. *Allah Ditta* (9) it was held that the question whether a certain alienation was for necessity or not when the facts were undisputed was a question of law and in the only ruling directly in point, namely, *Chando* v. *Buta* (1) it was held that an alienation by daughter-in-law for her father-in-law's debt was for necessity. In the present case if there were no remand and my principle of decision were correct the appeal would succeed because the onus of proving that

(1) 119 P. R. 1886.
(2) 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L R. 1916.
(3) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912; 173 P. L. R. 1912.
(4) 78 P. R. 1879.
(5) 22 Ind. Cas. 544; 51 P. W. R. 1914; 79 P. L. R. 1914.
(6) 96 Ind. Cas. 1035; A. I. R. 1926 Lah. 671.
(7) 17 Ind. Cas. 371; 30 P. R. 1913; 270 P. L. R. 1914.
(8) 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.
(9) 29 Ind. Cas. 802; 110 P R. 1915; 112 P W. R. 1915; 37 P. L. R. 1916.

the alienation was for valid necessity would lie on the alienee. Bowing, however, to the authority of *Santa Singh* v. *Waryam Singh* (8) and *Chando* v. *Buta* (1) I hold that the alienation was for justifiable necessity and dismiss the appeal. I make no order as to costs.

R. L. *Appeal dismissed.*

OUDH CHIEF COURT.

FIRST CIVIL APPEAL No. 71 OF 1925.

January 10, 1927.

Present:—Sir Louis Stuart, KT., Chief Judge and Mr. Justice Hasan.

Lala MANESHUAR BUKSH—PLAINTIFF—APPELLANT

versus

RAM NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), s. 33—Award of British Indian Association—Construction—Provision for maintenance of relatives—Title not affected.

The awards of "the British Indian Association," whether strictly falling within the purview of s. 33 of the Oudh Estates Act of 1869 or not, must be construed as making provision for the maintenance of the relatives of *taluqdars* and not deciding questions of title in lands. [p. 806, col. 2.]

Appeal against the judgment and decree of the Subordinate Judge, Mohanlalganj, at Lucknow, dated the 31st August, 1925.

Messrs. *J. Jackson* and *Hakimuddin*, for the Appellant.

Messrs. *Radha Kishen* and *Manohar Lal*, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Mohanlalganj, dated the 31st of August, 1925. The property in suit is a one-anna share in village Parseni. The village of Parseni together with other villages was exempted from the general proclamation of confiscation of the 15th of March, 1858. The holder of the village at the time of the proclamation was Zabbar Singh, who is described by his name as *zemindar* of Gopal Khera in the paragraph relating to the exempted estates. On the 11th of December, 1859, the village of Parseni and the other villages were granted by the British Government to Zabbar Singh under a *Sanad* of that date (Ex. 78) and subsequently his name was entered as Sirdar Jhabba Singh, in Lists I and III of the lists prepared under Act I of 1869. The plaintiff is the great-grandson of Sirdar Jhabba Singh and it is admitted that he is in rightful possession of the estate of Parseni as the present successor of the original grantee. One of the brothers of Sirdar Jhabba Singh was Guman Singh. The defendats are the grandsons of Guman Singh. In the Revenue Records of the village the one anna share in dispute is recorded in the names of the defendants. In virtue of the same entry the defendants possess numerous specified plots of land in the village of Parseni. Some land of the village outside these plots was recently acquired by the Government for public purposes. In proceedings relating to the award of compensation the defendants claimed on the basis of the entry mentioned above a proportionate share of the amount of the compensation. The plaintiff resisted the claim on the ground that the one anna share recorded in the name of the defendants in the revenue papers of the village of Parseni was not held by them either in proprietary or under-proprietary right. This controversy has led to the present suit, in which the plaintiff claims a declaration that the defendants are neither proprietors nor under proprietors of the aforesaid share. The learned Subordinate Judge, from whose decree this appeal is preferred, has given his finding on the matter in dispute in favour of the defendants and dismissed the suit.

It is not disputed that if there were nothing else in the case the effect of the grant in favour of Sardar Zabbar Singh and the entry of his name in Lists I and III of the lists of Act I of 1869 was to invest him with complete proprietary title in the village of Parseni as in other villages of the estate. The defendants, however, rely in support of their title on a decision otherwise called an award of a body of *taluqdars* in Oudh, popularly known by the name of British Indian Association, dated 19th of December, 1867. Certain awards of this body were given legal recognition by the provisions of s. 33 of Act I of 1869. The award in question, strictly speaking, falls outside the scope of those provisions for the reason that though it was made so far back as the year 1867 it was not filed in the Court of the Financial Commissioner within six months after the passing of the Act of 1869. In argument before us, however, the learned Counsel for the appellant argeed that the award of the 19th of December, 1867, should be

treated as having a binding effect on the parties to the present litigation and on the question in controversy. The sole argument addressed to us is that on a proper construction of the said award the defendants hold the share in dispute in the right of mere *guzaradars* and not as proprietors or under proprietors. If that is the true construction of the award of the 9th of December, 1867, there is no question that the plaintiff is entitled to succeed.

It is difficult to discover at this day the origin of the acquisition of jurisdiction by the British Indian Association over claims made by the relations of *taluqdars*; but one thing is clear that the jurisdiction was exercised within certain limits defined by rules made by the Association itself. The rules are printed in Mr. Chhail Behari Lal's Edition of the Oudh Estates Act in Appendix I. The preamble of the rules distinctly defines the nature of the claims over which the Association purported to exercise powers of adjudication. According to that preamble claims respecting the *guzara* of the relatives of *taluqdars* were to be determined according to the rules following the preamble. The awards made by the Association in respect of such claims were given statutory effect by the provisions of s. 33 of Act I of 1869 as already stated. That section says:—

"Whereas bodies of *taluqdars* have in several cases made awards respecting the provision to be made for certain relatives of *taluqdars*, and it is expedient to render such awards legally enforceable; it is hereby, further enacted....." It follows that the Association never abrogated to itself the jurisdiction of deciding questions relating to title, proprietary or under-proprietary, in the lands of an estate. Indeed this is manifest from the penultimate clause of the rules of the Association. That clause refers to such lands of the estate as may be claimed to be held in under-proprietary tenure in lieu of *guzara*. Claims of this nature, the clause says, shall be determined in proper Courts.

The award of the 19th of December, 1867, therefore, should be interpreted in the light of the dominant circumstances stated in the preceding paragraph of this judgment. For the purpose of determining Guman Singh's claim to a half share in the villages of the estate of Parseni the award traces the history and the source of the acquisition of the villages constituting the estate and dismisses the claim in respect of all except Parseni. As regards Parseni, it appears that a 4-annas share was held by the grandfather of Guman Singh. This was treated to be the ancestral property in the village and but for its inclusion in the *sanad*, Guman Singh would have been entitled to a 4 pies share in the same according to his position in the family pedigree. It further appears that an 8-annas share was acquired by one of the members of the family in the right of a mortgagee. According to the finding of the Association Guman Singh, would have also been entitled to an 8-pies share in the mortgaged *patti* but for the same obstacle. Finally the award was concluded with the following words:—

"We cannot award him (Guman Singh) any thing more than this under the rules of the British Indian Association because, as a matter of fact, the Government *sanad* has not, in any way, prejudiced the rights of the plaintiff in these *pattis* also (that is, the 12-annas share in Parseni) the plaintiff having himself allowed his right to be lost. We consider it proper that as the plaintiff is the own uncle of the defendant and as it is incumbent upon the defendant to maintain him, some such maintenance should certainly be fixed for him as may suffice for his livelihood. The case be returned to the Financial Commissioner and be struck off the list of pending cases of the Committee." (Ex. A-1).

It is quite clear to us that the one-anna share which the Committee of Association awarded to Guman Singh under its decision of the 19th of December, 1867, was a one-anna share in village Parseni in the right of a *guzaradar* and not either in proprietary or under-proprietary tenure.

The awards of the British Indian Association, whether strictly falling within the purview of s. 33 of Act I of 1869 or not, have always been construed by the Courts in Oudh and the construction has invariably been confirmed by their Lordships of the Judicial Committee as making provision for the maintenance of the relatives of *taluqdars* and not deciding questions of title in lands. In the case of *Bhaiya Ardawan Singh* v. *Udey Pratab Singh* (1) an award for maintenance made by the British Indian Association in favour of a relative of a

(1) 23 I. A. 64; 23 C. 838; 7 Sar. P. C. J. 24; 6 M. L. J. 79; 12 Ind. Dec. (N. s.) 557 (P. C.).

taluqdar was held by the late Court of the Judicial Commissioner of Oudh as having enured for the lifetime of the relative only. On appeal their Lordships of the Privy Council held having regard to the pre-existing title of the claimant, that the award should be construed to have upheld the maintenance not only in favour of the claimant personally but also to his direct lineal descendants; in other words, the award granted a heritable tenure but not a transferable one. In *Lal Raghuraj Singh* v. *Babu Balbhaddar Singh* (First Civil Appeal No. 55 of 1904, decided by Mr. (now Sir) Edward Chamier and Mr. Scott, in the Court of the Judicial Commissioner of Oudh on the 16th of December, 1904) it was held that the Committee of the British Indian Association had power only to deal with claims for maintenance and it had no power to decide questions of title. In that particular case the question of title rested on an alleged adoption. The decision was confirmed by the Privy Council in *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (2). Their Lordships of the Judicial Committee said :—

"For the reasons given in the judgment of the Additional Judicial Commissioner, their Lordships are of opinion that the Committee had no jurisdiction to decide the question of adoption, and the affirmation by the Financial Commissioner of their refusal to award maintenance could not give judicial validity to their decision on a point outside their jurisdiction."

The rules prescribing the jurisdiction of the British Indian Association, to which reference has already been made in this judgment, were also considered by their Lordships of the Judicial Committee in the case of *Thakur Nawab Ali Khan* v. *Wahid Ali* (3).

There was a further argument advanced on behalf of the appellant in support of the appeal. The argument was founded on certain partition proceedings relating to the village of Parseni, which arose in the Courts of Revenue in the year 1910. But having regard to our finding recorded above, we do not propose to deal with that argument.

(2) 34 I. A. 125; 29 A. 519; 6 C. L. J. 13; 11 C. W. N. 841; 9 Bom. L. R. 757; 17 M. L. J. 354; 4 A. L. J. 497; 2 M. L. T. 391; 10 O. C. 343 (P. C.).

(3) 5 Ind. Cas. 156; 37 I. A. 12; 14 C. W. N. 237; 7 A. L. J. 41; 11 C. L. J. 116; 12 Bom. L. R. 161; 20 M. L. J. 195; 32 A. 92; 13 O. C. 74 (P. C.).

We allow this appeal, set aside the decree of the Court below and decree the plaintiff's suit with costs in both the Courts.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL NO. 2220 OF 1926.

February 2, 1927.

Present:—Mr. Justice Tek Chand.

AMIR KHAN—APPELLANT

versus

TALEH MUHAMMAD AND ANOTHER —RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 25, 39—Application for custody of ward—Guardian too weak to keep minor—Refusal of application, legality of—Court's duty to help guardian in discharging his duties.

A Court cannot refuse to grant relief under s. 25 of the Guardians and Wards Act for return of the ward to the custody of the guardian on the ground that the guardian is too weak to keep the minor. It is the duty of the Courts to protect the weak against the high-handed acts of the strong and this duty has to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge. [p. 809, cols. 1 & 2.]

If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under s. 39 of the Guardians and Wards Act for his removal and the appointment of another guardian. But until this is done it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody. [p. 807, col. 2.]

In order to take action under s. 25 of the Guardians and Wards Act it is immaterial whether a minor leaves the guardian's custody of his own accord or is removed forcibly by others. [p. 810, col. 1.]

Miscellaneous first appeal from an order of the Senior Sub Judge, Rawalpindi, dated the 22nd May, 1926.

Mr. *Chiman Lal Gulati*, for the Appellant.

Mr. *M. M. Tufail*, for the Respondents.

JUDGMENT.—As the order of the lower Court under appeal is a very brief one it is necessary to give in detail the relevant facts leading up to it.

On the 21st October, 1922, one Amir Khan filed an application under s. 7 of the Guardians and Wards Act in the Court of L. Chuni Lal, Senior Sub-Judge, Rawalpindi, for appointment as guardian of the person of his minor daughter *Musammat* Begam Jan and his minor son Ghulam

Mustafa, who were then stated to be 11 and 8 years of age respectively. It was alleged in the application that during the absence of Amir Khan at Baghdad his wife *Musammat* Aishan, who was a woman of bad character, had been enticed away by one Taleh Muhammad retired Sub-Inspector Police and that it was not in the interest of the minors that they should remain with her. After enquiry L. Chuni Lal passed the following order on the 6th January, 1923: "This is an application for the appointment of guardian of the person of a Muhammadan minor boy and girl. The applicant is the father of the minors, who are at present with their mother. It appears that the applicant proceeded to Baghdad and in his absence his wife left his house and began to live with one Taleh Muhammad Sub Inspector. It is said on her behalf now that she has married Taleh Muhammad. This Taleh Muhammad is an utter stranger and it is clear that the mother under s. 105 of Wilson's Digest of Muhammadan Law, by being married to a stranger is disqualified to keep them. This position is not contested by the Counsel for the mother. As the applicant is otherwise not disqualified and is entitled to be a guardian I appoint him as such. The mother shall be called upon to hand over the minors to the applicant on the 19th January, 1923."

On the 19th January, 1923, it was represented on behalf of *Musammat* Aishan that she was ill and was consequently unable to produce the minors. On this the Court directed that if *Musammat* Aishan was unable to come to Court, Taleh Muhammad should produce the minors at the next hearing and that if he had any objection to raise he should do so on that day, otherwise warrants would issue against him. On the 1st February, 1923, neither Taleh Muhammad nor *Musammat* Aishan appeared. The Court accordingly ordered that notice be served upon *Musammat* Aishan under O. V, r. 20 that she would be arrested under s. 45 of Act VIII of 1890 if she did not produce the wards on the 12th February, 1923. Notice was accordingly served on *Musammat* Aishan and on the 12th February both she and Amir Khan appeared. On the 14th February the Sub-Judge passed the following order:—

"Amir Khan was appointed guardian of her minor son and daughter *per* my order dated 6th January, 1923. The application was granted as above stated and 19th January was fixed for the minors being handed over to the guardian by the mother. An order was sent to that effect, but no body appeared on the 19th and the order was sent back with the endorsement by Taleh Muhammad, that the minors had gone with their aunt and that he could not, therefore, produce them. A further notice was thereupon issued that as the minors were with *Musammat* Aishan when the order of appointment was made she should produce them on the 1st of February. This notice was not taken and service was evaded. A further notice was again issued that if the orders are not carried out action will be taken under s. 45, Act VIII of 1890. Taleh Muhammad put in appearance, but had no power-of-attorney and did not bring the minors. As orders have been contumaciously disregarded in this case, I fine *Musammat* Aishan Bibi Rs. 20 and to further fine of Rs. 2 for each day that the default continues. I further order that a warrant of arrest shall issue against her and that she shall be detained in the civil jail till she produces the minors or causes them to be produced or compels their return."

Soon after this order was passed Taleh Muhammad appeared in Court and stated that he would produce the children on behalf of *Musammat* Aishan if time was granted to him. The Court accordingly deferred the enforcing of the order till the 21st February, 1923, and directed that order would come into force on the 22nd. Thereupon on the 21st the minors were made over to Amir Khan guardian in the presence of the Court.

On the 27th August, 1925, Amir Khan guardian filed another application stating that the respondents, *Musammat* Aishan and Taleh Muhammad, had again forcibly taken away the minors from his custody and he prayed that steps be taken to restore the minors to him. Notice was ordered to issue to the respondents but the application was dismissed in default on the 12th December, 1925. On the 16th February, 1926, Amir Khan presented a fresh application under s. 25 repeating his previous allegation as to the forcible removal of the two minors from his cus ody by *Musammat* Aishan and Taleh Muhammad and praying for necessary action. Notice of this application was duly served upon the respondents who appeared on the 8th May, 1926, before the Sub-Judge and handed over the minors to Amir Khan the guardian. Amir

Khan executed a document admitting receipt of the minors. A little later on the same day Amir Khan appeared again in Court and stated that Taleh Muhammad had brought a motor car and 15 or 16 persons in the Court compound and was going to forcibly remove the minors from his custody. He appealed to the Court for Police assistance and the Court directed the Police to assist the guardian in taking away the children to his house. This was accordingly done.

On the 18th May, 1926, the guardian again filed an application stating that after he had taken away the children with him to his house on the 8th May the respondents re-appeared the next day (9th May) and with the help of 10 persons took away the said minors from his house. He further stated that since then he had several times tried to get back the minors but without success. This application came up for hearing before Mr. Ahmad Yar Khan, Senior Sub-Judge, on 22nd May, 1926, when he passed the following order:—

"The minors were sent with father and guardian under Police escort. The next day, it is alleged, they were taken away by Taleh Muhammad and others. The guardian is too weak to keep the minors. It is useless to restore the minors to him. The application is rejected."

Against this order Amir Khan the guardian has preferred an appeal to this Court and I have heard Mr. Gulati on his behalf and Mr. Muhammad Tufail has addressed me for the respondents, *Musammat* Aishan and Taleh Muhammad. I am of opinion that the order of the lower Court cannot be sustained and the appeal must succeed. The whole conduct of *Musammat* Aishan and Taleh Muhammad has been most contumacious throughout. From the very beginning they have on one pretext or another tried to disobey the orders that the Senior Sub-Judge has from time to time passed and have on more than one occasion taken the law into their own hands and forcibly removed the minors from the custody of the guardian duly appointed by the Court. Under these circumstances it was the duty of Court which appointed Amir Khan a guardian to see that this authority was maintained and that he was enabled to discharge his duties as guardian properly. The reason given by the lower Court that the guardian is too weak to keep the minors is wholly insufficient to refuse relief to him under s. 25. It is the duty of the Courts to protect the weak against the high-handed acts of the strong and this duty has to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge. Indeed Mr. Muhammad Tufail has candidly admitted that he is unable to support the order of the lower Court on the ground on which it proceeds. He, however, contends that the guardian is an incompetent person and is unfit to remain in charge of the minors. On the materials on the record I am unable to say if this is so. If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under s. 39 for his removal and the appointment of another guardian. But until this is done, it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody.

Mr. Muhammad Tufail further contends that under s. 25 the Court may refuse to restore the minors to the guardian, if it thinks that such a course is conducive to their welfare. He argues that the lower Court should be held to have rejected the guardian's application, because it thought that it was not to the interest of the minors to be restored to him. This contention is without any force whatever. The lower Court does not give this as a reason for dismissal of the application and I see no warrant for making such an assumption. Indeed after having handed over the minors to the guardian on the 8th May, the lower Court could not have on the 22nd held that it was not to the welfare of the minors that they should live with the guardian.

As a last resort the learned Counsel has argued that if the order of the lower Court is to be set aside the proper procedure would be to remand the case with a view to allow the respondents to prove that they did not remove the minors but that the minors came back to their mother and Taleh Muhammad of their own accord. After giving due weight to the arguments of the learned Counsel I am of opinion that it is not necessary to remand the case for proof of this allegation. Mr. Muhammad Tufail admits that the minors have been living with the respondents since the 9th

May and are still with them. In order to take action under s. 25 it is immaterial whether the respondents removed the minors forcibly or whether they left the guardian's custody of their own accord. It is competent to the Court to take action in either case. In view of all that has happened it seems to me to be highly improper to allow the minors to remain any longer with *Musammat* Aishan and Taleh Muhammad, who is her paramour (or her second husband as he alleges). Such a course would be contrary to the provisions of the Muhammadan Law and opposed to the express orders of the Court.

For the foregoing reasons I set aside the order of the lower Court and grant the appellant's application under s. 25. The lower Court is directed to order the respondents to surrender the minors to the appellant forthwith. The Deputy Registrar should see that a copy of this order together with the records is sent back to the Senior Subordinate Judge not later than the 4th February. The lower Court should fix a date for the appearance of parties and the production of the minors not later than a week from the date on which a copy of this order is received by it. Any further disobedience of the orders of the Court by the respondents should be dealt with in accordance with law.

Respondents must pay the costs of this appeal.

R. L. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1172 OF 1926.

February 2, 1927.

Present:—Mr. Justice Tek Chand.

HAKAM BEG AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAHIM SHAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1, O. XLII, r. 1—Appeal, second—Decree of lower Appellate Court, necessity of filing.

Order XLII, r. 1, Civil Procedure Code, read with O. XLI, r. 1 makes it imperative that in every second appeal the memorandum of appeal should be accompanied by a copy of the decree of the lower Appellate Court. [p. 811, col. 2]

Second appeal from the decree of the Senior Sub-Judge, Amritsar, dated the 12th January, 1926, reversing that of the Sub-Judge, Fourth Class, Amritsar, dated the 28th August, 1924.

Mr. *Jalal-ud-din*, for the Appellants.

Mr. *Mehr Chand Mahajan*, for the Respondents.

JUDGMENT.—Hakam Beg and Jhanda Beg sons of Bakhshinda Beg and a number of other Mughal proprietors of *Mauza* Khilchian in the Amritsar District instituted a suit against Rahim Shah for possession of a site in the village *abadi* which the latter had purchased from one Nathu Shah. The suit was decreed by the Subordinate Judge, Fourth Class, Amritsar. Rahim Shah, defendant preferred an appeal to the Senior Sub Judge, who by his order, dated the 22nd December, 1924, accepted Rahim Shah's appeal and dismissed the plaintiffs' suit. Against this judgment and decree of the Senior Sub Judge, a second appeal was preferred to this Court by Hakam Beg and Jhanda Beg two of the plaintiff proprietors. This appeal came up for hearing before Jai Lal, J., on the 13th July, 1925. Counsel on both sides complained that the learned Senior Sub-Judge in his appellate order had relied on evidence which was not on the record and it was agreed that it was not possible to come to any definite conclusion on the existing materials. The case was accordingly remanded to the Senior Sub-Judge with directions to restore the appeal on its original number and to dispose of it in accordance with law. He was further directed to place on the record copies or extracts from such land revenue records as the parties wanted to produce and his attention was drawn *inter alia* to a certain number of points which required determination. The Court-fee on the memorandum of appeal was refunded to the appellants and it was directed that other costs would abide the result. On remand, the defendants' appeal to the Senior Sub-Judge was restored on its original number. The parties were allowed to produce fresh documentary evidence, arguments were heard and the defendants' appeal was accepted with costs throughout on the 12th January, 1926. Against this decree Hakam Beg and Jhanda Beg plaintiffs-appellants preferred a second appeal to this Court through Mr. Jalal-ud-Din Advocate. The memorandum of appeal was not accompanied by a copy of the appellate decree of the Senior Sub-Judge, dated the 12th January, 1926. To the memorandum of appeal was

appended a note by the learned Advocate to the following effect: the above appeal was remanded by the Hon'ble Mr. Justice Jai Lal on the 13th July, 1925, please put up C. A. No. 436 of 1925 S. B., therefore, no need of filing the copies of the previous orders.

It is noteworthy that this note did not contain any reasons for not filing a copy of the decree of the Senior Sub-Judge, dated the 12th January, 1926, against which the appeal had been preferred. The office returned the memorandum of appeal to the appellants' Counsel on the 21st April, 1926, with the remark that a copy of the lower Appellate Court's decree should be filed and that the appeal without a copy of the decree could not be considered to have been presented within limitation. On the 22nd April, 1926, Mr. Jalal-ud din re-filed the memorandum of appeal with the following note: "As the lower Appellate Court has maintained its previous order the decree of the same Court is on the previous record to which I made reference in my note dated the 12th April, 1926. Thus there was no need for filing the copy of the decree. But, however, I have asked my client to furnish me with a copy of the decree which will be duly filed no sooner it is received. Time may be granted for the said purpose."

No affidavit was filed along with this note nor was any stamped application asking the Court to extend time under s. 5 of the Limitation Act presented. On the 28th April, 1926, Mr. Jalal-ud-din filed a copy of the decree of the lower Appellate Court. The appeal came up for preliminary hearing before a Motion Bench on the 27th May, 1926, and was admitted for final disposal before Single Bench. It seems that before that Bench no prayer was made for extension of time and certainly no orders condoning the delay were passed.

The appeal having come up for hearing before me to-day, a preliminary objection came from the respondents that the appeal was time-barred and ought to be dismissed as such. Mr. Jalal-ud-din for the appellants has filed to-day a copy of an affidavit by Hakam Beg *Lambardar* one of the appellants which was attested before a Magistrate of the Third Class at Amritsar on the 7th June, 1926, but which had not been filed in this Court until after the preliminary objection had been raised by the respondents to-day.

As has been noted above the judgment and decree of the lower Appellate Court against which the present second appeal has been preferred are dated the 12th January, 1926. The copy of the judgment of the lower Appellate Court was applied for on the 3rd March, 1926, and delivered to the appellants on the 8th March, 1926. Thus the appellant was entitled to six days in addition to the statutory 90 days, *i. e.*, he could prefer the appeal within 96 days from the date of the decree appealed against. Thus the last date for preferring the appeal was 18th April, 1926. The copy of the lower Appellate Court's decree having been filed in this Court on the 28th April, 1926, the appeal must be considered to have been presented on that date. It is, therefore, ten days out of time.

Mr. Jalal-ud-din has not sought to support the position that he had taken in his note dated the 12th of April, 1926, namely, that as the decree of the lower Appellate Court now appealed against re affirmed that Court's previous decree it was not legally necessary for him to file a copy of the decree dated the 12th January, 1926. It is obvious that Jai Lal, J., remanded the case under O. XLI, r. 23. The previous decree of the Senior Sub-Judge had been vacated and he was directed to re-hear the appeal and to dispose of it according to law. Under the circumstances, the contention would be untenable that a copy of the decree dated the 22nd December, 1924, which was on the record of Civil Appeal No. 436 of 1925 could be considered sufficient accompaniment for the purposes of the present appeal.

Mr. Jalal-ud-Din has, however, put forward a new contention that though under O. XLI, r. 1 it is necessary that every appeal preferred shall be accompanied by a copy of the decree appealed from, this rule applied only to first appeal against original decrees and that there is no rule of law which required the presentation of a copy of the decree of the lower Appellate Court with the memorandum of second appeal. Mr. Jalal-ud Din argues that though the practice of this Court and of the Chief Court has invariably been to insist upon a copy of the lower Appellate Court's decree being filed with the memorandum of a second appeal yet, he argues, that this is merely a rule of practice and not

a rule of law. This contention ignores the provisions of O XLII, r. 1 which specifically lays down that the rules of O. XLI, shall apply, so far as may be, to appeals from appellate decrees. I am, therefore, of opinion that the contention of Mr. Jalal-ud-Din on this point has no force and must be overruled.

It is necessary to see whether any sufficient cause has been made out for not complying with the provisions of O. XLI, r. 1. Mr. Jalal-ud-Din admits that the practice of this Court has invariably been to insist upon copies of the decree appealed against being filed with the memorandum of appeal. Indeed the affidavit which Mr. Jalal-ud-Din has presented to-day and which is, as already noted, deposed to by Hakam Beg one of the appellants states in para. 3 that when the deponent came to his Advocate at Lahore to prefer the appeal the Advocate told him that a copy of decree appealed against was necessary, that he intended to apply for a copy but that as soon as he returned to his village he got an attack of fever rhenal colic and could not apply for the copy in time. From this affidavit it is clear that Mr. Jalal ud-Din had rightly advised his client before filing the memorandum of appeal on the 12th April, 1926, that a copy of the decree was essential. If the appellants had taken proper steps to follow the advice which had been given to them by their learned Counsel and obtained a copy of the appeal could have been properly presented before the expiry of the period of limitation on the 18th April, 1926. The appellant Hakam Beg, however, instead of going to Amritsar and applying for a copy, seems to have gone to his village and taken no steps to comply with the directions given to him by his Counsel. The allegation as to his alleged illness is not supported by any medical certificate and is very inconvincing, and cannot be accepted, especially in view of the fact that the affidavit sworn to on the 6th June. 1926, was not presented until to-day. Moreover, there is no explanation offered either in this affidavit or orally by the learned Counsel as to the inaction of the other appellant Jhanda Beg. Under the circumstances I must hold that no sufficient cause has been made out for condoning the delay in not presenting a copy of the lower Appellate Court's decree with the memorandum of appeal. It is not necessary to refer to the authorities cited by the respondents' Counsel that it is essential that a memorandum of appeal must be accompanied by a copy of the decree appealed against. Indeed the provisions of O. XLI, r. 1 are imperative on this point. The appeal is, therefore, barred by time and is dismissed with costs.

R. L. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 584 OF 1925.

January 18, 1927.

Present:—Mr. Hallifax, A. J. C.

Thakur MANMOHANSINGH—DEFENDANT—APPELLANT

versus

Thakur BISHALSINGH—PLAINTIFF—RESPONDENT.

*C. P. Land Revenue Act (II of 1917), s. 156—Suit for village profits—Set-off claimed by co-sharer—Agreement, whether necessary—Permission of Court—*Sadar Lambardar, *remuneration of.*

Under s. 156 of the C. P. Land Revenue Act no agreement is necessary in order to entitle a co-sharer to claim a set-off in a suit for village profits although it cannot be claimed without the permission of the trial Court [p. 813, col. 1.]

A *Sadar Lambardar* is not entitled to any remuneration. [*ibid.*]

Anandrao v. *Daulat* (1), followed.

Appeal against the decree of the Additional District Judge, Bilaspur, dated the 16th September, 1926, in Civil Appeal No. 52 of 1925.

Mr. *G. R. Deo*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The parties are co-sharers in four villages, in all of which the plaintiff is *Lambardar* or *Sadar Lambardar* and he sued for the recovery of sums paid by him for the defendant as land-revenue for one of the villages. The defendant alleged that there was an express agreement that from the money due by him for this village should be deducted the money due to him for the others, and if he and the plaintiff are still sane, there can be little doubt that there was such an agreement. In the lower Appellate Court, however, it was held that the agreement was not proved, and the learned Judge went on to say that "in the absence of an agreement s. 156 (of the Land Revenue Act) forbids any claim by way of set-off."

The section mentioned says nothing about any agreement; it forbids a set-off in the absence of the permission of the Court, a permission which could not possibly be refused in this case in respect of proper items in any of the four villages. As to the village of Akaltara, for which the original claim is made, a sum of Rs. 82-8 has been allowed as *Lambardari haqq*. But the plaintiff is *Sadar Lambardar* of that village and, as was explained in *Anandrao* v. *Daulat* (1) a *Sadar Lambardar* is not entitled to any such payment. It is also admitted by the defendant-appellant that he is bound to pay the Rs. 8-8 disallowed, which the plaintiff had to pay as the costs of executing a warrant for the recovery of the land revenue.

The first sum which the defendant proposes to set-off is the difference in the rents of the occupancy holding of each in the other's *patti* in Akaltara The difference is Rs. 47-4 for each year. The defendant's claim for the first *kist* (twelve annas) of the year 1920 21 was barred by time when this suit was filed, but that for the second *kist* of that year and for the whole of the rent for the two following years was not. On this account, therefore, he is entitled to a credit of Rs. 106-5.

In the villages of Khond and Dhorla the parties are superior proprietors, and the plaintiff as *Lambardar* recovered Rs. 120 a year as *malikana* for the two villages. Of this he has to pay Rs. 60 a year or Rs. 180 for the three years to the defendant.

The last item claimed by the defendant is half of the costs of a partition of Dalha which was made by a Revenue Officer, as he actually paid them all. These he alleged to amount to Rs. 397-8, but they were found in the first Court to amount to Rs. 315 only. The finding is based on the mistaken idea that the sum stated by the Revenue Officer before the proceedings began, as his estimate of the probable cost of making the partition, was the sum allowed as costs in his final order. The defendant has, however, agreed to accept Rs. 315 as the actual costs of the proceedings, and he is, therefore, entitled on this account to Rs. 157-8.

In respect of proper items the plaintiff must, of course, be given the same permission as that given to the defendant. He claims in the first place a sum of Rs. 3 a year as his *lambardari haqq* for the two villages of Khond and Dhorla, where he is *Lambardar* and not *Sadar Lambardar*. This credit of Rs. 9 to the plaintiff for the three years is accepted by the defendant. The defendant also admits that the plaintiff paid a sum of Rs. 51 as cesses for the village of Dalha during the three years, of which he has to pay half, that is Rs. 25-8.

All these items are undoubtedly such that permission ought to be given to take them into account in this suit. The plaintiff has asked for the same permission in respect of three more sums. It is alleged that in Dalha in 1921-22 three thousand trees worth Rs. 1,000 were cut clandestinely and confiscated by the plaintiff but the defendant took possession of them and sold them, and also that the defendant has been all along realising grazing dues amounting to not less than Rs. 200 a year, in defiance of the authority of the *Lambardar*. In regard to Akaltara it is alleged that at the partition made in 1914 the demarcation of the *abadi* was wrong and gave the defendant certain plots that really belonged to the plaintiff; it took till 1920 to set the matter right and during that time the defendant realised Rs. 546 as *nazarana* for some of those plots.

These three claims only require stating to show that permission ought not to be given to set them off in this suit. The result of the account then is that the amount decreed by the Courts below must be reduced by Rs. 483-5-0 that is to Rs. 1,147-12 9. The plaintiff will pay one quarter of the total costs of both parties in the first Court, and a half of those in each Appellate Court, and the defendant will pay the rest. It is not necessary to fix any Pleader's fee for this Court.

G. R. D. *Appeal allowed in part.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2299 OF 1926.
January 24, 1927.

Present:—Mr. Justice Dalip Singh.

KIRPA RAM—PLAINTIFF—APPELLANT

versus

THE NOTIFIED AREA COMMITTEE, PINDI BHATTIAN THROUGH ITS PRESIDENT—DEFENDANT—RESPONDENT.

Punjab Municipal Act (III of 1911), ss. 189, 193—Sanction to build—Revocation of sanction, legality of

(1) 92 Ind. Cas. 909; 22 N. L. R. 37; A. I. R. 1926 Nag. 274.

—*Easement—Right to drain includes right to clean and supervise it.*

When once a Municipal Committee has given sanction to build, the Committee cannot revoke that sanction. [p. 815, col. 1.]

Ibrahim v. *Municipal Committee of Lahore* (1), *Vithal Dhonddev Raikar* v. *Alibag Municipality* (2), followed.

The right to supervise the drain and to have a right of way to the drain is accessory to the right to a drain and the owner of the dominant tenement is, therefore, entitled to demand reasonable convenience for cleaning and supervising the drain. [p. 815, col. 2.]

Ali Mardan v. *Municipal Committee of Kohat* (4), followed.

Second appeal from the decree of the District Judge, Gujranwala, dated the 11th May, 1926, affirming that of the Sub-Judge, Third Class, Hafizabad, District Gujranwala, dated the 7th July, 1925.

Lala *Badri Das*, R. B., for the Appellant.

Mr. *Fakir Chand*, for the Respondent.

JUDGMENT.—The plaintiff-appellant applied to the Notified Area Committee, Pindi Bhattian, to build on his own property according to a plan. The Committee gave the necessary permission on 30th December, 1922, but imposed a condition that the public drain which had been passing through the property proposed to be built on should not be blocked and should not be roofed over by the plaintiff and that a space of 3 feet wide around the drain should be left vacant for the sweeper to come and clean the drain. The plaintiff brought the present suit for a perpetual injunction restraining the Committee from preventing the plaintiff from blocking the drain and generally from building on his own property and for damages for the trouble caused to him.

The facts found are that the drain passes through the property of the plaintiff having collected the drainage water of the public street and that it has been there for a long time and, therefore, the Committee have a right of easement to pass their water through this drain, and that, therefore, the plaintiff is debarred from blocking this drain. It was also held by the trial Court that the Committee were entitled to impose the condition regarding the roofing of the drain and keeping of space for cleaning it under s. 189 of the Punjab Municipal Act, and that the action of the Committee was neither *ultra vires* nor in bad faith. On the question of damages it was held that no evidence to prove any damages had been given and therefore, the plaintiff was not entitled to damages. The plaintiff's suit was dismissed.

On appeal the learned District Judge upheld the decision.

In second appeal it is contended that sanction had been granted by the Committee by resolution, dated 30th May, 1922, and that, therefore, the Committee could not revoke that sanction. *Ibrahim* v. *Municipal Committee of Lahore* (1) and *Vithal Dhonddev Raikar* v. *Alibag Municipality* (2) are cited as authorities for this proposition. In reply Counsel for the respondent contends that the question of revocation of sanction was never previously raised and should not be allowed to be raised now. I find, however, that an issue was framed in the trial Court. No. 4. "Whether the defendant gave permission to the defendant, (plaintiff evidently) to build and if so when and on what conditions"? Upon this issue the trial Court interpreted the resolution of 30th May, 1922, as not giving the permission at all and it further held that even if the sanction was given, it was amended by the subsequent resolution, namely, that of 30th December, 1922. It is thus clear that the point was raised before the trial Court. In the appeal before the District Judge ground No. 3 was taken expressly raising this point. The learned District Judge also interpreted the resolution of the 30th May, 1922, as not giving any sanction. The resolution is worded as follows :—

"*Sael ko Committee hasb mansha member sahiban jinhon ne moqia mulahza farmakar report ki hai tamir makan aur darwaza rakhne aur nali chhatne ki ajazat di hai. Report kuninda member sahiban ne apni apni report men nali par chhat dalne aur us ki safai wa pani nikalne ka mukhtilif taur per zikr kia hai. Kuchh arsa guzra keh mohalladaran ke wawela karne par janab Mr. Estcourt Sahib Bahadur ne is moqia ka mulahza farmaya tha. Unka hukam purani misil ke sath shamil hai. Meri zati rai chhat dalne ke bare men Sahib Bahadur ke hukam ke barkhilaf nihin hosakti. Is liye misil bame hukam Sahib Bahadur barai istaswab Sahib Bahadur Deputy Commissioner Bahadur mursal howe.*"

This resolution is signed by various persons presumably by the members of the Notified Area Committee. I find it impos-

(1) 52 P. R. 1900; P. L. R. 1900, p. 385.
(2) 47 Ind. Cas. 145; 42 B. 629; 20 Bom. L. R. 756.

sible to interpret this resolution in any other way than to hold that it states that the Committee have given sanction to the plaintiff to build his home and roof drain, but as the view of the President is contrary to the view of the others the matter is referred to the Deputy Commissioner. If such sanction is once given it is clear law that it cannot be revoked.

Counsel for the respondent contends that this resolution does not give sanction and that the point was not raised in the Court below. But as I have already shown that point was raised and I am unable to agree with the Counsel for the respondent that this resolution can be interpreted to mean that no sanction was given.

The next point raised by Counsel for the appellant is that there was no easement vested in the Committee because an easement vests in a dominant tenement and the Committee has no right to discharge water in the drain in the plaintiff's property. This point has no force and was not seriously pressed by Counsel for the plaintiff. The dominant tenement is the public street, whose water passes through a drain in it and finally discharges on to the plaintiff's lane. I, therefore, hold that the plaintiff cannot block the drain.

The next point is that the learned District Judge has not disposed of the question as to roofing or the drain and 3 feet wide space along side the drain. Counsel relies on *Bala* v. *Maharu* (3). He also contends that the Committee cannot enforce its juristic rights, if any, by refusing sanction to build and he cited *Ali Mardan* v. *Municipal Committee of Kohat* (4) and *Khagendra Nath Mitra* v. *Bhupendra Narayan Dutt* (5). Counsel for the respondent relies on s. 132, s. 189, s. 190 and on *Municipal Committee, Delhi* v. *Abdul Hassan Khan* (6). In *Municipal Committee, Delhi* v. *Abdul Hassan Khan* (6) the bye-laws were on the record so far as the judgment shows. Section 189 refers to bye-laws. No bye-law is either on the record or has been shown to me by Counsel for the respondent. He contends that the bye-laws should be taken to be the ordinary bye-laws. I do not know what he means by this contention. I pointed out to him that perhaps s. 193 would apply. Counsel for the respondent accepts this and has also contended that s. 193 would apply. I consider that s. 193 (1) does apply but in any event as held in *Ali Mardan* v. *Municipal Committee of Kohat* (4) the right to supervise the drain and to have a right of way to the drain is accessory to the right to the drain and the Committee were, therefore, entitled to demand reasonable convenience for cleaning and supervising the drain. I cannot consider that 3 feet wide space is unreasonable for this purpose. I, therefore, hold that the plaintiff is not entitled to block the drain and that he is entitled to roof the drain because the Committee once gave him sanction to roof the drain and cannot revoke it, and I also hold that he must roof the drain in such a fashion as must give passage to the sweeper of the Committee to enter upon and clean the drain. He, therefore, must leave 3 feet wide space to permit the entry of the sweeper and must not roof the drain in such a fashion as to prevent the entry. As the plaintiff has only partially succeeded in his appeal I leave the parties to bear their costs throughout.

A. N. A. *Appeal allowed in part.*

(3) 20 B. 788; 10 Ind. Dec. (N. S.) 1096.
(4) 45 P. R. 1905; 40 P. L. R. 1905.
(5) 8 Ind. Cas. 530; 38 C. 296; 15 C. W. N. 316; 11 Cr. L. J. 665.
(6) 71 Ind. Cas. 775; A. I. R. 1924 Lah. 393.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2399 OF 1926.
January 27, 1927.

Present:—Mr. Justice Addison.

FIRM BHAGWAN DAS-KANHAYA LAL OF HARIPUR HAZARA, THROUGH KANHAYA LAL, AGENT OF THE FIRM—DEFENDANT—APPELLANT

versus

FIRM NAND SINGH-HARI SINGH SITUATE AT LYALLPUR, THROUGH HARI SINGH, SON OF NAND SINGH, ARORA OF LYALLPUR—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 85—Open account, meaning of.

An open account is one which is continuous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions. Where balance of a particular account is ascertained but deliberately is not carried over and a new account is started, the mere adding later on at the end of the new dealings the old balance would not make it an open account again. [p. 816, col. 2.]

Imrat Lal v. *Lal Chand* (1), distinguished.

Second appeal from the order of the Additional District Judge, Lyallpur, dated

the 26th June, 1926, reversing that of the Sub-Judge, Fourth Class, Lyallpur, dated the 12th November, 1924.

Mr. *Jalal-ud Din*, for the Appellant.

Mr. *Daulat Ram*, for the Respondent.

JUDGMENT.—The plaintiff firm carries on a commission agency business at Lyallpur. The defendant firm, which carries on business in Hazara District, used to deal with the plaintiff firm from time to time. In *Sambat* 1975 there were certain dealings which ended in a balance in favour of the defendant firm. That account was closed and the balance at the credit of the defendant firm was brought forward at the beginning of the new account which started in *Magh Sambat* 1975. The account in connection with the second dealings between the parties again closed with a balance due to the defendant and a third account was started shortly afterwards with the balance in favour of the defendant carried over into the new third account. This third account was closed on the 24th *Phagan Sambat* 1976, corresponding to the 7th March, 1920, with a balance of Rs. 1,140 including interest against the defendant. Dealings did not again commence between the parties till the 21st August, 1920, when a new account was opened in which the debit balance against the defendant was not put down. When the dealings in connection with this fourth account ended a considerable time later, the plaintiff added at the end of this fourth account the debit balance of Rs. 1,140 from the last account. This was some two years after the third account had been closed.

The plaintiff firm then sued the defendant firm on the 27th February, 1924, for Rs. 823-14-6 due to them on all the dealings. The trial Court dismissed the suit, holding that the item of Rs. 1,140 which was the balance at the closing of the account on the 7th March, 1920, was barred by time under Art. 85 of the First Schedule to the Limitation Act. It, therefore, dismissed the suit as nothing certainly was due if that item was excluded. The other issues were not decided. On appeal the learned District Judge held that this item was within time under the same Article and remanded the suit for decision on the remaining issues. Against his decision this second appeal has been preferred.

It is quite clear that the plaintiff firm treated the third account, ending with the balance due to it of Rs. 1,140, as finally closed. It did not carry forward that item to the next account, which started some months later, though at the end of the next account, probably because this item was in danger of becoming time-barred, Rs. 1,140 were added. Further, Ex. D-3, dated the 27th October, 1920, is a postcard sent by the plaintiff firm to the defendant firm. This was after the last set of dealings had commenced. In this postcard the plaintiff firm stated that they had formerly given the defendant firm a notice and has previously sent the account as well and still the defendant firm was not paying. Therefore, the defendant firm would have to pay further interest on the former account at 12 per cent. per annum from the date of the closing of that account. All these facts conclusively prove that the plaintiff firm treated the account as finally closed on the 7th March, 1920, and started a new account with the defendant firm on the 21st August, 1920, and treated that new account as entirely separate from the previous dealings. That being the case, *Imrat Lal* v. *Lal Chand* (1) is not applicable. There the balance was ascertained and carried over. Here it was ascertained but deliberately not carried over and even after the new account was started, the plaintiff firm still insisted on payment of the old account as a separate account. In *Firm Rup Chand-Jivan Singh* v. *Firm Poho Mal Nathu Mal* (2) it was said that an open account was one which was continous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions. In the present case the account was not continuous but was interrupted and closed. The mere adding later on, in order to avoid limitation, at the end of the new dealings the old balance would not make it an open account again as it was deliberately interrputed and closed. In my opinion, therefore, this item of Rs. 1,140 was barred by limitation under Art. 85 of the First Schedule to the Indian Limitation Act as the suit was not brought for more than three years after it became due. I, therefore, accept this appeal and setting aside the order of the District Judge dismiss the suit with costs throughout.

R. L. *Appeal accepted.*

(1) 7 Ind. Cas. 715; 75 P. R. 1910; 99 P. W. R. 1910; 124 P. L. R. 1910.

(2) 73 Ind. Cas. 916; A. I. R. 1923 Lah. 347.

OUDH CHIEF COURT.

CRIMINAL APPEAL No 40 OF 1927.

January 21, 1927.

Present:—Mr. Justice King.

WAJID ALI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 143, 147—Unlawful assembly—Members, when guilty of rioting—Use of force by some members, necessity of—Identity of assembly—Question of fact—Mere common object, whether sufficient.

Where it is found that the accused were members of an unlawful assembly having a common object and made an assault or preparation to use force or violence, in the absence of proof that some members of the unlawful assembly which they joined used force or violence in prosecution of their common object, they cannot be convicted of rioting under s. 147 of the Indian Penal Code, but can be convicted only of being members of an unlawful assembly under s. 143 of the Code. [p. 819, col. 1.]

Where members of two assemblies do not mingle together at any time or place, the mere fact that they have a common intention will not make them one assembly. The question whether two groups of men do or do not form one "assembly" is a question of fact in each case. [*ibid*]

Where two mobs start from different localities and operate independently and never come close to each other, they cannot be considered to be members of one assembly, though their object be the same. [*ibid.*]

Criminal appeal against an order of the Sessions Judge, Lucknow, dated the 7th January, 1927.

Mr. *Asghar Husain*, for the Appellants.

Messrs. *R. F. Bahadurji* and *G. H. Thomas*, Government Advocate, for the Opposite Party.

JUDGMENT.—The five appellants, Wajid Ali, Abid Ali, Hyder Ali, Baqar Ali and Kallu, have been convicted by the learned Sessions Judge of Lucknow under s. 147, Indian Penal Code, and sentenced to one year's rigorous imprisonment each.

Sixteen persons, including the five appellants, were on their trial before the Court of Session and the charges against them were under s. 307 read with s. 149, s. 326 read with s. 149 and s. 147, Indian Penal Code. Eleven persons were acquitted altogether, while the five appellants were convicted under s. 147, Indian Penal Code, only, being acquitted of the other offences.

The evidence shows that the feelings between the Muhammadans and Hindus in Lucknow had been very strained for some time past, and the District Magistrate had passed an order under s. 144, Criminal Procedure Code, on the 31st of May, 1926, prohibiting the taking out of any procession in the streets without permission and prohibiting the carrying of *lathis* or *dandas*, and prohibiting the assembling of five or more persons after 8 P. M., without permission.

On the 1st of June, 1926, a further incident occurred which greatly inflamed the hostility between the two communities. A corpse of a Muhammadan was found lying in a street, and it was sent by the Police for medical examination. The corpse bore no mark of external injury and the medical report was that the cause of death was unknown. The finding of this corpse, however, was made use of by certain Muhammadan agitators to rouse resentment against the Hindus, as they made out that this Muhammadan had been killed by Hindus and a proclamation was made in many quarters of Lucknow on the 1st of June, especially in Chikmandi (which is close to the scene of the riot with which we are concerned) stating that this Muhammadan was martyred by the Hindus, and that all Muhammadans should join in the funeral. Accordingly, Muhammadans to the number of some hundreds did join in the funeral procession, to do honour to the so-called "martyr".

On the following day, that is on the 2nd of June, the evidence shows that bodies of Muhammadans collected in various localities in Lucknow city and beat or molested Hindus. One scene of violence was in Maulviganj, where two Hindus were killed, but we are not immediately concerned with that affair.

In Terhi Bazar also it has been proved to the satisfaction of the Sessions Judge and also to my satisfaction that bands of Muhammadans were parading up and down the roads and threatening the Hindus who lived there. One gang of these Muhammadans, who had assembled at Rasibatan Chauraha, went and attacked the house of Ram Autar. He managed to drive them off by firing a gun, although he only used blank cartridge. This mob from Rasibatan Chauraha were armed with *lathis*, *dandas*, knives, etc., according to the prosecution witnesses, and after they had been repulsed from attacking Ram Autar's house, they happened to come across an unfortunate Hindu named Janki and assaulted him, inflicting one incised wound and one contused wound on the head, rendering him senseless. Ram Autar fired another blank

shot in order to drive off the Muhammadans who were attacking Janki. In the meantime another mob of Muhammadans, who had assembled at the Terhi Bazar Chaurah, were seen coming to attack Ram Autar's house from that side. When they came close Ram Autar fired again with blank cartridge, whereupon this mob dispersed or at least did not press their attack. Then Ram Autar and his friends managed to rescue Janki and had him carried up on to the *chabutra* of the house and attended to his injuries.

At this stage the Police appeared upon the scene coming from the direction of the house of Rajjan Lal, shown on the map. The evidence of the Deputy Superintendent of Police is very important, as he at least has been entirely relied upon by the learned Judge who has discredited most of the other prosecution witnesses. He, and the Police accompanying him, met a crowd of Muhammadans armed with *lathis* and *dandas*. They were mostly in the by-lanes and also there was a crowd on the Rasibatan Chauraha. On going past Ram Autar's house, the Deputy Superintendent noticed a crowd of Muhammadans in front, who were armed and were shouting. This crowd refused to disperse, and the Deputy Superintendent issued orders for their arrest. This resulted in the arrest of the five accused, who are the appellants before me. Two of them had *dandas* in their hands, the other three were empty handed.

I consider it to be clearly proved that the five appellants were arrested among a mob of about 25 or 30 Muhammadans who were in the street coming towards Ram Autar's house from the direction of Terhi Bazar Chauraha and that several at least of this mob were armed with *lathis* and *dandas*. They had every appearance of intending to make a second attack on Ram Autar's house, and I see no reason to suppose that the appellants, as their learned Counsel tries to make out, were merely harmless sightseers, who happened to be in the road at that time. Ram Autar deposes that he recognised Abid Ali, Wajid Ali and Baqar Ali among the mob who actually came to attack his house. I see no reason to doubt the truth of his evidence on this point, since those persons named, together with the other two appellants, were actually arrested in the street just outside his house within a few minutes after the alleged attack. The mere fact that the accused refused to disperse, when ordered to do so by the Police, does, I think, indicate that they were not mere sightseers, but they were persistent in their intention of combining to attack or molest Hindus.

I think the learned Sessions Judge has been unnecessarily sceptical about the story that Janki was beaten by a Muhammadan mob close to Ram Autar's house. The medical evidence shows his injuries. Moreover, he was actually found by the Deputy Superintendent of Police lying injured on Ram Autar's *chabutra* within a very few minutes after the time when he must have been injured. These facts strongly support the statement of Janki himself and of Ram Autar, and I see no reason to doubt that Janki was injured at the place and in the manner alleged.

I think it is perfectly clear from the evidence of Jeorakhan Lal, head-constable, supported by the report which he made on the first opportunity at 12-30 that very night, that two of the accused had *dandas* in their hands when arrested. From the comments of the learned Sessions Judge, I understand that he also accepts the statement that two of the accused had *dandas* when arrested, but he is not quite sure that Kallu and Abid Ali were the two persons in whose possession the *dandas* were found. For the purposes of this case it does not really matter very much which of the five appellants were carrying the *dandas*. It is sufficient that some of them at least were armed, and that all of them were in a mob of Muhammadans bent upon attacking Hindus.

There is a difficulty about upholding the conviction of the appellants under s. 147, Indian Penal Code. I am quite satisfied that they were members of an unlawful assembly, the common object of which was to attack Hindus, that is, to cause hurt to Hindus or to cause mischief to Hindus. The difficulty is that there is no clear finding and no evidence that this particular assembly, of which the five appellants were members, actually used any force or violence in the prosecution of their common object. At the very most they chased one or two Hindus who escaped, and they advanced to attack Ram Autar. This amounts to an assault or preparation to use force or violence, but does not amount to the use of force or violence,

The appellants cannot be convicted of rioting unless it is proved that some members of the unlawful assembly which they joined used force or violence in prosecution of their common object. But there is no such proof.

It is true that the *other* mob which had collected at Rasibatan Chauraha and attacked the house of Ram Autar from that direction did use force and violence, because they caused hurt to Janki, not to mention other alleged acts of force or violence. But the difficulty is that that mob cannot, in my opinion, be said to be the *same assembly* as the mob which the appellants had joined. The latter mob came from direction of Terhi Bazar Chauraha towards the house of Ram Autar and never actually reached that house because they were driven back by gun-fire. They never joined the Rasibatan Chauraha mob, which had previously come to attack Ram Autar's house from the opposite direction. So far as I can understand from the evidence these two mobs or assemblies, which started from different points never came within 30 or 40 paces of each other.

Certainly the members of these two assemblies never mingled together at any time or place. Although each of these assemblies had the common intention of attacking Hindus, the mere fact that they had a common intention will not make them one assembly. The question whether two groups of men do or do not form one "assembly" must be a question of fact in each case. In the present case, I am unable to hold that these two mobs, which started from different localities and operated independently and never came within 30 or 40 paces of each other, can be said to be considered to be members of one assembly. Hence the Terhi Bazar Chauraha assembly cannot be held responsible under s. 149 for offences committed by the Rasibatan Chauraha mob, any more than they can be held responsible for offences committed on the same day by the Maulviganj mob.

On this view, therefore, the appellants can only be convicted under s. 143, Indian Penal Code, of being members of an unlawful assembly, since there is no proof that any member of that assembly used any force or violence in the prosecution of its common object.

The maximum punishment under s. 143 is one of six months' imprisonment, or fine or both. In the present case I think the appellants do deserve the maximum sentence of imprisonment, since it was only a chance that they did not come across any Hindus to beat, and that they were driven back by gun-fire from pressing home their attack upon the house of Ram Autar. I am convinced that if they had the opportunity they would have beaten and perhaps killed any Hindu they came across. Other mobs which were similarly out for vengeance upon the Hindus in other localities close by actually did commit murder or grievous hurt upon Hindus. This mob, however, was fortunately dispersed by the Police before they had an opportunity of using force.

It is evident that the appellants may thank their good fortune that the mob which they joined did not have the opportunity of using force otherwise they would have been liable to heavy punishment. As it is, they are only liable to conviction under s 143, Indian Penal Code.

I, therefore, alter the conviction from one under s. 147, Indian Penal Code, to one under s. 143, Indian Penal Code, and alter the sentence from one year's rigorous impoisonment to six months' rigorous imprisonment each.

G. H. *Conviction altered.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1677 OF 1926.
January 28, 1927.
Present:—Mr. Justice Harrison.
MANIGIR—ACCUSED—PETITIONER
versus
EMPEROR—RESPONDENT.

Arms Act (XI of 1878), s. 19 (f)—Recovery of cartridges from house occupied by accused but previously occupied by him and his brother—Offence.

During the investigation of a certain theft case the house of the accused was searched by the Police and as a result of this investigation two cartidges of a rifle were discovered from an earthen pitcher placed in his house. The accused admitted the recovery of cartridges but stated that it was not within his knowledge and that his brother who was an ex-military employee might have placed them in the house which was jointly occupied by the accused and his brother. The Magistrate believed the story of the accused to be true:

Held, that no offence under s. 19 (*f*), Arms Act, had been established.

Case reported by the Sessions Judge, Karnal, with his No. 481-J of 4th November, 1926.

REPORT.—FACTS.—During the investigation of a certain theft case the house of the accused was searched by the Police and as a result of this investigation two cartridges of a rifle were discovered from an earthen pitcher placed in his house. The accused was chalaned under s. 19 (*f*), Act XI of 1878, and was sentenced to a fine of Rs. 20 or to suffer one month's simple imprisonment by Pandit Man Mohan Nath, Magistrate, First Class, Karnal, on the 13th August, 1926.

The accused had filed an application for revision of the above order.

GROUNDS.—The accused admitted the recovery of the cartridges but stated that it was not within his knowledge, and that his brother, who was an ex-military employee may have placed them in the house which was jointly occupied by the accused and his brother. The Magistrate believed this story of the accused to be true. Moreover, the Magistrate in his judgment says that the shape of the cartridges was such that a simple villager as the accused appears to be cannot really know that they were cartridges.

Considering the Magistrate's own finding in the case the accused should not have been convicted and if the Magistrate considered that there was a technical offence a very nominal sentence would have been enough. Under the circumstances the record of the case is submitted to the High Court under s. 438 of the Criminal Procedure Code with a recommendation that the sentence passed on the accused may be quashed or in case it is considered that any offence has been committed the fine be reduced to one rupee.

Malak *Ram Lal Anand*, for the Petitioner.

ORDER.—For the reasons given by the learned Sessions Judge, I set aside the conviction. The fine will be refunded.

R. L. *Conviction set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 107-B OF 1926.

January 31, 1927.

Present:—Mr. Kotval, A. J. C.

BHAGIA AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 162, whether overrides s. 27, Evidence Act (I of 1872)—Interpretation of Statutes—Marginal notes, value of—Implied repeal.

Section 162 of the Criminal Procedure Code overrides the provisions of s. 27 of the Evidence Act.

Side notes to sections are no real guides to the intention of the Legislature, the safest guide to it being the language of the section itself.

Abrogation of a section by implication is permissible under law.

Appeal from a judgment of the Additional Sessions Judge, Akola, in Sessions Trial No. 30 of 1926.

JUDGMENT.—This judgment governs also Criminal Appeals No. 108-B to 111-B of 1926, by Shekhji, Bahadur Khan, Govinda and Tukaram. I do not agree with the learned Sessions Judge's opinion that s. 162, Criminal Procedure Code, does not override the provisions of s. 27, Evidence Act. The Sessions Judge interprets the words "any person" in s. 162 as "any person other than the accused." His reasoning is this. Sections 160 and 161, Criminal Procedure Code, refer to witnesses as side notes to them indicate; s. 162 which immediately follows these must, therefore, have been intended to refer by association to witnesses. Side notes are no real guide to the intention of the Legislature. The safest guide to it is the language of the section and it is difficult to see how it could be plainer. Abrogation by implication is by no means uncommon and that such abrogation of s. 27 of the Evidence Act results is no reason for not interpreting the section according to its plain language. Nor is the provision contained in s. 27 of the Evidence Act of such paramount importance that there should be great hesitation in accepting an implied abrogation of it. It is to be further noted that s. 162, Criminal Procedure Code, by cl. (2) expressly saves s. 32 (1) of the Evidence Act. The implication of the abrogation of s. 27, Evidence Act, is so obvious that we should expect that section also to be expressly saved.

Apart, however, from the statements admissible under s. 27, Evidence Act, there is sufficient evidence to support the convictions of the appellants. Bhagaji admittedly produced a *lota*, article B-1, containing 15 *Chandori* and 62 *Buchadawala* coins from a cowdung heap wherein they were concealed; also the *Charvi* Article C, Govinda produced 7 *Chandori* coins, 33 *Buchadawala* and 2 rupees of 1862 which were buried in his field. Tukaram who is Govinda's brother is proved to have

possessed 70 *Buchadawala* coins which he gave to a *Sonar* Kashiram (P. W. No. 9) to make into ornaments which were before the Court. He produced 8 *Chandori* coins from a roof.

Shekhji produced a *lota* containing 15 *Chandori*, and 38 *Buchadawala* coins which were buried in his verandah. Bahadur Khan is proved to have been in possession of 14 *Chandori* and 22 *Buchadawala* coins which he gave to Umarkhan (P. W. No. 8) in payment of a debt.

None of the appellants have satisfactorily accounted for their possession of these coins and it is sufficiently proved that they came out of Venkatrao's store which was buried in his house with the *Charvi*, article C, and stolen.

All the appeals are dismissed.

G. R. D. *Appeals dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1051 OF 1926.

January 17, 1927.

Present:—Mr. Justice Harrison and Mr. Justice Agha Haidar.

NAWAB AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 164, 364—Confession recorded in language not used by accused, effect of—Prejudice to accused, what is—Failure to record questions, effect of.

The mere absence of the questions put by the Magistrate to the accused on the record, if the prisoner is not prejudiced in any way by the omission, does not make a confession illegal. [p. 822, col. 1.]

Empress v. *Sagambur* (1), followed.

Farid v. *Emperor* (3), distinguished.

Though a Magistrate should record the confession in the language used by the accused, omission to do so may be overlooked if it has not injured the accused in his defence. Where it is clear from the statement of the Magistrate that though he recorded the statement in English he explained the various portions of the confession and put them to the accused before signing it, it cannot be said that the accused has been prejudiced in any way. [*ibid.*]

Ratti Ram v. *Queem-Empress* (2), followed.

Appeal from an order of the Sessions Judge, Sialkot, dated the 1st September 1926.

Lala *Pindi Das Sabherwal*, D. B. and Mr. *Anant Ram Khosla*, for the Appellants.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

JUDGMENT.—Seven men were committed to Sessions on a charge of murdering Phagan Singh on the 25th March, 1926. Of these five were acquitted, one, Nawab, was convicted of having been one of the murderers and was sentenced to transportation for life while Sundar Singh was acquitted on a charge of murder but convicted under s. 201 and sentenced to seven years' imprisonment.

The main evidence against Nawab consists of his own confession which was recorded by Risaldar Muhammad Sarwar Khan on the 29th of March 1926. Except for this confession the evidence is purely circumstantial. It is proved that Phagan Singh was murdered at the time stated in the charge and his corpse was subsequently recovered from Kala Dum near Wazirabad and that both the accused were undoubtedly seen near the place where he was murdered about this time.

The motive for the murder consisting of previous enmity is established and the points to be considered in this Court, as they were considered by the learned Sessions Judge, are stated at page 13 of his judgment:

"Whether the retracted confession by Nawab is admissible in evidence, of course, against him only; whether the pointing out by Sundar Singh of the place where the dead body was drowned and the recovery of the dead body in pursuance thereof is legally sufficient to connect Sundar Singh with the murder and if not sufficient together with the circumstantial evidence to establish his guilt as a murderer, is it sufficient to justify his conviction under s. 201, Indian Penal Code.

"Whether the evidence of the tracker is admissible and what is the value of the circumstantial evidence."

So far as Nawab's appeal is concerned it is quite clear that without his confession there is not sufficient evidence to warrant his conviction. If the confession be admissible against him, there is ample corroboration and his guilt is established. There are many peculiar features in his confession and indeed many irregularities were committed, and the question is whether in spite of those irregularities the confession can be taken into account. The Magistrate arrived on the 29th at Wazirabad. He questioned the accused and he went with him to the scene of murder the Police following at some distance. The handcuffs of the accused having been removed it is obvious that

natural precautions had to be taken and that the Magistrate and the accused had to be watched. The accused pointed out various places as scenes of various stages in the commission of the crime and made a statement chiefly consisting of answers to questions put and the Magistrate recorded the questions and answers at the time. When the statement had been concluded the Magistrate returned to Sialkot and came back the following day. He transcribed the present record of the confession from his notes, leaving out the actual questions. He then read it over and explained it to the accused. The whole thing was done in English. As laid down in s. 364, Criminal Procedure Code, the questions and answers should be recorded, the language should be that used by the accused and the record should be prepared at once and the precautions detailed in s. 164, Criminal Procedure Code, must be observed. So far, as the failure to record the questions is concerned, it has been laid down in *Empress* v. *Sagambur* (1), that if the prisoner is not prejudiced in any way by the omission, the absence of the questions does not make the confession inadmissible. We find, therefore, that this defect is not vital. As regards the taking down of the record in a language other than that in which it was made we have the authority of the Punjab Chief Court in *Ratti Ram* v. *Queen-Empress* (2), that this defect may be overlooked if it has not injured the accused in his defence. We are of opinion that he has not been injured in any way, for it is clear from the Magistrate's statement that he explained the various portions of the confession and put them to the accused before signing it. Counsel for the accused has laid great stress on the absence of the questions put and answers given under s. 164 and he stated that no such questions were put. It is true that they were not recorded. Counsel urges that *Farid* v. *Emperor* (3) lays down the law on the subject and that in accordance with that authority this confession is inadmissible. The great difference between this case and *Farid* v. *Emperor* (1), is that here the questions were put and the Magistrate has told us so and if the Magistrate's statement on the subject be read as a whole it is quite clear that he questioned the accused more than once and that it was from the answers received to his questions that he satisfied himself, as he did, that the confession was voluntary and although it would have been better had the record been fuller, the requirements of s. 164 have been fulfilled.

The only point remaining is whether the confession is hopelessly vitiated by the fact that the original notes were destroyed and that we have nothing but a transcript made the following day. We are satisfied that the accused has been in no way prejudiced, that the transcript is correct that it was explained portion by portion to the accused and, in our opinion, all the irregularities which have been committed may be overlooked and the confession may be taken into consideration against the accused. This confession together with the circumstantial evidence which corroborates it amply proves that he was one of the murderers.

So far as Sundar Singh is concerned it is contended that the mere discovery of the corpse by him which corpse was fully identified as being that of Phagan Singh, does not prove his guilt under s. 201, Indian Penal Code. It is, however, not a question of mere discovery for there is ample corroboration in the remaining evidence against Sundar Singh which when read with the evidence regarding the discovery establishes his guilt under this section.

We dismiss the appeal of both the appellants and confirm the sentence.

R. L. *Appeal dismissed.*

(1) 12 C. L. R. 120.
(2) 7 P. R. 1899 Cr.
(3) 65 Ind. Cas. 613; 2 Lah. 325; 5 P. W. R. 1922 Cr.; 23 Cr. L. J. 149; 4 U. P. L. R. (Lah.) 33; A. I. R. 1922 Lah. 237.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 645 OF 1926.
January 17, 1927.
Present:—Mr. Justice Dalal.
JAGANNATH—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 435—Revision—Further inquiry—Mere wrong view of facts no ground for further inquiry—Substantial justice.

The fact that the view of the facts taken by the trial Court is questionable is no ground for directing a fresh inquiry to be made under s. 435, Criminal Procedure Code.

Though the judgment of the trial Court be open to criticisms, a Court acting under s. 435 of the

Code should see whether the judgment on the whole is fair and sensible or not.

Chandan v. *Kallu* (1), followed.

Criminal revision from an order of the District Magistrate, Meerut, dated the 6th of September, 1926.

Mr. *S. C. Goyle*, for the Applicant.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.—The applicant Jagannath was discharged of an offence under s. 60 of the Excise Act of being in possession of cocaine by the trial Court of a Magistrate. The District Magistrate took the case up in revision and disagreeing with the estimate of the evidence made by the first Court has directed further enquiry to be made in the applicant's case. Such a reason for a fresh enquiry under s. 435 is not sufficient. This has been held in a large number of rulings of this Court since 1910. In 1910 in the case of *Chandan* v. *Kallu* (1) a learned Judge of this Court laid down that where the nature of the case is such that Courts are liable to take different views of the evidence and of the probabilities, the case is not one which calls for any further enquiry. That opinion was based on the Full Bench ruling of *Queen-Empress* v. *Chotu* (2). There are more recent Single Judge rulings to the same effect of 1920 and 1922, *Bindeshri Dube* v. *Emperor* (3) and *Udai Raj Singh* v. *Emperor* (4). As pointed out by Mr. Justice Griffin in *Kallu's case* (1) that though the judgment of the trial Court may be open to certain criticisms, this Court should see whether the judgment on the whole is fair and sensible or not. The judgment of the trial Court in the present case gives valid reasons for the discharge and in no way can be said to be perverse. The District Magistrate does not suggest that any more evidence is available. All that the District Magistrate has said is that the view of facts taken by the trial Court was questionable. He has not detailed the particular point on which the judgment is open to question. The trial Court had excellent reasons to suspect that the cocaine was planted where it was found and having such suspicion the only course open to it was to discharge the applicant. No further enquiry was, therefore, called for and the order of the District Magistrate of 6th September is hereby set aside.

The bail-bond shall be cancelled.

Order set aside.

A.

(1) 9 Ind. Cas. 274; 8 A. L. J. 45; 12 Cr. L. J. 45.
(2) 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465.
(3) 59 Ind. Cas. 193; 18 A. L. J. 1135; 2 U. P. L. R. (A.) 374; 22 Cr. L. J. 49.
(4) 71 Ind. Cas. 528; 44 A. 691; A. I. R. 1922 All. 29; 24 Cr. L. J. 176.

CALCUTTA HIGH COURT.

CRIMINAL REVISIONS Nos. 864, 1010 AND 1011 OF 1926.

January 4, 1927.

Present:—Mr. Justice Suhrawardy and Mr. Justice Cammiade.

LOKE NATH ROY AND OTHERS—FIRST PARTY—PETITIONERS

versus

BAZLAL GANI PATARI AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Dispute as to immoveable property—Fallow land—Presumption of possession by owner—Occasional acts of user, sufficient evidence of possession—Attachment, legality of.

Possession under s. 145 of the Criminal Procedure Code must be absolute and continuous and not occasional. But by continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes. Continuity of possession should be understood with reference to the object over which it is exercised. [p. 824, col. 2.]

With respect to lands which are fallow and liable to be submerged, possession must be presumed to be with the owner until the contrary is proved. Occasional acts of user of such land by the owner constitute possession for the purposes of s. 145 of the Code. [*ibid*]

Rule against an order of the Deputy Magistrate, First Class, Chandpur, dated the 28th July, 1926.

Mr. *Narendra Kumar Basu* and Babu *Bhagirath Chandra Das*, for the Petitioners.

Babus *Jagindra Mohan Ghose*, *Asitaranjan Ghose*, *Nagendra Nath Basu*, *Giris Chandra Paul* and *Nalin Chandra Paul*, for the Opposite Party.

JUDGMENT.—In these proceedings under s. 145, Criminal Procedure Code, there were six parties—the first three being the landlords (the first party holding one anna share, the second party three annas share and the third party a twelve annas share in the land in dispute). The fourth party claims to have executed a *kabuliyat* in respect of the land in dispute in favour of the second and third parties and is now holding over—the term of the lease having expired in 1330. The fifth party is the

Chittagong Company which claims to hold possession of a portion of the land where it repairs its launches, and sometimes cuts earth and erects a bamboo jetty fencing when the river rises. The sixth party does not claim any title but says he took a verbal *bandobust* from the *maliks*. The learned Deputy Magistrate went thoroughly into the evidence and found that none of the parties had been able to produce sufficient evidence of possession within the meaning of s. 145, Criminal Procedure Code, and therefore, passed an order under s. 146, Criminal Procedure Code, attaching the land in dispute. This Rule was obtained by the first party on the ground that upon the findings arrived at by the Magistrate he should have been held to be in possession and that the order under s. 146 was without jurisdiction. The second and the third parties who were the joint landlords with the first party have not filed any separate application disputing the findings of the Magistrate; but at the hearing of the Rule they have expressed their intention not to object to the Rule being made absolute if the first party agreed to treat them as co-sharer landlords of the land in dispute. The first party has said that he has no objection if the joint possession of all the landlords is declared in the land. The real dispute, therefore, is between the landlords on one side and the other parties who claim possession of the land either on settlement from the landlords or by adverse possession on the other. Applications objecting to the order passed by the Magistrate have been filed on behalf of the fourth and fifth parties. Rules have not been issued upon those applications but it is ordered that they should be heard along with the present Rule. We have heard all the parties who have appeared before us except the sixth party who is not represented before us by any Pleader and we are of opinion that on the findings arrived at by the Deputy Magistrate the order under s. 146, Criminal Procedure Code, must be held to be bad in law. The position is this. The Magistrate has found with reference to the claim of the fourth, fifth and the sixth parties that they were not in possession. His finding is that the land is fallow and low-lying and during the rainy season covered with water. As happens to all fallow lands people who have any occasion to use them and especially the neighbours use them not with an idea of exercising any act of possession but simply for the sake of convenience. Such being the state of the land, the learned Magistrate has found that the acts which the fourth, fifth and the sixth parties have claimed to have done over it are not in assertion of any title or possession and are not, therefore, sufficient evidence of possession within the meaning of the section. With this finding we do not disagree. The possession claimed by persons other than the landlords having been disbelieved, possession is presumed to be with parties who have title to the land, and admittedly the first three parties have title to the land as claimed by them. This possession may not be actual possession within the meaning of s. 145 (1); but on the finding of the Magistrate there is no reason to doubt that the possession exercised by the landlords is sufficient to satisfy the requirements of law. Possession under s. 145, Criminal Procedure Code, must be, as has been held in the case of *Nayan Manjuri Dasi* v. *Fazley Huq Sardar* (1) absolute and continuous and not occasional. But it is not intended that possession must be such as should be exercised continuously or every day of the year. By continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes. Continuity of possession should be understood with reference to the object over which it is exercised. It is a fallow land not capable of yielding much profit on the bank of a river and gets covered with water at certain seasons of the year. It is found by the Magistrate that the first party stacked some bricks on it, that the second party sometimes allowed people to dry jute on this land, and that the third party held *bastu puja* on the land. These are the proper uses of a land of this description and on this finding it cannot be said that the landlords were not in actual possession.

The fourth party who claims to hold over argues that possession should have been found with him of at least a portion of the land in dispute. The finding of the Magistrate is that he held land adjacent to the land in dispute, and in common with other people sometimes uses the land

(1) 71 Ind. Cas. 527; 49 C. 871; A. I. R. 1922 Cal. 502; 24 Cr. L. J. 175.

in dispute in storing bamboos, thatching grass, etc. On this finding of fact we do not think that he has been able to prove his possession.

As regards the fifth party (the Chittagong Company), they have claimed to have used a portion of the land when it gets under water for repairing launches and also to have put up a bamboo jetty fencing and have got a drain passing across the land. They do not claim any right to the land; but they claim to have possessed the land in the manner above described for a long time. The Magistrate was not satisfied as regards the erection of the fencing and in his opinion possession exercised by the Company was not continuous as they used the land only during the season when it goes under water and not to the exclusion of others. The Company have expressed their willingness before us to take settlement of this land from the landlords. We think that the proposal is reasonable. We, however, do not want in this case to decide the legal rights of the parties.

The result is that this Rule is made absolute and we direct that possession of the land in dispute be declared in the first, second and the third parties as one body of landlords until evicted therefrom in due course of law and forbid disturbance of such possession until such eviction.

The applications of the fourth and the fifth parties are rejected.

A. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1309 OF 1926.

January 24, 1927.

Present:—Mr Justice Harrison.

KHAZAN CHAND—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 107, 144 —Breach of peace, apprehension of—Action against peaceful citizens, legality of—Magistrate's power to stultify High Court's order by taking action under some other law.

When a breach of the peace is anticipated action is to be taken against the potential law-breakers and not against peaceful citizens whom it is expected that the law-breakers will molest. [p. 826, col. 2.]

A Magistrate should not stultify an order of the High Court by taking action under some other provision of the same Code or some other Code or Act. [*ibid.*]

Case reported by the Sessions Judge, Ludhiana, with his No. 860, dated the 20th August, 1926.

REPORT.—FACTS.—In the town of Khanna in Ludhiana District there is a well called Jatiwala well. Khazan Chand and Garja Singh, who are originally *Chamars* but have become Arya Samajist, claim the right to draw water from that well. Some members of the other communities objected to their doing so. As there was danger of the breach of the peace, proceedings under s. 107, Criminal Procedure Code, were started against Khazan Chand and Garja Singh and both of them were bound down to keep the peace for a period of one year by Sardar Amar Singh Magistrate First Class, by an order dated 30th November. The appeal to the District Magistrate was rejected on 30th January, 1926 and thereupon Khazan Chand and Garja Singh moved the High Court and their application for revision was accepted by the Hon'ble Mr. Justice Harrison by an order dated 14th May, 1926*, and the order demanding security was set aside.

After that, Khazan Chand and Garja Singh commenced to draw water from Jatiwala well, and some members of the other communities as before objected to their doing so. On 28th June, 1926, the Sub-Inspector of Khanna submitted a report to the District Magistrate, stating that there was a danger of the breach of the peace. Thereupon on 2nd July, 1926, the learned District Magistrate issued an order under s. 144, cls. (1) and (2) of the Criminal Procedure Code, to Khazan Chand and Garja Singh, directing them not to use Jatiwala well until they had established their right to draw water therefrom in a competent Civil Court.

Against that order, Khazan Chand has preferred an application for revision.

GROUNDS.—The Hon'ble Judge in his order, dated the 14th May, 1926, made the following observations:

"The District Magistrate says in his order that had they been prepared to give an undertaking not to draw water from this well, he would have accepted their appeal. Whereas in this case the anticipated breach is to be committed by the other side, the only point to be seen is whether the act which brings about that breach is wrongful in itself as laid down in *Mohammad Yakub* v. *Emperor* (1),

(1) 6 Ind. Cas. 454; 32 A. 571; 11 Cr. L. J. 355; 7 A. L. J. 649.

*Reported as 97 Ind. Cas. 93. -[*Ed.*]

and many subsequent rulings and this view is in accordance with the clear wording of the section. It is not even alleged that it is a wrongful act for these *Chamars* to draw water from a public well as opposed to one which has been built for or dedicated to the use of any particular religion or class of the population. Indeed one of the witnesses a Muhammadan, named Imdad Hussain, says that if a sweeper turns Muhammadan, there is no objection to his drawing water from such a public well. Fifteen defence witnesses all Hindus of the upper classes appeared and stated that the majority of the population did not object. It is clear, therefore, that the objectors form a section, large or small, of the population of this town but do not constitute the whole and even if they did, it would not affect the question materially. So long as these *Chamars* are doing a lawful act there can be no reason for putting them on security and it would appear to me more reasonable to take proceedings against those who are expected to commit the breach of the peace and offer violence to law-abiding citizens.

Counsel for the petitioner contended that the learned District Magistrate in passing the order dated 2nd July, 1926, had ignored the opinion expressed by the Hon'ble Judge of the High Court, and that, therefore, it was a fit case to be submitted to the High Court on the revision side.

A perusal of the order of the learned Judge leaves no doubt that this contention is well-founded. Moreover, the order of the learned District Magistrate does not mention the period during which the order is to remain in force, and the order as it stands amounts to perpetual injunction. The position of the petitioner is fully dealt with by the Hon'ble Judge in his order, dated 14th May, 1926 and according to the observations made therein the petitioner is not committing any wrongful act in drawing water from Jatiwala well and the order in question does not appear to be justified.

I, therefore, submit the records of the case to the Hon'ble High Court for proper orders.

Bakhshi *Tek Chand*, for the Petitioner.

ORDER.—This is an application made by the Sessions Judge of Ludhiana asking that an order passed by the District Magistrate of Ludhiana under s. 144 of the Criminal Procedure Code be quashed. This order was originally passed as a sort of perpetual injunction restraining two persons from using a certain well until they had established their right to do so but was subsequently modified on the 2nd of August, 1926, on its being pointed out to the District Magistrate that under this section order could only be passed which would operate for two months. I have doubts as to the legality of this revising order but as the question is not before me it is not necessary to decide it. Although the two months have expired Counsel asks for an adjudication as to the propriety of the order in the hope that it may have the effect of stopping any more orders of this nature under this or any other section of any other Act or Code which will have the effect of cancelling or setting at naught, the previous order passed by this Court.

The facts are simple enough. Two *Chamars* Khazan Chand and Garja Singh persist in asserting their right to draw water from a public well. A section of the population objects. Both *Chamars* were put on security under s. 107 of the Criminal Procedure Code and that order was quashed by me. A new order has now been passed under s. 144 of the Criminal Procedure Code forbidding them from using this well. In my previous order it was made very clear that they were entitled to do so and that the proper persons to be proceeded against, if a breach of the peace was anticipated were the persons who wished to interfere with the exercise of the right. In spite of this, action has been taken under s. 144 and steps have been taken to prevent them from exercising their right. It has been laid down in *Mohammad Ismail* v. *Barkat Ali* (2) and *Blong* v. *Emperor* (3) and indeed the facts require no authority at all that when a breach of the peace is anticipated action is to be taken against the potential law-breakers and not against the peaceful citizens whom it is expected that the law breakers will molest. I have no hesitation in setting aside the order passed by the District Magistrate and I express a hope that he will refrain from taking action under any other section of any Act or Code with a view to stultifying this order.

R. L. *Order set aside.*

(2) 71 Ind Cas. 506; 26 C. W. N. 904; A. I. R. 1922 Cal. 483; 24 Cr. L. J. 154.

(3) 82 Ind. Cas. 42; (1924) Pat. 262; A. I. R. 1924 Pat 767; 25 Cr. L. J. 1178; 6 P. L. T. 130; 3 Pat. L. R. 41 Cr.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 875 OF 1926.

January 4, 1927.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

TAMEZKHAN *alias* TAMEJUDDIN AND OTHERS—ACCUSED—PETITIONERS

versus

RAJJABALI MIR AND ANOTHER—COMPLAINANTS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 235, 239, 342, 537—Joint trial for separate offences, legality of—'Same transaction'—Omission to examine accused at proper stage, whether vitiates trial.

The joinder of two distinct offences in a single charge is an irregularity, but not an illegality. [p. 828, col. 1.]

What does or does not form part of the same transaction is a question of fact in each case. [p. 828, col. 2.]

The accused were charged with being members of an unlawful assembly and of committing theft of certain trees in a forest on two different occasions. There was an interval of 24 hours between the acts. The acts took place in different parts of the forest and related to different logs:

Held, that the acts committed on the two occasions were separate and not parts of the same transaction and a joint trial for the four offences was, therefore, illegal. [*ibid.*]

Obiter.—Omission to examine the accused under s. 342, Criminal Procedure Code, at the stage indicated by the section is a mere irregularity curable by s. 537 of the Code. [p. 827, col. 2.]

Rule against an order of the Deputy Magistrate, Sadar Mymensingh, dated the 3rd August, 1926.

Messrs. *K. N. Chowdhury*, *S. K. Sen*, Babus *Sures Chandra Taluqdar* and *Probodh Nath Sanyal*, for the Petitioners.

Mr. *B. C. Chatterjee* and Babu *Panna Lal Chatterjee*, for the Opposite Party.

JUDGMENT.

Cuming, J.—This Rule has been granted on four grounds which I propose to deal with seriatim. The first ground is that the trial is vitiated by the fact that the provisions of s 342, Criminal Procedure Code, were not complied with in the case of the accused Tamejuddin inasmuch as he was not examined under the mandatory provision of that section at the close of the prosecution evidence. It will appear that Tamejuddin who was represented by a Pleader was ill at the time and was not present when his examination at the close of the prosecution evidence should have taken place. The other accused persons were duly examined but Tamejuddin was not then examined not being present. He was examined at a subsequent stage, namely, at the conclusion of the defence evidence.

Mr. Chowdhury who appears in support of the Rule contends that this was not a compliance with the terms of s. 342, Criminal Procedure Code. He contends that the provisions of the section are mandatory and that the accused persons must be examined at the conclusion of the evidence for the prosecution and that the subsequent examination at a later stage is no compliance with the terms of the section. There are a number of decisions of this Court which go to support the view which Mr. Chowdhury asks us to adopt of the provisions of s. 342, Criminal Procedure Code. They will be found in the case of *Promotha Nath Mukhopadhya* v. *Emperor* (1), and in the case of *Surendra Lal Shah* v. *Isamaddi* (2). In the last case it was held that the examination of the accused under s. 342, Criminal Procedure Code, must take place at the close of the prosecution case and before the accused has entered upon his defence, and his examination at a subsequent stage was no compliance with the section. Mr. Chatterjee who has appeared for the opposite party has contended that the law as laid down in these cases is wrong and he would ask us to refer the question to a Full Bench as to whether a failure to comply with the provisions of s. 342, Criminal Procedure Code, was curable under s. 537, Criminal Procedure Code, or whether it was incurable and an illegality as has been held in the cases I have already referred to. Speaking for myself and with great respect to the learned Judges who have held otherwise, it has always been my view that an omission to examine the accused at the stage indicated by the section is an irregularity and curable under s. 537, Criminal Procedure Code. But Mr. Chatterjee has asked that if we do not agree with the law as laid down in the decisions referred to, we should refer the question to a Full Bench. But as we shall dispose of the case of all the petitioners on another point, no reference would seem either possible or desirable.

Mr. Chowdhury has argued that the failure to examine Tamejuddin vitiates the trial not only as regards Tamejuddin but

(1) 71 Ind. Cas. 792; 50 C. 518; 27 C. W. N. 389; A. I. R. 1923 Cal. 470; 24 Cr. L. J. 248.

(2) 84 Ind. Cas. 325; 51 C. 933; 26 Cr. L. J. 261; A. I. R. 1925 Cal. 480.

as regards all the accused persons. None of the decisions to which I have referred decides this particular point. It is not, however, necessary to decide the point. For other reasons we are obliged to hold that the conviction and sentence must be set aside and the whole case re-tried. However, it is not necessary to pass any order under this particular branch of the Rule, because for certain reasons which I shall shortly deal with, it would be necessary to hold that the whole trial is bad and that the whole case will have to be re-tried. This depends upon the last two points which have been urged by Mr. Chowdhury on behalf of the petitioners. Mr. Chowdhury first of all contends that the charge as framed is bad in law because two distinct offences have been included within one charge. This, no doubt, is correct. As far as can be seen there were two distinct offences, namely, the occurrence on the 16th March when a number of persons attacked the complainant and his party to deprive them of a large number of logs which they were removing from the forest and also the occurrence on the 17th March when it is alleged the accused took away certain other logs from another part of the forest which also belongs to the complainant. The petitioners are charged both with being members of an unlawful assembly and of committing theft on both these occasions. Clearly these offences were distinct offences, there being one unlawful assembly and theft on the 16th March and another unlawful assembly and theft on the 17th March. Section 233, Criminal Procedure Code, requires a separate charge for each distinct offence. In this case clearly the two offences have been dealt with in a single charge. There is one charge of being members of an unlawful assembly and one charge of committing theft. The joinder of two offences in a single charge has been held by this Court to be an irregularity and not an illegality. See the cases of *Moharuddi Malita* v *Jadu Nath Mandul* (3), *Ram Subhag Singh* v. *Emperor* (4), *Musai Singh* v. *Emperor* (5), and *Radha Nath Karmakar* v. *Emperor* (6).

(3) 11 C. W. N. 54; 4 Cr. L. J. 415.
(4) 30 Ind. Cas. 465; 19 C. W. N. 972; 16 Cr. L. J. 641.
(5) 22 Ind. Cas. 1008; 41 C. 66; 15 Cr. L. J. 224; 18 C. W. N. 183.
(6) 71 Ind. Cas. 120; 50 C. 94; 36 C. L. J. 149; A. I. R. 1922 Cal. 573; 24 Cr. L. J. 72.

It has not been suggested by Mr. Chowdhury that his clients have been prejudiced by this joinder of offences in one charge which is by itself not a sufficient reason for setting aside the trial. Mr. Chowdhury's next contention is that these four offences do not form part of the same transaction and, therefore, they could not be tried together. Mr. Chatterjee who appears for the opposite party has admitted that if these four offences do not form part of the same transaction then clearly their joint trial was illegal. Therefore, the question that remains to be decided is whether these four offences can be considered to form part of the same transaction. What does or does not form part of the same transaction may be considered to be a question of fact in each particular case. Certain tests have been laid down in various cases by which it may be determined whether certain acts do or do not form part of the same transaction. In some cases it has been held that acts may be considered to form part of the same transaction if there are between these acts proximity of time, community of intention and continuity of action. Mr. Chatterjee has argued that the intention of all the four acts was the same, namely, to take possession of the logs which the complainant was endeavouring to take out of the forest and to deprive the complainant of his right to take any of the logs of the forest. Admitting that this is so for the sake of argument, there are still the other two tests—the proximity of time and the continuity of action. Between these two acts there was an interval of at least 24 hours. The two acts took place in different parts of the forest and they related to different logs. It was not the case of the prosecution that the accused endeavoured on the first day to remove a certain number of logs forming a particular batch and came back next day to remove the remainder of the logs that they had not been able to remove on the previous day. The two transactions or acts took place in different parts of the forest. After a careful examination of all the facts of the case we do not think that these acts can be considered to form part of the same transaction. The offence on the 16th March seems to us to be a separate transaction to the offence on the 17th March. Clearly, therefore, the trial of these offences in the same trial is against the provisions of s. 235, Criminal Procedure Code, read with

s. 239. We have, therefore, no alternative in the present case but to set aside the conviction of, and the sentence passed on, these accused persons and to order that they be re-tried of the offences, if necessary, in separate trials. The trial to be held before some Magistrate other than the Magistrate who has already tried the case.

Pending the disposal of the case the accused will remain on the same bail.

Gregory, J.—For the reasons stated by my learned brother I agree that there must be a re-trial.

A. *Retrial ordered.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 240 OF 1926.

November 26, 1926.

Present:—Mr. Percival, J. C., and Mr. Rupchand Bilaram, A. J. C.

KHURSETJI NANABHOY—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 441—Criminal trespass—Intention, an essential ingredient.

In order to constitute criminal trespass, it is necessary for the prosecution to prove that the accused either unlawfully entered upon property of another or having lawfully entered thereon continued to remain unlawfully *with intent* thereby to intimidate, insult or annoy the person in possession of such property or with intent to commit an offence. [p. 830, col. 1.]

Unlike several sections of the Penal Code, where *mens rea* consists in intention *or* knowledge, under s. 441, it is not sufficient to prove mere knowledge on the part of an accused person that he was likely to cause annoyance unless the evidence of such knowledge coupled with other facts is such as to lead the Court to infer therefrom the requisite intent. [*ibid.*]

Application to revise the conviction and sentence of the Additional City Magistrate, Karachi, dated the 9th August, 1926

Mr. *Rewachand Vassanmal*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor for the Opposite Party.

JUDGMENT.—The accused was put on his trial before the learned Additional City Magistrate, Karachi, under ss. 506 and 448, Indian Penal Code, for criminal intimidation of the manager or custodian of certain buildings called Sohrab Quarters and for criminal trespass by staying in one of those quarters after he had been served with a notice to vacate. He was acquitted on the first charge but convicted on the second charge and ordered to pay a fine of Rs. 25. He was also warned that if he continued to stay in those quarters he would render himself liable for further prosecution.

It appears from the judgment of the learned Magistrate that these quarters are attached to a Parsi Club building and were primarily intended for outside relatives and guests of the members of the Club visiting Karachi, who were permitted to stay therein for a period of 8 days on payment of 8 annas per day as rent for use and occupation of each quarter. The period of their stay could be increased for 8 days more by the Secretary of the Club and at the end of that period they were required to vacate.

During recent years another trust building known as Jehangir Bagh has been reconstructed and affords greater facilities for Parsi travellers than the quarters in question and, therefore, these quarters are seldom requisitioned by the members of the Club for their guests. They are, however, let out to Parsi residents of Karachi probably subject to the restriction that occupants are bound to vacate at any time, the Secretary wishes them to do so. The accused is an old Parsi resident of Karachi and has been staying with the permission of the Secretary of the Club in one of these quarters from December, 1925. For the 15 days of December he paid Rs. 2-8-0 only to the responsible authorities of the Club, for 31 days of January he paid Rs. 5-0-0 and likewise for the month of February and March he paid Rs. 5 a month. The entries in the books show that the amounts were paid by him as rent for each month.

In March 1926 a report was made by the then custodian of the quarters to the Secretary that the accused was a nuisance to the other residents and that he should, therefore, be removed. Nothing definite seems to have been decided at that time. On 8th April, 1926, the complainant who had assumed duties of the custodian in place of the former custodian, went over to the quarters and informed all the occupants including the accused that they would have to vacate unless they obtained recommendatory notes from the members of the Club. It is alleged that on this, the accused got annoyed and used threats to the custodian which formed the subject-matter of the first

charge and on which he has been acquitted for want of reliable evidence. It also appears that in consequence of what transpired at that time, the accused was served with a notice by the Secretary requiring him to vacate the quarter but he declined to do so claiming to be a monthly tenant and, therefore, not liable to be ejected, in view of the provisions of Bombay Rent Act or at any rate without a month's notice. It is this refusal on his part to vacate the premises which has been made the foundation of the second charge.

The learned Magistrate came to the conclusion that the accused was not a monthly tenant but a permissive occupant whose occupation was terminable at once and that on such termination he became a trespasser. The learned Magistrate also was of the opinion that the accused was a nuisance to the other occupants.

Now unlike several sections of the Code where *mens rea* consists in intention or knowledge s. 441 requires that the accused should either unlawfully enter upon property of another or having lawfully entered thereon continue to remain unlawfully with intent thereby to intimidate, insult or annoy the person in possession of such property or with intent to commit an offence. The onus, therefore, lies on the prosecution to prove the requisite intent. Assuming for the moment that the accused was a tenant on sufferance who had come in the quarter by right and had continued to remain by wrong this would not without proof of the requisite intent make his wrongful stay punishable as criminal trespass. Mere knowledge on his part that he was likely to cause annoyance would not by itself be sufficient, unless the evidence of such knowledge coupled with the other facts was such as to lead the Court to infer therefrom the requisite intent. The learned Magistrate does not seem to have applied his mind to this aspect of the case and has given no findings as to the intent with which the accused had continued to stay on the premises. The finding that the accused was a nuisance to the co-occupants was by itself of no consequence whatsoever.

Now on the one hand, there seems to be no evidence in the case to show that the accused had stayed there with the requisite intent, on the other, all the circumstances point to the fact that his intention in staying on was either that he *bona fide* believed that he had a right to stay and that he could not be ejected without process of law or because he found it impossible to get other lodgings and could not, therefore, shift.

We think, under the circumstances, the conviction cannot possibly be maintained. We accordingly set it aside and order that the fine, if paid, should be refunded.

P. B. A. *Conviction set aside.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 840 OF 1926.

November 19, 1926.

Present:—Mr. Justice Cuming and Mr. Justice Gregory.

SHEIKH ABDUL AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 188—Order under s. 144—Disobedience—Knowledge of accused, evidence of—Promulgation of order, whether sufficient for conviction.

It is not sufficient in order to affect a person with the knowledge of an order under s. 144 and to render him liable to conviction under s. 188 to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made. [p. 831, col. 1]

Rule against an order of the Additional Presidency Magistrate, Calcutta.

Mr. *Narendra Kumar Bose* and Babu *Probodh Chandra Chatterji*, for the Petitioners.

Mr. *Khundkar*, for the Opposite Party.

JUDGMENT.—This Rule was issued by my learned brothers Mr. Justice Rankin and Mr. Justice Duval on three grounds, first, that the learned Magistrate should have acquitted the accused holding that the knowledge which was the main ingredient of an offence under s. 188 of the Indian Penal Code was not brought home to the accused; secondly, that the learned Magistrate considered the merits and demerits of the prosecution and defence cases in a vague and general manner without considering the evidence of individual defence witnesses with reference to the accused for whom they deposed and the accused had been seriously prejudiced on account of this procedure. The petitioners have not pressed the third ground on which this Rule was issued.

In disposing of the Rule it is only necessary for me to deal with the first ground. Mr. Bose who appears for the petitioners has contended that it is not sufficient for the prosecution to prove that notice has been duly promulgated. The prosecution must prove by positive evidence that notice has been brought to the knowledge of the persons whom it is sought to affect by it. The learned Vakil points out that in dealing with the present case the Magistrate has held that as notice was duly promulgated the petitioners must be presumed to have had the knowledge of it. This, the petitioners contend, is entirely a wrong view of law. In support of their contention we have been referred to the case of *Ram Das Singh* v. *Emperor* (1), to an unreported decision of this Court in Revision Case No. 754 of 1926 (*Sheikh Aiyub* v. *Emperor*) and also to a decision of the Lahore High Court in the case of *Emperor* v. *Abdullah* (2). The contention of the petitioners is obviously correct. It is not sufficient in order to affect a person with the knowledge of an order under s. 144 and to render him liable to conviction under s. 188 to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made. The Magistrate has not approached the case from this point of view and he has not found that the accused persons in this case had the knowledge of the order for the disobedience of which he has punished them under s. 188.

The result is the conviction of, and the sentences passed on, the petitioners are set aside.

A. N. A. *Conviction and sentences set aside.*

(1) 99 Ind. Cas. 36; 44 C. L. J. 250; A. I. R. 1927 Cal. 28; 28 Cr. L. J. 4.
(2) 63 Ind. Cas. 865; 22 Cr. L. J. 705.

PATNA HIGH COURT.

CRIMINAL REVISION No. 341 OF 1926.
June 4, 1926.
Present:—Justice Sir Jwala Prasad, KT., and Mr. Justice Macpherson.

KULDIP SINGH—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 423—Appeal—Appellant not present—Procedure—Duty of Court to decide on merits.

Under the provisions of s. 423 of the Code of Criminal Procedure a Court is bound to peruse the record and decide an appeal on the merits even if the appellant does not appear.

Criminal revision from an order of the Sessions Judge, Patna, dated the 28th April, 1926, upholding that of the Magistrate, Patna City, dated the 13th February, 1926.

Mr. *C. M. Agarwala*, for the Appellant.

Mr. *H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application against the order of the Sessions Judge of Patna, dated the 28th of April, 1926, dismissing a criminal appeal of the petitioner.

The appeal was admitted on the 18th of February, 1926, and after certain adjournments was fixed for hearing for the 28th of April. On the last date the learned Sessions Judge dismissed the appeal recording the following order :—

"Appellant not present. Appeal dismissed."

The order in question has contravened the requirements of s. 423 of the Code of Criminal Procedure under which a criminal appeal has to be dealt with. That section requires that the Court is bound to peruse the record and to hear the appellant or his Pleader if he appears before disposing of the appeal. Even if the appellant was not present, the learned Sessions Judge was bound to go through the record himself and to decide the appeal upon merits. Therefore, the appeal has not been legally disposed of.

The order of the learned Sessions Judge, dated the 28th of April, 1926, is illegal and is set aside, and the appeal is restored to its original file. The learned Sessions Judge will now dispose of it in accordance with law.

A. N. A. *Appeal restored.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1623 OF 1926.
February 1, 1927.
Present:—Mr. Justice Broadway.

KANSHI—ACCUSED—PETITIONER
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 338—Rash driving of motor car—Contributory negligence, effect of—Motor driving—Driver's duty—Sentence.

In a prosecution for rash and negligent driving, though contributory negligence is no defence entitling the accused to an acquittal, it is yet a factor

which should be taken into consideration in determining the sentence.

A person driving a car should always keep it in a state of control sufficient to enable him to avoid running into any passenger who may fail to step off the road, however annoying the dilatoriness of the foot passenger may be to him.

Petition, for revision of an order of the Sessions Judge, Hoshiarpur, dated the 6th October, 1926, affirming that of the Magistrate, First Class, Hoshiarpur, dated the 25th August, 1926.

Mr. *Abdul Aziz*, for the Petitioner.

Diwan *Ram Lal*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Kanshi Ram, motor driver, is the petitioner in this and the connected petition for revision which arises out of two separate trials in which the learned Magistrate and the learned Sessions Judge have thought fit to write one judgment, a procedure which in the present case has, to a large extent, prejudiced Kanshi Ram.

The trials related to two different offences alleged to have been committed by Kanshi Ram on two different dates under s. 338 of the Indian Penal Code. In one he was charged with having driven a motor car rashly and negligently on the 15th of May, 1926, his rash and negligent driving resulting in grievous hurt being caused to one Gajjan.

In the other case he was charged with having driven his car rashly and negligently on the 11th of June, 1926, his rash and negligent driving resulting in grievous hurt being caused to a little girl named *Musammat* Ananti, aged 12 years. The sentence imposed in each case was one year's rigorous imprisonment and a fine of Rs. 150, the imprisonment to run concurrently.

The learned Counsel for the petitioner has accepted the findings arrived at by the Courts below and has confined himself to the question of sentence and in this connection has referred me to the case of *Kamdar Ali Serang* v. *Emperor* (1) where it was remarked that "in considering the question of degree, the question of contributory negligence has also to be taken into account, not as a defence to the indictment, but for the purposes of determining causation and fixing a measure of the liability of the accused." In cases of this nature it seems to me that while contributory negligence would not be a defence entitling the petitioner to an acquittal it might be a factor for consideration in determining the sentence.

Taking the case of Gajjan first it seems to me clear that the sentence upon him would not have been passed but for the fact that the Magistrate and the Sessions Judge thought fit to deal with the two cases together. It is in evidence that as the petitioner's car approached Gajjan and his companions, the petitioner sounded his horn which gave warning to Gajjan's companions and caused them to get out of the way. It has not been shown that the petitioner was aware of Gajjan's deafness and as remarked in *Proceedings, 17th August 1871* (2), "a driver must necessarily assume an ordinary state of faculties". At the same time it seems to me that in the case of a person driving a motor car the car should always be kept in a state of control sufficient to enable the driver to avoid running into any passenger who may fail to step off the road, however annoying the dilatoriness of the foot passenger may be to the driver. In this case I think a punishment of fine would have met the situation and I, therefore, set aside the sentence of imprisonment in the case relating to Gajjan but retain the fine.

The second case is, to my mind, of a more serious nature. It appears that there were two or three girls playing in the middle of the road when the petitioner approached in his car. According to the petitioner he was not responsible for the injury to *Musammat* Ananti and his plea throughout has been that he never knocked her down. It has been found that he was responsible for the injury to the girl and I think that his conduct deserves more serious punishment. It seems to me that the petitioner must have been driving very recklessly to have caused the accident to *Musammat* Ananti without being able to pull up till he had gone a distance of 700 *karams*. I would, therefore, dismiss the petition in this case.

The result is that the petitioner's sentence in the case relating to the injuries caused to *Musammat* Ananti is maintained in its entirety while the sentence of imprisonment passed in the case relating to the injuries caused to Gajjan is set aside, the fine only being maintained.

R. L. *Order accordingly.*

(1) 11 Ind. Cas. 130; 15 C. W. N. 835; 14 C. L. J. 656; 12 Cr. L. J. 362.

(2) 6 M. H. C. R. App. 31

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2290 OF 1926.

January 13, 1927.

Present:—Mr. Justice Addison.

FATEH ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHMAD DIN—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 108—Person not heard of for seven years—No presumption as to time of death—Punjab Limitation Customs Act (I of 1920), Sch. I, Art. 2 (b)—Limitation—Burden of proof—Counsel and client—Admission by Counsel on point of limitation, whether binding on client.

Though there is a presumption of a person's death if he has not been heard of for a period of not less than seven years, there is no presumption that he died at any particular date. [p. 833, col. 2.]

Lal Chand Marwari v. *Ramrup Gir* (1), followed.

In a suit for possession by a collateral of a vendor on the ground of the invalidity of the sale it is for the plaintiff to prove that his suit is within three years from the vendor's death and it is not enough to show that the vendor is dead. [*ibid.*]

An admission by a Counsel on a point of limitation being an admission on a point of law does not bind his client. [p 834, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 30th April, 1926, modifying that of the Sub-Judge, Fourth Class, Wazirabad, District Gujranwala, dated the 17th March, 1925.

Messrs. *B. A. Cooper* and *Parkash Chandar*, for the Appellants.

Mr. *Iftikhar Ali*, for the Respondent.

JUDGMENT.—One Ahmad Din sold the land in dispute to another Ahmad Din on the 14th September, 1907. The vendor's collateral Sarbland obtained a decree in 1914, declaring that the sale would not affect his reversionary rights except to the extent of Rs. 281-13 upon payment of which Sarbland would be entitled to get the land upon the death of the vendor. The vendor joined the army during the late war and has not been heard of since. The present suit was brought by the three sons and four grandsons of a fourth son of Sarbland for possession of the land on payment of Rs. 281-13 on the ground that Ahmad Din, the vendor, had died about a year prior to the institution of the suit. The trial Court held that the plaintiffs had failed to prove that the vendor had died within three years of the suit and dismissed the whole suit as time-barred for that reason. On appeal the learned District Judge held that all that the plaintiffs had succeeded in proving was that Ahmad Din had not been heard of for more than seven years. There was thus a presumption that he was dead, but there was no presumption as to when he died. As the onus was on the plaintiffs to show that the suit was within time the District Judge held that the suit of the major sons of Sarbland must fail as they had only three years according to Act I of 1920 within which they could sue, while they had not established whether Ahmad Din had died within the last three years or before that. As regards the share of the four grandsons of Sarbland the District Judge has recorded that so far as their share of the land was concerned the suit was admittedly within time. It was further conceded that they were entitled to get one-fourth of the land on payment of one-fourth of Rs. 281-13. The appeal was, therefore, accepted and the four minor grandsons got a decree for possession of one-fourth of the land in suit on payment of Rs.70-7. Against this decision two appeals have been presented here.

I shall first take the appeal of the sons. It was urged that the burden should have been upon the defendants to prove that Ahmad Din had died more than three years before suit. It is the law that there is a presumption of a person's death if he has not been heard of for a period of not less than seven years, yet there is no presumption that he died at the end of the first seven years or on any particular date [*Lal Chand Marwari* v. *Ramrup Gir* (1).] It is for the plaintiffs to establish that their suit is within time, *i. e.*, that they are entitled to a decree. In a somewhat analogous case [*Jayawant Jivanrao* v. *Ramchandra Narayan Joshi* (2)] it was held that it lay on the plaintiff to show affirmatively that he had brought his suit within 12 years from the actual death of the mortgagor. Similarly in the present case I would hold that it was for the plaintiffs to show that they had brought their suit within three years of the vendor's death, whereas all that they have been able to establish is the presumption that he is dead. The suit of the major sons was, therefore, properly dismissed. They have not established that their suit was within time and the declaratory decree did not effect a charge on the land. I dismiss that appeal with costs.

(1) 93 Ind. Cas. 280: 5 Pat. 312; 24 A. L. J. 105; A. I. R. 1926 P. C. 9; (1926) M. W. N. 203; 7 P. L. T. 103; 43 C. L. J. 249; 50 M. L. J. 289; 3 O. W. N. 375; 30 C. W. N. 721; 28 Bom. L. R. 855; 53 I. A. 24; 42 T. L. R. 159 (P. C.).

(2) 33 Ind. Cas. 484; 40 B. 239; 18 Bom. L. R. 14,

The vendee has also appealed against the decision of the District Judge that the suit, so far as the share of the four minor grandsons is concerned is within time. It was urged that this was admitted before the District Judge, but it is clear from the context that the learned Counsel, who admitted that the suit for their share was within time, was only making an admission in law and not of facts. It was urged in this appeal that it was also for the plaintiffs in order to bring their suit within time to establish that the cause of action had not arisen in favour of the father of the minors before he died, for, if it had so arisen, time having once commenced to run, would continue to do so. In my opinion, this contention is sound. It is the case that no attempt was made to prove that the cause of action had not arisen in favour of the father of the minors in his lifetime and perhaps this was incapable of proof as the plaintiffs could not even establish the exact date of death of the vendor. It is stated that the minors' father only died two months before the institution of the suit. An admission by Counsel on a question of law cannot bind his clients. For these reasons I accept the appeal of the vendee, and setting aside the order of the lower Appellate Court dismiss the suit *in toto*. The vendee will have his costs in the trial Court and in the Court of the District Judge but not in his own appeal here.

R. L. *Appeal accepted.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1819 OF 1926.
January 12, 1927.
Present :—Mr. Justice Dalip Singh.

ABDUL RAHIM—PLAINTIFF—APPELLANT
versus
THE MUNICIPAL COMMITTEE OF DELHI—DEFENDANT—RESPONDENT.

Lease—Permanent lease of structure on land—Lessee's right to build on structure.

A perpetual lessee of a structure on a piece of land as distinguished from a permanent lessee of the land itself is not entitled to build a projection above the structure, which is actually leased to him. [p. 835, col. 1.]

Second appeal from the decree of the District Judge, Delhi, dated the 12th April, 1925, affirming that of the Sub-Judge, Second Class, Delhi, dated the 5th May, 1925.

Lala *Sardha Ram*, R. S., for the Appellant.

Messrs. *Raj Narain* and *Mehr Chand Mahajan*, for the Respondent.

JUDGMENT.—The plaintiff-appellant in this case is a perpetual lessee of certain *nazul* land situate in Delhi. Over this land the plaintiff has built certain shops. Originally there were certain wooden *takhts* in front of these shops. The Committee ordered the removal of these *takhts*. Thereupon the predecessor-in-interest of the plaintiff brought a suit for injunction restraining the Municipal Committee from asking them to remove these *takhts*. They asserted in that suit that the land under the *takhts* formed a part of the *nazul* land, which had been leased to them. The Municipal Committee on the other asserted that the land did not form part of the *nazul* land but formed part of a public street. The suit was compromised by *raznama* dated 18th August, 1896. By that compromise it was agreed between the parties that the Municipal Committee were to build a *chabutra* in place of the *takhts* and keep it in repairs. Rs. 16-8 per annum was fixed as rent. Reduction and enhancement of rent was to be according to the terms of the lease of the *nazul* land, dated the 1st April, 1903. It was further provided that a *saiban* which had been built at the lessee's expenses was to remain, and that the plaintiff had no further claim left *qua* this suit. The plaintiff now wishes to build a verandah in the second storey of a shop and he has already built a *chhajja*. The Committee served him a notice to demolish the *chhajja* or to pay rent, for the same. The plaintiff has asked for a perpetual injunction or restraining the Committee from demolishing the *chhajja* and from demanding rent for the erection of the verandah projecting on the *chabutra*. Both Courts have dismissed the plaintiff's suit.

In second appeal it is argued that the land under the *chabutra* forms part of the land leased to the plaintiff's predecessor in 1903. Reliance is placed on the evidence of P. W. No. 1 the *girdawar* of the Committee. It is contended that if the land belongs to the plaintiff, the perpetual lessee, then by the terms of the lease he is entitled to build on the same. In reply the Counsel for Committee contends that the rights of the parties were determined

by the compromise of 1896. It seems to me clear that by the compromise the plaintiff gave up his claim to be a perpetual lessee of the land under the *chabutra*, and accepted in lieu thereof a perpetual lease of the *chabutra*. This being so it is not open for the plaintiff to raise this point in second appeal.

It may further be noted that his claim to be the perpetual lessee of the land under the *chabutra* was not raised in the plaint, and seems to have been taken in arguments only after the admission made by the *girdawar* of the Committee. I, therefore, hold that by the compromise the plaintiff or his predecessor gave up their claim to be the lessees of the land.

The second point urged by Counsel for the appellant is that he is perpetual lessee of the *chabutra*, that he is, therefore, entitled to the space above the *chabutra* and is, therefore, entitled to project his verandah and his *chhajja* in the space above *chabutra* provided that he does not alter the nature of the *chhajja*. No authority is cited for this proposition. It seems to me that a perpetual lessee of a structure on a piece of land as distinguished from the permanent lessee of the land itself is not entitled to build a projection above the structure, which is actually leased to him. It is clear that a structure may have only limited user and the projection might have wholly different effects to what were contemplated when a lease of the structure was given. I, therefore, repel this contention of the appellant's Counsel.

The last point urged by the Counsel but not seriously pressed was that under the rulings *Damodar Das* v. *Municipal Committee, Delhi* (1) and *Ali Mardan* v. *Municipal Committee of Kohat* (2) the condition as to rent was *ultra vires*. I do not see that these rulings at all apply to the present case.

The appeal fails and is dismissed with costs.

R. L. *Appeal dismissed.*

(1) 27 P. R. 1901; P. L. R. 1900, p. 395.
(2) 45 P. R. 1905; 40 P. L. R. 1905.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

November 17, 1921.

Present:—Lord Buckmaster, Lord Atkinson, Lord Carson, Sir John Edge and Sir Lawrence Jenkins.

NALAM PATTABHIRAMA RAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANDAVILLI NARAYANAMOORTHY, SINCE DECEASED AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 17, 21—Self-serving statement in Will, admissibility of.

A statement in a Will which suggests an inference as to a fact in issue, though relevant under the provisions of s. 17 of the Evidence Act, cannot be proved by or on behalf of the person who made it or his representatives in view of the provisions of s. 21 of the Evidence Act. [p. 836, col. 2.]

Appeal from the decree of the Madras High Court, dated the 17th January, 1917, reversing that of the Subordinate Judge, Rajahmundry, dated the 24th July, 1913.

Messrs. *DeGruyther, K. C.*, and *B. Dube*, for the Appellants

JUDGMENT.

Sir Lawrence Jenkins.—This is an appeal from a decree of the Madras High Court, dated the 17th January, 1917, reversing a decree passed on the 24th July, 1913, by the Temporary Subordinate Judge of Rajahmundry.

The defendants Nos. 2 to 49 are members of a Hindu family known as the Nalam family. Their common ancestor was Nalam Bhimanna, who died in or about 1848, leaving seven sons and three daughters. The sons were Virayya, Venkanna, Ramanna, Vallabharayudu, Pattabhiramanna, Subbayya and Chalamayya. The daughters were Kamamma, Venkamma and Jaggamma.

The fifth of the sons, Pattabhiramanna, separated from his brothers in 1870. The defendants Nos. 2 to 49 are the descendants of the six brothers who continued joint, and they are the appellants in this appeal.

Kamamma married Mandavilli Butchi Kamanna, and the only child of that marriage was Peda Pattabhiramanna. He died in 1881, leaving an adopted son, Chinna Pattabhirammaya, who died in 1895 without issue but survived by his widow, Mandavilli Seetharam. She is defendant No. 1.

The original plaintiff was Mandavilli Narayanamoorthy, a son of Mandavilli Butchi Kamanna, by his second marriage

and so a half-brother of Peda Pattabhiramanna. On his death, his sons, Mandavilli Venkata Gopala Row, and Mandavilli Satayanarayannamurty, were substituted as parties in his place. They are the respondents in this appeal.

In 1896 the members of the Nalam joint family as then constituted separated, but the partition was not completed until 1900. Though there were only six branches, the family property was divided into seven shares. One share was allotted to each branch, and the remaining seventh share was allotted as to three-eighths to defendant No. 1 as the representative of Kamamma, four-eighths to the issue of the second daughter, Venkamma, and one-eighth to charity at Rajahmundry. The purpose of this suit is to impugn this partition and establish the plaintiffs' claim as heir in reversion to one-seventh of the Nalam properties.

In the plaint it is alleged that Nalam Bhimanna arranged that Pattabhiramanna should do business with his sons and be given an equal share along with his sons, and that this was agreed to by the sons; that the partition of 1896 was made only with the evil intention of disinheriting the reversioners and there was no legal necessity for it; and that the cause of action arose from November, 1900.

By the plaint it is prayed that a decree may be passed "declaring that the division effected among the members of the families of defendants Nos. 2 to 49 concerning the joint property wherein the 1st defendant was entitled to one seventh share, is invalid after the 1st defendant's lifetime, so far as it relates to the 1st defendant's share of the property, and cannot affect the reversioners." It will thus be seen that the plaintiff's claim is based on an alleged right in Peda Pattabhiramanna to a share in the Nalam joint family property. It was rejected by the first Court, but on appeal the claim was affirmed by the High Court and a decree passed in the plaintiff's favour. The right asserted could not have been inherent one, and so an arrangement under which it is alleged to have accrued is set up. This arrangement is pleaded and the following issue was settled :—

"Whether Nalam Bhimanna agreed as alleged in para. 5 of the plaint to give a share in his family properties to Pattabhiramanna along with his sons, and whether the sons of Bhimanna assented to that arrangement?"

The burden of establishing this agreement and the sons' assent to it is on the plaintiff, and it is necessary to see whether this burden has been discharged.

First the plaintiff seeks to rely on a statement in the Will of Peda Pattabhiramanna, dated the 11th July, 1881, in these terms :—

"After my father, Butchi Kamanna Garu, married Kamamma, the eldest daughter of Nalam Bhimanna Garu, residing at Mandapeta, I was born to her. But as she died 10 days after I was born, my mother's father, the said Bhimanna Garu, his wife Papamma Garu, and his seven sons, Virayya and others, had since then kept me in their house, supported me, and educated me and taught me wisdom and business. As they arranged to get my second maternal uncle, Venkanna Garu's daughter married to me and to give me a share equally along with my maternal uncles without my having anything to do with the property of my natural father, I was attending to their business matters carried on at Mandapeta, Vizianagram, Cocanada, Berhampur, Rajahmundry, Tallarevu, Madras and other places for some time jointly with my maternal uncles and for some time myself singly."

Even treating this as a statement which suggests an inference as to a fact in issue, still it cannot be proved by or on behalf of the person who made it or his representative-in interest (Evidence Act, ss. 17 and 21).

Therefore, standing alone, the statement in the Will cannot be proved by or on behalf of the plaintiff as evidence of what it asserts.

To escape from this difficulty the plaintiff contends that the course of dealing in the family, the conduct of Peda Pattabhiramanna in relation to the properties in his possession and the independent status which he held and enjoyed, the conduct of the executors in acting on the Will, and the treatment of him by the family, support the view that the statement in the Will is true. Thus it has been contended that the Will was acted on by the executors, who were members of the Nalam family, with the result that the statement was adopted as true.

What happened is this. Property was

purchased with the joint funds of the family, and the transfer was taken in the name of Peda Pattabhiramanna. On his death it became necessary to obtain a transfer from his name, and accordingly, on the 6th October, 1882, a petition was presented on behalf of Nalam Kamaraju and his brother Nalam Venkataravuloo, to the Deputy Collector and Deputy Registrar of Grants and Certificates, Madras, praying for the issue of a certificate. In the application it was stated that the property had been acquired by inheritance, the grantee or registered holder being the brother-in-law of the petitioners, and that the registered holder being on the point of death, wrote and delivered a Will stating that the two brothers-in-law might take a fresh certificate after his death. There is a clause in the Will to that effect. The certificates were issued as prayed. Though this may be properly regarded as an assent by the two executors that the Will was duly executed, it cannot be treated as an admission by the members of the family that the statement in the Will, on which reliance is now placed, was true. What was done by the executors was a requisite or at any rate convenient step for the purpose of procuring a transfer in the Registry, but cannot be deemed an admission of title in the sense urged by the plaintiff.

The High Court was influenced by the idea that account-books had been kept back, and if there was any real foundation for this, there might be ground for considering whether there was a presumption that these accounts, if produced, would be unfavourable to the defendants. But, when regard is had to all the facts disclosed, there is no justification for the view that books were improperly withheld, as is conclusively shown in the judgment of the first Court. Nor do their Lordships think that the items in the accounts that have been produced when properly considered really support the plaintiff's case; for it has to be borne in mind that Peda Pattabhiramanna was a son-in-law and in management of the branch where he resided, and it is no matter for surprise if he was treated with favour. And in this connection, it is significant that the family of Vijjapu, also a son-in-law, and engaged in the family business, was treated with similar favour, and yet it never has been suggested that this was evidence of or even pointed to a right of participation in the Nalam family property.

But over and above this infirmity in the plaintiff's proof, the dealings with the property are inconsistent with the right he claims. According to his case Peda Pattabhiramanna acquired his share before the date of Ex. I, which is a Cadjan leaf dated the 24th August, 1849. It embodies the terms drawn up by the seven sons for the guidance of the Nalam family in reference to the joint family property. Peda Pattabhiramanna was not a party to it, nor does it contain any reference to any share of his in the property. The first Court relied on this exhibit as genuine. The High Court, however, doubted its authenticity, but on grounds that do not satisfy their Lordships, and they prefer to accept the appreciation of the Subordinate Judge as to its genuineness.

On the 15th of December, 1870, a partition deed, Ex. II, was executed, when Pattabhiramanna separated from the Nalam family. This document contains no reference to any share such as that now claimed. It treats the property, after deduction of the separating brother's share, as divisible into seven shares, six of which were to belong to the remaining six branches, while the seventh share was to be dealt with by these six branches as they liked. These branches continued joint till 1896. In that year the partition now attacked began. Its terms have already been set out.

In the plaint it is described as "made only with the evil intention of disinheriting the reversioners of the said property and not *bona fide*." But no such case is proved. In its omission of all notice of a one-seventh share as belonging to the line of Kamamma, this partition is in precise accord with the dispositions of 1849 and 1870, and it is difficult to suppose that they were both made without the knowledge of Peda Pattabhiramanna. Moreover, the members of the six branches did not gain by the omission; they did not keep for themselves the one-seventh share, but allotted it in the manner indicated. Then again it is significant that the lines of the two daughters both benefited, and that Appalaraju, the 1st defendant's father, took part in this allotment, and never suggested that the one-seventh share belonged to his daughter, or that she had any better claim than the line of Venkamma the

sister. Nor did the 1st defendant herself demur to the allotment which was made. On the contrary, she expressly assented to it. This the plaintiff treats as a relinquishment and in effect an invalid alienation of the one-seventh share to which he claims to be reversionary heir.

In their Lordships' opinion the plaintiff has failed to prove the arrangement or agreement under which a share is alleged to have been given to Peda Pattabhiramanna, and they will humbly advise His Majesty that the decree of the High Court ought to be reversed and the suit dismissed with costs in both the lower Courts. The respondents must also pay the costs of this appeal.

A. N. A. *Appeal allowed.*

Solicitor for the Appellants:—Mr. *Douglas Grant.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1137 OF 1922.

January 15, 1927.

Present:—Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

MUHAMMAD ISHAQ AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Pirzada MUHAMMAD HUSSAIN KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92—Order III, r. 4, O. XLI, r. 4—Appeal by some of the plaintiffs authorised to file suit, legality of—Power of one appellant to sign power-of-attorney on behalf of the rest.

In a suit under s. 92 of the Civil Procedure Code, all the persons authorised to institute the suit constitute one plaintiff and all must combine to take any material step in the prosecution of the suit. An appeal filed by some of them only is incompetent. [p. 838, col. 2; p. 839, col 1.]

Maddala Bagavannarayana v. *Vadapalli Perumallacharyulu* (1) and *Vishondas* v. *Damomal* (2), followed.

Provisions of O. XLI, r. 4, Civil Procedure Code, do not authorise the filing of an appeal from a suit under s. 92 of the Code by some only of the plaintiffs authorised to file the suit. [p. 839, col. 2.]

In the absence of proof that one of the appellants is duly authorised by the others to sign the power-of-attorney of the Counsel on their behalf such power-of-attorney must be signed by all the appellants personally. [p. 839, col. 1.]

First appeal from the decree of the District Judge, Delhi, dated the 3rd February, 1922.

Lala *Sardha Ram*, R. S., and Mr. *Gobind Ram Khanna*, for the Appellants,

Messrs. *Bishan Narain* and *Hem Raj Mahajan*, for the Respondents.

JUDGMENT.—Three men Haji Muhammad Ishaq, Muhammad Ibrahim and Muhammad Sadiq, after having obtained the consent in writing of the Collector of Delhi under s. 92 of the Civil Procedure Code, instituted a suit in the Court of the District Judge of Delhi in respect of a mosque known as *Musjid Khurd Tin Burjwali* situate at Bara Hindu Rao in Delhi claiming reliefs such as are mentioned in s. 92. The suit was partially decreed by the District Judge. This is an appeal by the plaintiffs against the decree of the District Judge so far as he declined to grant certain reliefs to the plaintiffs

A preliminary objection is taken on behalf of the respondents that no appeal lies as the decree was given with the consent of the plaintiffs. A reference to the judgment of the learned District Judge, however, shows that the plaintiffs through their Counsel merely approved of the appointment of certain gentlemen as a committee of management and in the grounds of appeal to this Court objection is taken to the appointment of one Hamid Ullah as one of the managers. So far as the other matters decided by the District Judge are concerned there was no consent by either party to the conclusions of the learned Judge. We are, therefore, of opinion that there is no force in this objection except with regard to the grounds of appeal relating to the appointment of Hamid Ullah

But another preliminary objection taken by the Counsel for the respondents has force. It appears that out of the three plaintiffs only two have authorised this appeal. In the memorandum of appeal the names of all three are mentioned but in the grounds of appeal only Haji Muhammad Ishaq is mentioned as the appellant and the power-of-attorney in favour of Mr. Sardha Ram who presented this appeal is signed only by Muhammad Ishaq and Muhammad Ibrahim. Muhammad Sadiq has not authorised Mr. Sardha Ram in writing to present this appeal. We must, therefore, assume that the appeal is only by two out of the three plaintiffs who were authorised by the Collector to institute the suit.

Mr. Sardha Ram, however, contends that an appeal could be filed by one or more of the plaintiffs on behalf of all. We are unable to concede to this contention. In a

suit under s. 92 of the Civil Procedure Code all the persons authorised to institute the suit constitute one plaintiff and all must combine to take any material step in the prosecution of the suit. This was the view taken in the case of *Maddala Bagavannarayana* v. *Vadapalli Perumallacharyulu* (1) [in Civil Appeals Nos. 144 to 146 of 1912, decided by a Division Bench of the Madras High Court on the 23rd of March, 1915,] in which it was held that where more than two persons interested in a trust have obtained the necessary sanction under s. 92 of the Civil Procedure Code any two of them cannot sue without the others and that the language of s. 92 shows that the persons authorised to sue are all the persons to whom the consent has been given and not any two of them. It is true that this case relates to a suit and not to appeal but we consider that the same principle applies to both cases.

The same view was taken by the Judicial Commissioner of Sind in *Vishondas* v. *Damomal* (2) The facts of that case are identical with those of this as in that case also three persons authorised under s. 92 of the Civil Procedure Code instituted a suit which was dismissed. Two of the plaintiffs filed an appeal which was held to be incompetent. It was indicated in the judgment of the learned Judicial Commissioner that the proper procedure in such cases is to implead the plaintiff who does not consent to an appeal as a respondent but with the permission of the Advocate General authorising the remaining plaintiffs to present an appeal and to make the rest as respondents.

Counsel for the appellants then contended that some of numbers of appellants could authorise him to file an appeal but in the absence of proof that one of the appellants is duly authorised by the others to sign the power-of-attorney of the Counsel on their behalf such power-of attorney must be signed by all the appellants personally. This is clear from O. III, r. 4, Civil Procedure Code, which provides that the appointment of a Pleader shall be in writing and shall be signed by the person who appoints him or by his recognised agent or by some other person duly authorised by the power-of-attorney to act on his behalf.

(1) 31 Ind. Cas. 236; 29 M. L. J. 231.
(2) 76 Ind. Cas. 345; A. I. R. 1925 Sind 1.

Mr. Sardha Ram then relied upon O. XLI, r. 4, which provides that where there are more plaintiffs than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs any one of the plaintiffs may appeal from the whole decree. But as we have already indicated in the present case the three persons who filed the suit are in the eye of law one plaintiff and not more than one plaintiff and, therefore, O. XLI, r. 4, does not apply to the facts of this case.

Mr. Sardha Ram then asked us to adjourn the hearing under O. XLI, r. 20 and to direct that Muhammad Sadiq be made a respondent. We declined to accede to this prayer as, in our opinion, even if under the circumstances of this case we had the power to order that Muhammad Sadiq be made a respondent without the consent of the Collector we considered that the circumstances of the case did not justify such a course.

We dismiss this appeal with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 741 OF 1926.
January 19, 1927.
Present :—Mr. Justice Addison.

KARAM KHAN AND ANOTHER —PLAINTIFFS—APPELLANTS
versus
MAST ALI KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4 —Death of one of several respondents—Legal representatives not brought on record—Abatement, whether partial or in toto—*Tests.*

Whether a suit or an appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined. If they are separable, the suit or appeal will abate only as regards the interest of the deceased. If they are joint the proceedings will abate as regards the whole of the joint interests. [p. 840, col. 1.]

Darshan Das v. *Bikramajit Rai* (2) and *Raghbir Saran* v. *Sohan Devi* (3), followed.

Second appeal from the decree of the District Judge, Dera Ghazi Khan, dated the 20th November, 1925, affirming that of the Additional Sub-Judge, Fourth Class, Dera Ghazi Khan, dated the 25th August, 1925.

Mr. *Niaz Muhammad*, for the Appellants.
Mr. *Hargopal*, for the Respondents.

JUDGMENT.—The plaintiffs are co-sharers of certain land along with defendants Nos. 1 to 3 and certain other *pro forma* defendants. The plaintiffs instituted a suit for a declaration that defendants Nos. 1 to 3 were in reality owners of only a 24/576ths share and not a share of 60/576ths as recorded in the revenue records, that is, the plaintiffs claimed a declaration that 36/576ths of the shares recorded in the name of defendants Nos 1 to 3 was theirs. The trial Court dismissed the suit. On appeal the learned District Judge found that defendant No. 2 named Bahadur Khan, had died on the 9th May, 1925, during the pendency of the suit and that his representatives were never brought upon the record. He held that a suit or appeal filed against a dead person was a nullity and that the appeal could not proceed as regards defendants Nos. 1 and 3, that is, Mast Ali Khan and Jamal Khan as no specification of their shares was possible. He purported to follow *Habu* v. *Lala* (1). Against this decision the plaintiffs have preferred this second appeal.

It seems to me that the question whether the appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined. If they are separable, the appeal will abate only as regards the interest of the deceased respondent. If they are joint, the appeal will abate as regards the whole of the joint interests. This was what was laid down in *Darshan Das* v. *Bikramajit Rai* (2). A similar view was taken by a Division Bench of this Court in *Raghbir Saran* v. *Sohan Devi* (3). In it there was a sale to various vendees the interest conveyed to each of them being specified in the sale deed. One of the vendees died and no application was made for the substitution of his heirs within time. Accordingly the whole suit was dismissed on the ground that it had abated. It was held on appeal that the suit had abated as against the interests of the deceased vendee only. In this ruling *Khuda Bakhsh* v. *Mathra Dass* (4) was distinguished while *Zainab Bibi* v. *Rohila* (5) was followed. In the last named case the plaintiff who was the daughter of a Dogar, sued the nine defendants collaterals of her father for possession of her father's landed property on the ground that it was self-acquired and that she as a daughter had a preferential right to the collaterals. The lower Court dismissed the suit holding that the property was ancestral. During the pendency of the appeal in the Chief Court one of the defendants-respondents died and application for the substitution of the names of his legal representatives was not made within time. It was held that the appeal abated *qua* the deceased collaterals' share of the land but not as regards the shares of the other collaterals as each had a separate right to his ancestral share. In my opinion the principles laid down in *Raghbir Saran* v. *Sohan Devi* (3) and *Zainab Bibi* v. *Rohila* (5) apply in the present case for the interests and shares of the first three defendants are separately given, namely, Mast Ali Khan 36/576, Bahadar Khan 20/576 and Jamal Khan 4/576. The claim of the plaintiffs was that the total of the shares of these three should be declared to be 24/576 and not 60/576, *i. e.*, that Mast Ali Khan's share should be declared to be $14\frac{2}{5}/576$; the share of Bahadur Khan deceased 8/576 and that of Jamal Khan $1\frac{3}{5}/576$. The fact, therefore, that the appeal is no longer competent as against Bahadur Khan's share of 20/576 does not mean that it is not competent as regards Mast Ali Khans' share of 36/576 and Jamal Khan's share of 4/576 which can be reduced if the plaintiff's suit is correct, to

$$\frac{(14\frac{2}{5}+1\frac{3}{5})=16}{576}.$$

Besides, it is obvious that in the present suit the plaintiffs need not have included Bahadur Khan in the beginning had they not wished to dispute his right to hold the share recorded in his name. The shares of all three defendants are separate and the suit could have been brought against one of them or two of them or all three. In these circumstances I hold that the appeal was still competent as regards Mast Ali Khan and Jamal Khan defendants Nos. 1 and 3. This was the only point argued in

(1) 21 Ind. Cas. 951; 41 P. R. 1915; 15 P. L. R. 1914; 16 P. W. R. 1914.

(2) 89 Ind. Cas. 953; 48 A. 81; 23 A. L. J. 938; L. R 6 A. 587 Civ.; A. I. R. 1926 All. 128.

(3) 86 Ind. Cas. 1; 6 Lah. 233; 26 P. L. R. 100; A. I. R. 1925 Lah. 381; 7 Lah. L. J. 149.

(4) 18 Ind. Cas. 182; 62 P. R. 1913; 85 P. L. R. 1913; 99 P. W. R. 1913.

(5) 39 Ind. Cas. 277; 23 P. R. 1917.

appeal. It was admitted that so far as Bahadur Khan's share was concerned the plaintiffs had lost all rights to contest it.

I accordingly accept the appeal and setting aside the order of the District Judge hold that the appeal was competent so far as the shares of defendants Nos. 1 and 3 were concerned. I return the appeal to the District Judge to be decided in accordance with law as regards the shares of those two persons. Court-fee on appeal will be refunded. Parties will themselves bear the other costs incurred in this Court.

R. L. *Appeal accepted.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 386 OF 1925.

October 13, 1926.

Present:—Mr. Justice Odgers and Mr. Justice Curgenven.

THUSHTU BALAKRISHNA CHETTIAR AND OTHERS—APPELLANTS

versus

V. KRISHNAMURTHI IYER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 92, 145, O. XX, r. 11 (2)—Suit under s. 92—Power of Court to direct taking of accounts—Court, whether entitled to postpone payment under decree with consent of decree-holder—Security bond, executed by third party, whether enforceable under s. 145, Civil Procedure Code—Additional interest, provision for, in security bond, whether legal—Decree—Construction—Direction to trustee to make good certain sums to temple—Decree, whether declaratory or executable—Reference to pleadings and judgment.

The provisions of s. 92, Civil Procedure Code, are wide enough to entitle the Court to direct an account against a trustee and to make an order on him to pay the amount found to be due on the taking of those accounts. [p. 842, col. 1.]

Nathu Mal v. *Kishori Lal Singh* (3), followed.

Where a decree is ambiguous, it is competent to the Court in executing it to refer to the pleadings and the judgment. [*ibid.*]

Upadhayayulu Yegnanarayana v. *Kottalanka Makayya* (4), followed.

A decree which directs that the defendant shall be liable to make good to another a specified sum of money is an executable decree and not merely a declaratory one. [p. 842, col. 1; p. 844, col. 2.]

Syama Charan Das v. *Satya Prosad Choudhury* (1), followed.

Order XX, r. 11 (2), Civil Procedure Code, empowers a Court in executing a decree to order, with the consent of the decree-holder, the payment of the decree amount to be postponed upon such terms as to taking of security as it thinks fit. [p. 842, col. 2.]

Subramania Pillai v. *Corera* (9) and *Satya Shankar Ghosal* v. *Maharaj Narain Choudhuri* (10), followed.

Where during the pendency of an appeal against a decree in consideration of the decree-holder postponing execution, a third person executes a security bond for due satisfaction of the decree, the security bond is enforceable in proceedings under s. 145 and a separate suit therefor is not necessary. It makes no difference that the security is furnished by a third person not a party to the suit. [p. 843, col. 1.]

If a surety offers security which is accepted and undertakes to pay additional interest on condition that execution is stayed, the decree-holder is entitled to insist that that contract shall be carried out. [p. 843, col. 2.]

Sadasiva Pillai v. *Ramalinga Pillai* (6), followed.

Appeal against the order of the Court of the Subordinate Judge, Tanjore, dated the 10th August, 1925, and made in E. P. No. 91 of 1925 of the Additional Subordinate Judge, Tanjore.

Mr. *A. C. Sampath Ayyanger*, for the Appellants.

Messrs. *S. T. Srinivasagopalachari* and *A. V. Viswanatha Sastri*, for the Respondents.

JUDGMENT.

Odgers, J.—The facts are set out in the judgment of my learned brother which I have had the advantage of reading and I, therefore, need not repeat them here.

The first point taken in this appeal against the judgment of the Subordinate Judge of Tanjore is that the decree is merely declaratory and, therefore, not executable in that no act is to be done [*cf Syama Charan Das* v. *Satya Prosad Choudhury* (1).] The decree says "that this Court doth order and direct that the 1st defendant shall be liable to make good to the temple Rs. 2,774 and odd and that failing recovery thereof from him, defendants Nos. 6 and 7 be liable to make good the deficiency and also Rs. 338 and the 7th defendant liable to make good to the temple Rs. 60." It is to be observed that the words 'order and direct' appear in the decree but some argument has ranged round the words 'shall be liable to make good.' The suit was a suit under s. 92, Civil Procedure Code, and prayed *inter alia* that the defendants be directed to render accounts of their management of the plaint temple for the last 12 years and for their removal as trustees. The plaintiff clearly charged the defendants with non-maintenance of accounts, improper use of the money and mis-appropriation of the temple funds. In *Saminatha Pillai* v. *Sundaresa Pillai* (2) a Full Bench of this Court held that if the relief is claimed as to amount of mis-

(1) 70 Ind. Cas. 427; 36 C. L. J. 101; A. I. R. 1923 Cal. 252.

(2) 62 Ind. Cas. 911; 14 L. W. 238; 29 M. L. T. 267.

appropriation but the amount is not ascertained and would have to be determined by enquiry in the suit, this brings the case within the mischief of s 92 (*d*), Civil Procedure Code. In *Nathumal* v. *Kishori Lal Singh* (3), a decision of the Allahabad High Court, the learned Judges held that the provisions of s. 92 are wide enough to entitle the Court to direct an account against a trustee and to make an order on him to pay the amount found to be due on the taking of those accounts. So it seems to me there is ample authority for saying that a decree passed under s. 92 may order the defendant to pay the amount as may be found due from him. I said that some argument had been addressed to us on the words "shall be liable to make good." There is authority for saying that, if the decree is ambiguous, the judgment may be consulted and the decree construed in the light of the plaint and judgment [*cf. Upadhayayulu Yegnanarayana* v. *Kottalanka Makayya* (4) followed in *Rangachariar* v. *Souri Bhattachariar* (5) both decisions of this Court.] The judgment finds that a certain sum has to be accounted for by the 1st defendant and the learned Subordinate Judge directs that the 1st defendant shall make good to the temple Rs. 2,774 and odd and defendants Nos. 6 and 7 shall make good to the temple, etc. Why the drafting clerk in drawing up the decree introduced the words "be liable to" one cannot guess. But in any case it seems to me the intention is clear enough that the defendants found liable shall pay the various sums to the temple for which they are found responsible. It seems to me, therefore, that this first point must fail.

The second contention is that this security bond as to which execution proceedings have been taken and which is really the subject of the appeal ought not to have been accepted by the Court and that it is in fact *ultra vires*. The argument is that this taking of security must be governed by O. XLI, rr. 5 and 6 in that the decree was under appeal at the time the security was offered and accepted. An argument of this sort comes with the worst possible grace from the appellant who has himself offered security in order to stay execution proceedings instituted against the 1st defendant. Rules 5 and 6 of O. XLI lay down that an appeal shall not operate as a stay of proceedings and further rr. 5 (2) and 6 appear to be inapplicable because the appeal time here had expired and there is no question here of any order for sale. Order XLI, rr. 6 (1) does not in terms apply, nor need we consider rr. 5 (3) and (4). The argument further overlooks the provisions of O. XX, r. 11 (2) which provides for a matter of consent of this sort. The Privy Council in *Sadasiva Pillai* v. *Ramalinga Pillai* (6), a case similar to this, said that they were not clear that the contention that only the Appellate Court was competent to grant a stay was well-founded. They did not discuss this in detail as the point had not been taken in appeal. *Lakshmana* v. *Sukiya Bai* (7) appears to me to be quite clear. The case in *Sadasiva Pillai* v. *Ramalinga Pillai* (6) referred above was followed and the order proceeded on a condition assented to by the decree-holder which the Court approved of and sanctioned. It may also be noticed in connection with the fourth point to be hereafter mentioned that in this case extra interest was also agreed to be paid [*cf.* also *Sheo Golam Lall* v. *Beniprosad* (8) which points out that the Privy Council in *Sadasiva Pillai* v. *Ramalinga Pillai* (6) allowed execution for mesne profits not specifically included in the decree but in respect of which the defendant had entered into an agreement to account on condition of execution being stayed.] A recent case of our own High Court *Subramania Pillai* v. *Corera* (9) held on a similar agreement that the judgment-debtor was estopped. The case of *Satya Shankar Ghosal* v. *Maharaj Narain Choudhri* (10) quoted by the learned Vakil for the appellant seems to be inapplicable as it refers to a Court having executed a decree and then after such execution having restored the property to the person *ejected by it*. I am of opinion that this matter of contract falls under O. XX, r. 11 (2) and that the appellant cannot be heard to say that the matter is *ultra vires*.

(3) 28 Ind. Cas. 886.
(4) 31 Ind. Cas. 478; (1915) M. W. N. 914.
(5) 33 Ind. Cas. 561.

(6) 2 I. A. 219 at p. 232; 24 W. R. 193; 15 B. L. R. 383; 3 Sar. P. C. J. 519; 3 Suth. P. C. J. 190 (P. C.).
(7) 7 M. 400; 2 Ind. Dec. (N. S.) 862.
(8) 5 C. 27; 4 Ind. Jur. 409; 4 C. L. R. 29; 2 Shome L. R. 182; 2 Ind. Dec. (N. S.) 629.
(9) 86 Ind. Cas. 723; 48 M. L. J. 121; (1925) M. W. N. 86; A. I. R. 1925 Mad. 457.
(10) 17 Ind. Cas. 728; 35 A. 119; 11 A. L. J. 83.

The third point is as to the liability incurred under the security bond. The material portion of it is as follows:—

"As an undertaking has been given to furnish security for a sum of Rs. 2,774-8-2 and interest thereon at 6 per cent. per annum without prejudice to the right of the 1st defendant objecting as aforesaid and as execution proceedings are going to be stayed on security being furnished for the aforesaid amount, in the event of the High Court Appeals Nos. 85 of 1921 and 118 of 1922 [*Peria Nathamai Malkajigunda* v. *Thippa Ramaswami Chettiar* (11)] preferred by the 1st defendant against the preliminary decree and final decree in the above suit being decided against the 1st defendant and the 1st defendant directed to pay the amount, *I have agreed to pay on behalf* of the 1st defendant a sum to the extent of Rs 2,800 with interest at 6 per cent. per annum for and towards the amount to be so decreed and have furnished the under-mentioned property as security. *Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property.*"

It seems to me that on the words in italics there can be no question that the liability is personal and that the appellant undertook personally to pay and did not simply furnish security by offering his property. If this is so, s. 145, Civil Procedure Code, clearly applies and, even if one is wrong as to this, *Beti Mahalakshmi Bai* v. *Badan Singh* (12) is an authority for the position that a security bond offered and accepted under these circumstances is enforceable under s. 145. It was attempted to be argued that the cases cited on behalf of the respondent were all cases relating to the judgment-debtor himself and that s. 145 applies to the intervention of a third party only. Section 145 says "any person" and I have not heard anything to convince me that there is any difference in law whether a security is furnished by the judgment-debtor himself or whether he obtains the services of some one else to furnish security for him.

The fourth point is as to interest. The point was never raised in any of the lower Courts and that is really sufficient for us to refuse to deal with it. I have already referred to *Subramania Pillai* v. *Corera* (9) and reference may also be made to *Subramania Chettiar* v. *Rajeswara Sethupathi* (13) and *Lakshmana* v. *Sukiya Bai* (7). A point was attempted to be made here that the sum of Rs. 2,800 mentioned in the security bond was intended to cover the principal and all interest. This, to my mind, is clearly untenable. Having regard to the authorities cited, it seems to me to be perfectly clear that, if a surety offers security which is accepted and undertakes to pay additional interest on condition that execution is stayed, the decree holder is entitled to insist that that contract shall be carried out on the principle laid down in the Privy Council case in *Sadasiva Pillai* v. *Ramalinga Pillai* (6).

I am of opinion for all these reasons that the appeal fails and must be dismissed with costs of the 1st respondent.

Curgenven, J.—This appeal is against an order enforcing a security bond executed by the appellant in the following circumstances. The 2nd and 3rd respondents filed a suit (O. S. No. 33 of 1921 on the file of the Additional Sub-Court of Tanjore) against certain temple trustees, praying for their removal, for accounts, and for the preparation of a scheme. There was a preliminary decree on 9th February, 1921, and a final decree was passed on 21st November, 1921, which among other things made some of the defendants liable for certain sums of money and appointed a Receiver. On 15th March, 1921, the trustees appealed to the High Court against the preliminary decree and while this appeal was pending the respondents sought to execute the final decree. Thereupon at the instance of the 1st defendant, whom this decree made liable in a sum of Rs. 2,774-8-2 the appellant executed the security bond now in question, and execution was postponed. Now the Receiver has obtained the order under appeal (E. P. No. 91 of 1925) directing the security to deposit the amount for which he has made himself liable.

The order is contested on four grounds, and the first ground is that the decree is merely declaratory and not executable. It is said in the first place that s. 92 of the Civil Procedure Code under which the suit was brought, does not provide for recovery of money but for the rendering of accounts. confining ourselves to the relevant terms of the section, it authorises the institution of a

(11) 78 Ind. Cas. 950; A. I. R. 1925 Mad. 212.
(12) 74 Ind. Cas. 927; 45 A. 649; 21 A. L. J. 604; A. I. R. 1924 All. 105.
(13) 43 Ind Cas. 187; 41 M. 327; 6 L. W. 762; (1917) M. W. N. 872; 34 M. L. J. 84.

suit" to obtain a decree.....(*d*) directing accounts and inquiries.....(*h*) granting such further or other relief as the nature of the case may require."

We have not been referred to any authority for the position that a decree for the payment of money is outside the scope of the section. On the other hand, the view is expressed in *Nathu Mal* v. *Kishori Lal Singh* (3) that the provisions of s. 92 "are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount found to be due upon the taking of those accounts." It is claimed that this is exactly what the Court has done here. In a Madras case, *Swaminatha Pillai* v. *Sundaresa Pillai* (2), the question was not expressly discussed but the suit was one by the general trustee of a temple to recover money due from a subordinate trustee, and it was held to fall within s. 92, a conclusion which assumed, I think, that the section could give the plaintiff, what he asked for. It appears to me that cl. (*h*) is quite wide enough to cover relief of this character and that very strong reasons should be required before driving a plaintiff to a separate suit for money found due upon an account taken in a suit under the section. It remains to be seen whether the decree in this suit does, in fact, order payment. The words used are that the Court "doth order and direct that the 1st defendant shall be liable to make good to the temple Rs. 2,774-8-2." To adopt the test employed in *Syama Charan Das* v. *Satya Prosad Choudhury* (1) and elsewhere, is this a decree which merely declares the rights of parties or does it direct any act to be done? On the one hand, it 'orders and directs;' and does not merely 'declare,' but, on the other hand, by the use of the phrase 'shall be liable' it leaves uncertain whether the intention was to direct payment or merely to establish liability. It is, therefore, in my view, ambiguous and there is ample authority for the principle that in such circumstances it is permissible to construe the decree in the light of the pleadings and of the judgment [see *Upadhayayulu Yegnanarayana* v. *Kottalanka Makkayya* (4) and *Rangachariar* v. *Souri Battachariar* (5).] The plaint asks for a direction to the defendants to render accounts of their management of the plaint temple for the past 12 years and concludes with the general prayer "for such further or other relief as the Court may deem fit to grant under the circumstances of the case." The issues included, as No. 10 'to what relief plaintiffs are entitled?' Turning to the final judgment of 21st November, 1921, we find that the material passage of the decretal portion runs as follows:—"The result is that I direct that the 1st defendant shall make good to the temple Rs. 2,774 8-2." This is a perfectly clear direction to pay that sum, and I can only infer that if the learned Judge who wrote those words had taken care to ensure the unambiguous expression of his intention in the decree, it would have in terms directed payment accordingly in the light of the judgment. I decide that the decree is executable and not merely declaratory.

The second point taken is that the Subordinate Judge was not competent to stay execution at that juncture and, therefore, that the security bond, which was given in consideration of the stay, is unenforceable. The argument proceeds upon the supposition that the Court must be deemed to have acted either under r. 5 (2) or under r. 6 (2) of O. XLI, because it is said the Code contains no other provision under which it could act. It may be conceded that neither of these rules gave a jurisdiction to stay, since, as regards the former the appeal time had expired, and as regards the latter, no sale had been ordered. Nevertheless, I think that the course taken was clearly permissible. Rule 5 (1) of O. XLI provides that an appeal shall not operate as a stay of execution, so that where a decree is under appeal a Court may proceed with its execution, and may in the course of execution do all such things as may be legal, just as it might do if no appeal had been preferred. Rules 5 (2) and 6 (2) of O. XLI, so far from interfering with these powers, confer certain additional powers upon the executing Court. The question thus is whether in the ordinary course of execution the Court could have deferred execution upon the security furnished by the appellant, and the answer to this is, undoubtedly, 'yes'. In the first place it was a consent arrangement and even if the Code made no provision for such a course, it is hardly open to the appellant, who consented to bear his share in it, to dispute his liability under it. The Code, however, does expressly make such a provision for r. 11 (2) of O. XX, enables a Court after the passing of a decree, and with the consent of the decree-holder, to order

payment of the amount decreed to be postponed upon such terms as to the taking of security as it thinks fit. That was what was done here and the objection, therefore, fails.

The third point is that the bond did not create a personal liability enforceable in execution under s. 145, Civil Procedure Code, and that in so far as the appellant's property was hypothecated under it, the decree-holder's only remedy is by separate suit. Upon the question of fact, I am quite clear that the bond does make the appellant personally liable. A translation made here of the material passage runs thus:—

"As an undertaking has been given to furnish security for a sum of Rs. 2,774-8-2 and the interest thereon at 6 per cent. per annum without prejudice to the rights of the 1st defendant objecting as aforesaid and as execution proceedings are going to be stayed on security being furnished for the aforesaid amount in the event of the High Court Appeals Nos. 85 of 1921 and 111 of 1922 [*Peria Nathamai Malkajigunda* v. *Tippa Ramaswami Chettiar* (11)] preferred by the 1st defendant against the preliminary decree and final decree in the above suit being decided against the 1st defendant and the 1st defendant directed to pay the amount, I have agreed to pay on behalf of the 1st defendant a sum to the extent of Rs. 2,800 with interest at 6 per cent. per annum for and towards the amount to be so decreed and have furnished the under-mentioned property as security. Myself and my representatives are hereby bound to pay the aforesaid amount on the liability of the said property."

This, undoubtedly, comprises a personal covenant to pay as well an agreement to hold liable the property given as security. Accordingly the decree-holder may proceed in execution against the surety, under s. 145 of the Civil Procedure Code, to the extent of his liability, as if he was a judgment-debtor. The question has then been raised as to the position of the hypothecated property, whether it can be proceeded against at all in execution and, if so, whether it may be sold as though under a mortgage-decree for sale. On the first point, neither principle nor authority has been shown for the entire exclusion of this property from execution process so long as the surety remains the owner of it. We have been referred to two cases, *Chandrabati* v. *Babu Ram* (14) and *Amir* v. *Mahadeo Prasad* (15) where it was held that such property cannot be summarily sold as mortgaged property, but that, if it is to be brought to sale in execution the decree holder must give up his mortgage rights. Those cases proceeded upon a consideration of the terms of s. 145 Civil Procedure Code. But the whole question of the enforce of a bond of this character has since been considered by the Judicial Committee in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (16). The bond with which their Lordships dealt with was found to be an instrument of charge only, and not a bond imposing any personal liability, so that s. 145 had no application. Nevertheless, they held that the charge could be enforced by bringing the property to sale in execution. It is important to note this point of similarity between that case and this, that the bond was not executed to any juridical person. In the case before the Privy Council no person at all was mentioned. Here the bond is to the Tanjore Sub-Court, and as their Lordships observe: "The Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign. It remains, therefore, that here is an unquestioned liability and there must be some mode of enforcing it, and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named sureties find the money." These are in effect the terms of the Subordinate Judge's order now under appeal, and there are no grounds, therefore, for setting it aside.

The fourth and the last point relates to interest. The bond undertakes to pay on behalf of the 1st defendant a sum to the extent of Rs. 2,800 (which is I think a round equivalent for the Rs. 2,774-8-2 mentioned earlier in the instrument) with interest at 6 per cent. per annum. The objection made is that under s. 145, Civil Procedure Code, the surety's liability is limited by the amount of the decree, which does not provide for interest. I do not think that this is a conclusive answer to the claim. Execution of the decree against the 1st defendant was deferred upon the surety undertaking to pay the

(14) 27 Ind. Cas. 365; 19 C. W. N. 178.

(15) 38 Ind. Cas. 33; 39 A. 225; 15 A. L. J. 76.

(16) 55 Ind. Cas. 550; 42 A. 158; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 46 I. A. 228; 13 L. W. 82 (P. C.).

amount with interest, that is to say, the decree-holder withdrew his claim to immediate payment upon these terms, and the surety cannot now be heard to say that his bond so far as it relates to interest cannot be enforced against him. Quite apart from s. 145, the case cited above is authority for such enforcement in execution. I may also refer to another Privy Council judgment *Sadasive Pillai* v. *Ramalinga Pillai* (6) where a judgment-debtor executed a bond undertaking to pay subsequent mesne profits not comprised in the decree. It was held that he was estopped from saying that these profits were not payable under the decree and the principle of estoppel applies equally, in my view, to a surety. The same principle was applied in *Sheo Golam Lall* v. *Beniprosad* (8) and *Subramania Pillai* v. *Corera* (9). On the authority of *Sadasiva Pillai* v. *Ramalinga Pillai* (6) I consider, therefore, that execution may issue for the amount of interest for which the bond makes the appellant liable.

Thus the appeal fails upon all the points raised, and is dismissed with costs of the 1st respondent.

V. N. V. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2018 OF 1922.

January 25, 1927.

Present :—Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

ABDULLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALLAH DIYA—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 239—Contract forbidden by law—Forest contractor—Agreement to take shikmi *partner, legality of—Partnership, definition of—Money lent under contract—Breach of contract—Interest on money lent.*

An agreement between two or more persons to participate in the right to cut and remove the trees from a forest in certain shares irrespective of the profit or loss that may accrue from the sale of the trees does not constitute a partnership inasmuch as under s. 239, Contract Act, an agreement to share profits is essential to the constitution of a partnership. [p. 847, col. 2.]

Where conditions are prescribed by Statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the conditions was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed, but they are valid if no specific penalty is attached to the specific transaction and if it appears that the condition was imposed for merely administrative purposes, *e. g.*, the convenient collection of the revenue. Therefore, a contract by which a Forest Contractor from a State takes some persons as *shikmi* partners in violation of the rules of the State prohibiting him from doing so, not being forbidden by law, is not void. [p. 847, col, 2]

Where a defendant receives plaintiff's money under a contract and then refuses to carry out the contract, the defendant is liable not only to return the money but also to pay damages for breach of the contract which may be awarded in the shape of interest at the market rate. [p. 848, col. 2.]

First appeal from the decree of the Senior Sub-Judge, Ambala, dated the 1st July, 1922.

Bakhshi *Tek Chand* and Messrs. *Jagan Nath Bhandari* and *Hem Raj Mahajan*, for the Appellants.

Messrs. *G. C. Narang* and *D. R. Narang*, for the Respondent.

JUDGMENT.—This first appeal has arisen out of an action brought by Allah Diya *Khoja* of Ambala City against Abdullah and his son and son-in-law of the same city for the recovery of Rs. 7,000.

The facts are briefly as below :—

On the 7th October, 1920, Allah Diya, plaintiff, Abdullah, defendant and one Rahmat Ullah executed an agreement in three parts with the object of obtaining contracts for cutting and removing bamboos from the jungles of the Rewah State. It appears that the State had invited tenders for the purpose, and tenders had already been filed separately by the three contracting parties as well as by certain relations or partisans of Abdullah and Allah Diya respectively. The agreement that Allah Diya, plaintiff, Abdullah, defendant, and Rahmat Ullah made was to the effect that whosoever from among them or their partisans should succeed in obtaining contracts they would all participate therein in certain shares. It so happened that the tenders of Habib Ullah and Ibrahim, the son and son-in-law of Abdullah, were accepted. A sum of Rs. 1,000 had already been deposited by them with their tenders and Rs. 5,000 more were paid in the treasury of the State to obtain the necessary permits. The plaintiff's case was that Rs. 2,700 out of the said sum of Rs. 5,000 were contributed by him but that the defendant subsequently refused to recognise him as their partner and denied receiving the said amount of

Rs. 2,700 from him. He, therefore, sued to recover Rs 2,700 *plus* Rs. 4,300 stating that he would have made a profit of Rs. 4,300 if the defendants would have allowed him to take bamboos of his share. The defence was that the plaintiff himself had resiled from the agreement and had refused to work as a partner and that he never made the alleged payment of Rs. 2,700 and that the agreement was void as one of the conditions on which the State granted the contract was that the contractors would take no co-partners or *shikmi* contractors. The trial Court came to the conclusion that the defendants did receive from the plaintiff the sum of Rs. 2,700 and did subsequently break their part of the contract and that the plaintiff was entitled to recover that sum with Rs. 1,350 as interest by way of damages but that his claim to profits was premature and could not be allowed. A decree for Rs. 4,050 has accordingly been granted to the plaintiff with costs in proportion to that amount. The defendants have appealed through Mr. Tek Chand.

The plea of jurisdiction which the trial Court overruled was again raised in the memorandum of appeal, but Mr. Tek Chand ultimately abandoned it before us as it was clearly untenable. The parties being residents of Ambala they were decidedly subject to the jurisdiction of the Civil Courts of that place for the purpose of this suit.

Mr. Tek Chand has, however, raised another law point, *viz.*, that the suit was incompetent inasmuch as the only remedy open to the plaintiff was to sue for dissolution of partnership and accounts. This objection also which has for the first time been taken in this Court is untenable because there was no partnership as defined in s. 239 of the Indian Contract Act and the parties to the agreement were not partners within the purview of that section. The agreement gave each party a certain share in the bamboos that were to be obtained from the jungles of the State and if the agreement had been carried out each would have got a certain quantity of bamboos irrespective of the consequences that might have accrued by sale thereof in the market. Thus no business was contemplated entitling the contracting parties to share the profits thereof if any. On the other hand, each party was to get and deal with his share of the bamboos as his own personal concern. In the plaint, no doubt, the written agreement is described as a deed of partnership and the bargain too is referred to as "partnership"; but by the use of the word 'partnership' the nature of the transaction could not be altered. The illustrations to s. 239 clearly indicate that an agreement to share profits is essential to the constitution of a partnership, and as in the present case there was no such agreement there was no partnership of which a dissolution could be claimed.

Another law point which Mr. Tek Chand argued before us was that the agreement was void being in violation of one of the conditions on which the contract was obtained from the State and according to which the contractor was precluded from taking anybody as his partner without the sanction of the State. But there is nothing to indicate that the agreement in question was forbidden by law. All that can be said of the condition is that it was imposed for administrative purposes. The State might have refused to recognise the partners under the agreement but none of them was competent to wriggle out of it on that ground. The principles of English Law on this point which are followed in India have been stated by Pollock and Mulla thus :—

"When conditions are prescribed by Statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e g*, the convenient collection of the revenue."

The above principles were followed in *Bhikanbhai* v. *Hira Lal-Ramdinshet Marwadi* (1), where the question arose as to whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sublet the tolls was valid and binding between the lessee and sub-lessee. Section 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the

(1) 24 B. 622; 2 Bom. L. R. 483; 12 Ind. Dec. (N. S.) 944.

conditions of the lease was that the lessee should not sublet the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sublet the tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sub-lease. It was contended on behalf of the defendant that the sub-lease was unlawful as it was made without the permission of the Collector, and that the lessee was not, therefore, entitled to recover the amount claimed by him. But this contention was overruled, and it was held that the plaintiff was entitled to succeed. Parsons, J., after citing the passage set forth above, said: "In our opinion this case falls within the latter class, because the Statute itself does not forbid or attach a penalty to the transaction of subletting, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals." Ranade, J., said: "As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under s. 23 of the Contract Act.....As no penalties are prescribed under the (Tolls) Act, the agreement does not *prima facie* fall under the first clause of s. 23." The same view was held in similar cases by the Madras and Allahabad High Courts, *vide Abdulla* v. *Mammod* (2) and *Gauri Shankar* v. *Mumtaz Ali Khan* (3). We, therefore, overrule this contention also.

Mr. Tek Chand's third point is that the alleged payment of Rs. 2,700 was not proved and he points out that according to the postscript to the agreement the plaintiff should have obtained a receipt for the amount paid and he contends that in the absence of a receipt the oral evidence on the point is unworthy of credit. He further makes capital of the circumstance that the plaintiff in his examination by the trial Court before settlement of issues stated that he made the payment on the 14th October while, as a matter of fact, the deposit in the treasury of the State was made on the 13th October. But the plaintiff stated in the next breath that the payment by him was made on the very day on which the money was deposited in the treasury and thus it becomes clear that he had forgotton the correct date of the payment and so mentioned 14th instead of 13th October. The oral evidence in support of the payment is very strong and includes the testimonies of two of the witnesses examined by the defendants themselves, namely, Ragunandan and Nand Kishore both of whom are *Lambardars* and appear to be respectable men. They were corroborated on this point by several witnesses produced by the plaintiff. The trial Court having given credence to all this evidence we see no reason for disbelieving it.

Lastly, Mr. Tek Chand contended that the Court below had erred in law in allowing plaintiff interest by way of damages for he himself had claimed profit (to which he was found not entitled) and not interest. But as the defendants received the plaintiff's money under a contract and then dishonestly refused to carry out that contract they were undoubtedly liable not only to return the money but also to pay damages for breach of the contract, or in other words wrongful use of the plaintiff's money. It was but fair to estimate damages on the basis of interest at the market-rate. The Court below, however, erred in allowing interest "at a very high rate." We are of opinion that Rs. 9 per cent. per annum for three months, *i. e.*, up to the date on which the suit was instituted, and Rs. 6 per cent. after that till realization will be quite sufficient.

We, therefore, accept the appeal to this extent and modify the decree of the trial Court accordingly. The defendants will pay plaintiff's costs on Rs. 2,760-12-0 (Rs. 2,7,00 *plus* Rs. 60-12-0 interest) for three months throughout.

R. L. *Decree modified.*

(2) 26 M. 156.
(3) 2 A. 411; 1 Ind. Dec (N. s.) 828 (F. B.)

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1349 OF 1926.

February 1, 1927.

Present:—Mr. Justice Dalip Singh.

DILA RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

P. BIDHYA DHAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 77 (j) (p)—Suit for recovery of dues payable by inferior to superior proprietor—Civil Courts, jurisdiction of—Punjab Courts Act (VI of 1918), s. 41—Question of nature of dues, whether of law—Civil Procedure Code (Act V of 1908), s. 11—Additional parties in second case—Res judicata—Obiter, *definition of.*

The share of produce recoverable by the Brahmans of Pohlian Prohitan village from the Rajputs of the village with respect to lands in the cultivating possession of the latter is either dues recoverable by a superior land-owner from an inferior land-owner or is a village cess and in either case a suit for recovery of the same is not cognizable by a Civil Court. [p. 851, col. 1.]

The question as to the nature of dues is one of law and not of fact and can be considered in second appeal. [p. 850, col. 2.]

Where in a subsequent suit in addition to all the parties in the previous suit there are some additional defendants, the decision in the previous suit cannot operate as *res judicata* in the subsequent suit. [p. 851, col. 1.]

A decision on a point which is not in issue but the decision of which is necessary for the decision of the point in issue is not an *obiter*. [p. 850, col. 1.]

Appeal against the decree of the Senior Sub-Judge, Hoshiarpur, dated the 27th December, 1925, confirming that of the Fourth Class Sub-Judge, Hoshiarpur, dated the 26th October, 1923.

Mr. *Shamair Chand*, for the Appellants.

Mr. *N. C. Pandit*, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—

The village Pohlian Prohitan was gifted by the then Raja to certain Brahmans who were his *Prohits*. The land revenue was also remitted in perpetuity to the Brahmans. Thereafter the ancestors of the present defendant who are Rajputs also settled in the village. In 1866 a suit was brought by the ancestors of the present plaintiffs against the ancestors of the present defendants for a declaration of title as to proprietorship. In that suit the Brahmans claimed that they were full and sole proprietors of the village and that the Rajputs were at first servants and later tenants of the Brahmans. The Rajputs, on the other hand, claimed that they were the proprietors of the whole village and the Brahmans were the *muafidars* with no proprietary rights. The matter was referred to arbitration and the arbitrators gave an award in which they declared each party to be the proprietors of the land in its cultivation. The Brahmans were styled as *adna malikan* and the Rajputs as *ala malikan* in respect of land other than the land in the cultivating possession of either party. Certain other decisions were given as to land which was in the occupation of the tenants and was in their cultivating possession at the time and we are not concerned with this part of the decision. It was also decided that the Rajputs were to pay 13¼ seers per maund of produce out of the land in the Rajputs' possession to the Brahmans as heretofore, and in the judgment it was stated that for this purpose the Rajputs were to be deemed tenants of the Brahmans. A decree followed the award, and the terms of the decree were incorporated in the *wajib-ul-arz* and were followed in the Settlement Records thereafter.

On the 15th March, 1910, Rikhi defendant No. 1 a Brahman proprietor mortgaged his rights in certain land in the possession of Dila Ram, Gopi and Shaman, present defendants Nos. 2, 3 and 4, Rajputs, to the present plaintiffs, and the present plaintiffs brought a suit for possession of this land against Dila Ram, etc. They contested the suit and alleged that Rikhi was merely a *jagirdar* or *muafidar* and had, therefore, no right to alienate his rights. Other pleas which had been raised were abandoned by the parties and finally the sole question to be decided by the Court was whether the right of Rikhi was alienable or inalienable. The trial Court held that these rights were alienable and gave a declaratory decree to the mortgagee that he was entitled to recover 13¼ seers per maund of produce from the defendants.

In appeal the then Divisional Judge, Mr. LeRossignol, confirmed the decree of the trial Court holding that the Brahmans were the owners as well as *muafidars* of the village and the defendants, the Rajputs, were only permanent tenants and the right claimed by the plaintiffs was a right to recover rent from a permanent tenant. The Rajputs appealed to the Chief Court, but the appeal was dismissed *in limine*, the Court holding that the decision of the Divisional Judge that these Rajputs were tenants was probably correct, but that in

any event the rights were alienable. The plaintiff then sought to secure a mutation of names on the basis of his mortgage and the Revenue Court first sanctioned the same, but later on they appeared to have refused the same or altered the entries, back again.

The plaintiff next brought a suit for recovery of dues on the basis of 13¼ seers of each maund of produce against the Rajputs. The Financial Commissioner held that the decision as to the right being a tenant's right was an *obiter dictum* on the part of the Divisional Judge and presumably on the part of the Chief Court too and he held that the plaintiff possessed no proprietary right in the land in dispute and that he had not secured the sanction of the Collector to recover the equivalent of his dues under s. 48 of the Punjab Land Revenue Act. The plaintiff made another attempt to obtain a decree from the Revenue Court, but his claim seems to have been again dismissed. It seems to me that with due deference to the learned Financial Commissioner's ruling on the point the decision of the Divisional Judge upheld by the Chief Court was not *obiter*. The point in dispute was whether the right was alienable or not. To decide that question it was necessary to decide what the nature of the right was and rightly or wrongly the Divisional Judge decided that the right was one for recovery of rent from a permanent tenant and the Chief Court seems to have been inclined to agree with him. In any event the Rajputs failed to secure a counter-decision and the Brahmans in whose favour the decree stood could not appeal from the decree.

The plaintiff having failed in the Revenue Court brought the present suit for the recovery of Rs. 110 on cash value of the customary dues recoverable by him from defendants Nos. 2 to 9 (Rajputs) for the past three years at the rate of 13¼ seers in each maund of defendants' produce of land in their possession. This particular land is situate in Taraf Rajputan, and admittedly this land was in the cultivating possession of the Rajputs in 1866. According to that decision, therefore, *qua* this land that Rajputs are proprietors of the land. The present suit was decreed by the trial Court which held that the Civil Court had jurisdiction and that the nature of the rights was *Prohit's* rights due from the Rajputs to the Brahmans. In appeal the learned Senior Subordinate Judge upheld the decree of the trial Court holding that these rights were not *jagir* rights, and also were not *Prohit's* rights, but were a kind of customary due recoverable by Brahman proprietors as such in accordance with an agreement embodied in the *wajib-ul-arz*. He also held that the plaintiff's suit was cognizable by the Civil Court.

In second appeal Counsel for the appellants has contended that if the judgment of Mr. LeRossignol upheld in the Chief Court is correct and the Rajputs are to be regarded as permanent tenants then the suit is not cognizable by a Civil Court under s. 77, paras. (*n*), (*i*) or (*o*). Secondly, he contends that if these rights are to be taken as right dues from an inferior proprietor to a superior proprietor then they are barred from the cognizance of a Civil Court under s. 77 (*p*) of the Punjab Tenancy Act. Thirdly, he contends that if they are taken to be customary dues other than the two mentioned above then they fall within the definition of village cess in s. 4 (12) of the Punjab Tenancy Act, and are, therefore, barred from the cognizance of a Civil Court under s. 77 (*j*) of the Punjab Tenancy Act. He also contends that as the present plaintiff was a plaintiff in the previous suit decided by Mr. LeRossignol, that decision is *res judicata* between the parties who are practically the same as in that suit. In reply Counsel for the respondents contends that the question of the nature of the dues is a question of fact. I am unable to see how the question of the nature of dues can be a question of fact, and I, therefore, overrule this contention.

Next Counsel contends that the Rajputs are not tenants because in the award they were declared to be proprietors. He also contends that the decision of Mr. LeRossignol is not *res judicata*, because the parties are not the same in that there are two fresh defendants who were not parties to that case. He also contends that the Brahmans are the inferior land-owners and not the superior land-owners, because they are described as *adna maliks* both in the award and in the *wajib-ul-arz*, because they take only ⅓rd of the produce, whereas Rajputs take ⅔rds. The last argument seems to me to have no force whatsoever. A superior land-owner would generally not take as much produce or have as many rights in the land as the inferior proprie-

tors. No doubt, the Brahmans are described as the *adna maliks* and the Rajputs as the *ala maliks*, but the whole history of the village shows that, as a matter of fact, the rights of the Rajputs were carved out of the full proprietary rights once granted to the Brahmans, and it seems to me that in the circumstances it is a misnomer to speak of the Brahmans as *adna maliks* at all.

The case is not free from difficulty. I do not consider that the judgment of Mr. LeRossignol can be considered to be *res judicata*, because the parties are not the same. It is difficult for me to hold that the Rajputs are permanent tenants in view of the terms of the award of 1866, which gave them full proprietary rights in the land cultivated by them. The incidents of tenancy and ownership are different though, no doubt, it might have been more convenient to describe the Rajputs as permanent tenants, had the arbitrators in the award of 1866 been aware of the possibilities of this definition. But the arbitrators described them as proprietors and not as tenants permanent or otherwise, and the Chief Court in that case gave no final decision as to the exact position of the parties. But the appeal must succeed on the contention either that this is a due recoverable by a superior land-owner from an inferior land owner or that it comes within the definition of village cess. It seems to me that the Brahmans the original proprietors and *jagirdars* were really left with superior land-owners' rights in the land which were in the cultivating possession of the Rajputs. Lands which were not in the cultivating possession of the Rajputs were treated differently but I am concerned with the question of the nature of the 13¼ seers per maund of the produce which is now in dispute, and it seems to me clear that this was nothing more than a recognition of the original proprietary rights of the Brahmans in the entire village area. But even if I am wrong in this matter, it seems to me that this due falls within the definition of village cess, because it is a due leviable by custom and is not for the use of the private property, nor for personal service, nor imposed by any enactment for the time being in force. In either event the Civil Courts are barred under s. 77 (*p*) or s. 77 (*j*) of the Punjab Tenancy Act from taking cognizance of this suit and the appeal, therefore, succeeds, and the plaintiffs' suit is dismissed. Having regard to the difficulty of the case and the conflicting nature of the decisions by the Civil and the Revenue Courts I leave the parties to bear their own costs throughout.

R. L. *Appeal accepted.*

OUDH CHIEF COURT.

CIVIL APPEALS NOS. 5 AND 6 OF 1926.

January 31, 1927.

Present :—Mr. Justice Raza and Mr. Justice King.

Khan Bahadur Molvi MAHMUD-UL-HASAN KIRMANI—PLAINTIFF—APPELLANT

versus

BALDEO SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Under-proprietary rights—Sir rights, whether necessarily comprise under-proprietary rights—Decision of Rent Court as to status of tenant—*Res judicata*—Oudh Sub-Settlement Act (XXVI of 1866), r. 10—Proof of under-proprietary rights—Oudh Courts Act (IV of 1925), s. 12, sub-s. (2)—Case certified as fit one for appeal, whether can be argued in its entirety.*

Where a case is certified as a fit one for appeal under s. 12, sub-s. (2) of the Oudh Courts Act, 1925, the appellant is entitled to argue the appeal on all the points and is not bound to confine himself to the points considered by the Judge in granting the certificate. [p. 852, col. 2]

The mere fact that a man sets up *sir* rights does not necessarily mean that he claims under-proprietary rights. [p. 85 , col. 1.]

The decision by a Rent Court that a certain person held lands as an under-proprietor is not *res judicata* in a subsequent suit in a Civil Court by the proprietor for a declaration that he was not an under-proprietor. [*ibid.*]

Under r. 10 of the Oudh Sub-Settlement Act, 1866, the defendants must prove (1) that they have formerly been proprietors, (2) that the lands in suit had been held by them or by some persons from whom they inherited at some time since 13th February, 1844, and (3) that the lands had been held by them as *sir* (or *nankar*) when they were in proprietary possession. [p. 853, cols. 1 & 2.]

Appeals from the decrees of Mr. Justice Hasan, dated the 17th March 1926, in Second Civil Appeal No. 212 of 1925.

Mr. *M. Wasim*, for the Appellant.

Mr. *K. P. Misra*, for the Respondent.

JUDGMENT.—These appeals arise out of two declaratory suits brought by the plaintiff against Baldeo Singh and Fateh Singh separately in the Court of Munsif, Fatehpur, in the District of Bara Banki. The plaintiff is, admittedly, the proprietor of the village Mujibpur, hamlet of Sheikhpur. Baldeo Singh and Fateh Singh hold

certain lands in that village and pay rent for the same. Baldeo Singh holds 16 *bighas*, 13 *biswas*, 10 *biswansis* land at the annual rent of Rs. 27-10-0. Fateh Singh holds 14 *bighas*, 2 *biswas* land at the annual rent of Rs. 25. The declaratory suits were brought by the plaintiff in respect of these very lands. The rent for the years 1328 to 1331 *Faslis* fell in arrears and the plaintiff brought suits for ejectment against both the persons named above. Each defendant asserted his under-proprietary right in respect of the lands held by him and his plea was accepted by the Rent Court. The plaintiff's suits were consequently dismissed by the Rent Court on the 29th April, 1924. The plaintiff then brought the present suits against the defendants (separately), for a declaration that they were not under-proprietors of the land in respect of which they claimed under-proprietary tenure in ejectment proceedings taken against them in the Rent Court.

The defence was that the defendants were under-proprietors. The under-proprietary title was claimed by the defendants on various grounds.

The plaintiff's claim was decreed by the learned Munsif. The defendants' appeals were dismissed by the learned Subordinate Judge of Bara Banki. They then came to this Court in second appeal and their appeals were allowed by a learned Judge of this Court on the 17th March, 1926. The plaintiff then applied for permission to appeal under s. 12 of the Oudh Courts Act of 1925. His applications were granted and it was declared that the case was a fit one for appeal. The appeals were thus referred to a Bench of this Court for decision.

In disposing of these appeals, we have to see if the defendants named above have succeeded in establishing under-proprietary rights in respect of the lands in suits under r. 10 of the Oudh Sub-Settlement Act of 1866. Though the under-proprietary title was based on several grounds in the lower Courts, but the only ground which survived for consideration in this Court was that the defendants were entitled to under-proprietary right under r. 10 of the Oudh Sub-Settlement Act. This was the only ground which our learned brother had to consider in disposing of the appeals before him and which we have to consider now, in disposing of the appeals before us. Our learned brother has found that the defendants have succeeded in establishing their under-proprietary title to the lands in suit within the meaning of r. 10 of the Oudh Sub-Settlement Act. This finding is questioned in the appeals before us.

The respondents' learned Counsel contends that the appellant should confine his arguments to the particular point which was considered by our learned brother in declaring that the case was a fit one for appeal under s. 12, sub-s. (2) of the Oudh Courts Act of 1925. We are not prepared to accept the contention. We think the whole appeal is open before us and it should not be confined to the particular point which was considered by our learned brother in making a declaration required by sub-s. (2) of s. 12 of the Oudh Courts Act. It was not provided by that section that the appeal should be heard on that point only which was considered by the Judge, who made the decree in declaring that the case was a fit one for appeal. Our learned brother has declared that the *case* is a fit one for appeal. The memorandum of appeal was before him at the time he made the declaration. In our opinion the appellant is entitled to argue his appeals before us on all the points taken in the appeals. Whether or not there is any substance in the plea or pleas taken by him in the appeals is a different question.

Now we proceed to consider the plaintiff's appeals. Our learned brother has based his finding on a judgment of the Rent Court in an ejectment case between the predecessors-in-title of the parties in 1869 (Ex. A-19). There is nothing in this judgment to show that the lands to which it refers are the lands with which we are now concerned in this litigation. There was a dispute between the parties about the identity of the land in the lower Courts. That point was decided against the appellant by our learned brother. The appellant's learned Counsel, however, does not question the finding of our learned brother on this point in the appeals before us. The judgment of the Rent Court of 1869 should, therefore, be taken to refer to the lands with which we are now concerned in this litigation. We have considered that judgment carefully. It seems to us to be impossible to say definitely on that evidence that in the year 1869 the ejectment notice issued by the plaintiff's predecessor-in-title was contested by the defendants' predecessors-in-title on the ground that they were under-proprietors. It is true that the

word "*sir*" was used in the judgment in question, but as pointed out in the case of *Khanu Singh* v. *Abbas Bandi Bibi* (1) a man who sets up *sir* rights does not necessarily claim under-proprietary rights for, under s. 5 of Oudh Rent Act the person who is in possession of the *sir* land under certain circumstances is deemed to be not an under-proprietor but an occupancy tenant and it is also clear from the provisions of the Oudh Rent Act that an occupancy tenant cannot be ejected by an issue of notice. There is nothing in the judgment to show that the Rent Court had used the word "*sir*" to mean under-proprietary right or that it was held in those proceedings that the defendants' ancestors were entitled to claim under-proprietary rights in respect of the lands held by them. It appears to us that the view of the Commissioner who decided that case on the 25th September, 1869, was hypothetical and speculative on some points. Even granting that the word "*sir*" was used in that judgment to mean under-proprietary right, that expression cannot help the defendants in this case. Be it as it may the judgment in question does not operate as *res judicata* against the present plaintiff in the present litigation. As pointed out by their Lordships of the Privy Council in the case of *Mohammad Abul Hasan Khan* v. *Prag* (2) the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands, and what are the special or other terms upon which such tenant holds, and that the Civil Courts have the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or under-proprietary right in the lands. It should be noted that that case was decided by the Rent Court after the Settlement Court had rejected the claims of the defendants' ancestors for proprietary rights and also for sub-settlement in Village Mujibpur. The claim for proprietary rights was finally rejected on the 7th January, 1869, (Ex. 9) and the claim for sub-settlement, on the 22nd July, 1869, (Ex. 10).

Under r. 10 of the Oudh Sub-Settlement Act, 1866, it was necessary for the defendants to prove (1) that they have formerly been proprietors, (2) that the lands in suit had been held by them or by some persons from whom they inherited at some time since the 13th February, 1844, and (3) that the lands had been held by them as *sir* (or *nankar*) when they were in proprietary possession.

We agree with our learned brother that r. 10 does not require that the claimant must have been proprietor within 12 years preceding the date of annexation, *i.e.*, 13th February, 1856, and it is enough, to show that the claimant or his predecessor-in-interest was a proprietor at some time and that under the said rule the limitation is insisted upon only with reference to the possession of the *sir* lands with regard to which the claim is made. It is also necessary for the claimant to prove that the land had been held by him (or his predecessor-in-interest) as *sir* (or *nankar*) when he was in proprietary possession.

We have to see what have the defendants proved? There are some passages in Ex. 9 which may be relied upon as observations made by the Settlement Court, indicating that the defendants' ancestors had formerly been proprietors of the village, but this point is not free from doubt. It was stated at the close of the judgment that the defendants' ancestors had nothing to show that they were ever acknowledged as *zemindars*. It was clearly stated in the judgment in the sub-settlement case that the defendants' ancestors were not the old proprietors of the village. Even granting that the defendants' ancestors were proprietors of the village at a very remote period and that the lands in suit had been held by them at some time since the 13th February, 1844, the defendants have failed to prove that the lands in suit had been held by them (or their ancestors) as *sir* when they were in proprietary possession. We do not find and have not been referred to any reliable evidence on that point. It may be that it is very difficult for the defendants to prove at the present time that the lands in suit had been held by them or their ancestors as *sir*, but the Court cannot help them. It cannot be presumed that the lands which were held by them or their ancestors in 1869, had been held by them as *sir* also when they were in proprietary possession at a very remote period. Hard cases must not be allowed to make bad law. The fact in question might have been proved if the defendants or their

(1) 45 Ind. Cas. 849; 5 O. L. J. 121.
(2) 38 Ind. Cas. 814; 20 O. C. 8; 15 A. L. J. 113; 21 M. L. T. 102; 19 Bom. L. R. 202; (1917) M. W. N. 232 and 456; 32 M. L. J. 388; 21 C. W. N. 582; 26 C. L. J. 165; 5 O. L. J. 34 (P. C.).

ancestors had put forward a claim under r. 10 mentioned above at the first Regular Settlement, but they failed to do so. They (or their ancestors) were recorded as mere tenants of the lands in suit in the papers prepared at the last two Settlements and the entries in the village papers are all against them.

In these circumstances we are unable, with great respect, to agree with the learned Judge of this Court who decided these appeals. In our opinion the plaintiff's suits should be decreed with costs. We agree with the conclusions of the trial Court and the learned Subordinate Judge and restore the decree of the trial Court. The plaintiff will get his costs from the defendants in all the Courts.

G. H. *Appeals accepted.*

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 677 OF 1926.

November 22, 1926.

Present:—Mr. Justice Coldstream.

BABU SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

MANGAT RAI—PLAINTIFF AND TOTA SINGH—DEFENDANT—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—Appeal—Time requisite for obtaining copy of first Court's judgment, whether can be excluded.

In computing the period of limitation for filing a second appeal, the time required for obtaining a copy of the order of the Court of first instance cannot be excluded under s. 12 of the Limitation Act, even though under the rules of the Court a copy of that order has also to be filed along with a memorandum of second appeal.

Madan Gopal v. *Malawa Ram* (2) and *Chuhar Mal* v. *Bira Ram* (3), followed.

Maung Po Anuy v. *U Bya* (1), not followed.

Miscellaneous second appeal from the decree of the District Judge, Ambala, dated the 11th November, 1925, reversing that of the Subordinate Judge, Third Class, Ambala, dated the 24th August, 1925.

Mr. *Man Singh*, for the Appellants.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—Mangat Rai, the present respondent, instituted a suit against Babu Singh etc., the present appellants to recover a debt. The suit was dismissed by the Subordinate Judge, Third Class, Ambala, on the 24th August, 1925. Mangat Rai appealed and the learned District Judge of Ambala accepting the appeal remanded the case for re-trial on the 11th November, 1925. Against this decision of the District Judge Babu Singh, etc., filed the present second appeal on the 18th February, 1926.

On the appeal coming on for hearing Mr. Shamair Chand for Mangat Rai, the respondent, objects that the appeal is barred by limitation. Allowing three days for obtaining a copy of the decree appealed against, limitation for the present appeal expired on the 9th February, 1926, and, therefore, the appeal is *prima facie* barred by limitation. Mr. Man Singh for the appellants pleads, however, that the time spent by his clients in obtaining a copy of the Subordinate Judge's order of the 24th August, 1925, should also be excluded. Under O. XLII, r. 2 of the Civil Procedure Code, as amended by this Court, a copy of the judgment of the Court of first instance must be filed with a second appeal and Mr. Man Singh argues that this amendment has the effect of extending the privilege provided by s. 12 of the Indian Limitation Act so as to include the time required for obtaining a copy of the first Court's order. He cites a ruling of a single Bench of this Court reported in the Lahore Law Journal and the judgment reported in *Maung Po Aung* v. *U Bya* (1). In the latter case the Rangoon Court extended time under the provisions of s. 12 of the Indian Limitation Act.

I find no legal authority empowering the High Court to interfere with the provisions of s. 12 of the Indian Limitation Act which do not allow an extension of time for obtaining a copy of the order of the Court of first instance, nor in the present case is there any ground for extending the time in exercise of the discretion vested in a Court by s. 5 of the Act. The memorandum of appeal does not refer to any excuse for the presentation of the appeal after the expiry of the period of limitation, nor up to date has there been any application for extension of time under s. 5. Further I notice that the appellants were furnished with a copy of the order of the first Court on the 5th February, 1926, that is to say, many days before the period of limitation for this appeal expired. The judgments of this Court published in

(1) 90 Ind. Cas. 910; 3 R. 310; A. I. R. 1925 Rang. 344.

Madan Gopal v. *Malawa Ram* (2) and *Chuhar Mal* v. *Bira Ram* (3) support my view of the law and the merits which, in my opinion, preclude the extension of time in this case.

The appeal is accordingly dismissed with costs. The cross objections have not been pressed by Mr. Shamair Chand and they are dismissed.

A. N. A. *Appeal dismissed.*

(2) 68 Ind. Cas. 777; A. I. R. 1923 Lah. 96.
(3) 73 Ind. Cas. 919; A. I. R. 1923 Lah. 461.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 436 OF 1924.
December 16, 1926.
Present:—Mr. Kinkhede, A. J. C.
GHASIA—DEFENDANT—APPELLANT
versus
Thakur RAM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Transfer of tenancy—Acquiescence of landlord—Consent and acquiescence, pleas of, distinction between—Acquiescence during progress of act and after—Delay, when raises presumption of acquiescence—Civil Procedure Code (Act V of 1908), s. 100—Pleas recorded parties not properly examined with advertence to law—Decision, whether binding on second Appellate Court.

A landlord, who, knowing that a transferee from a tenant has entered into possession of a house site and has commenced to expend labour and capital in improving it for his own benefit, keeps quiet over the affair and thereby impliedly encourages him to go on incurring the expenditure, will be deemed to have acquiesced in the transferee's right to occupy the premises. [p. 858, col. 2.]

The extent of time and conduct which will suffice to raise such a bar to the landlord's right to claim possession from the transferee must always depend upon the circumstances of each case. [*ibid.*]

A plea of consent to a transaction is distinguishable from that of ratification. [p. 857, col. 2.]

Consent imports either an express or implied agreement to waive one's own election to a void a transaction which two or more persons are negotiating or are about to enter into; as such it precedes the transaction and gives strength to it so as to enable the parties to the transaction to complete it on its basis. Whereas ratification is subsequent in point of fact and time to a transaction which is voidable. [*ibid.*]

In order to sustain a plea of acquiescence and to raise a bar of equitable estoppel, it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering or active intervention was sufficient to justify the legal inference that he had by plain implication contracted out of his right of ownership. [*ibid.*]

Acquiescence is a question of legal inference drawn from the facts found. [*ibid.*]

There is a distinction between a case where the acquiescence occurs while the act acquiesced is in progress and another, where the acquiescence takes place after the act has been completed. In the former case acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it. In the latter when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. As a right of action has vested on him a mere delay to take legal proceedings cannot by itself constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent; but it must count against the person who has shown his quiescence under the circumstances, from which his assent may reasonably be inferred as a matter of legal inference. [p. 857, col. 2; p. 858, col. 1.]

If there is no attempt by the Court to focus the contention of the parties by proper examination with advertence to the law bearing on the point, and the real points are missed, even though the bald pleas of the parties are on record, the trial is vitiated and the decision is liable to be ignored even in second appeal. [p 858. col 2.]

Damusa v. *Abdul Samad* (4) and *Tukaram* v. *Chintaram* (5), relied on.

Appeal against the decree of the District Judge, Nimar, dated the 28th July, 1924, in Civil Appeal No. 216 of 1923.

Messrs. *Jakatdar* and *M. K. Padhye*, for the Appellant.

Mr. *S B. Gokhale*, for the Respondents.

JUDGMENT.—I think this case has not been tried on proper lines. The real question to be decided has not been properly grasped; nor were proper issues framed; the trial has consequently been wholly vitiated. There is much which though necessary for the proper adjudication of the case has been left unascertained and undecided. This was pre-eminently a case for the personal examination of the parties. The principal question in the case was of the acquiescence on the part of the landlord in the right of the defendant to occupy the premises purchased by him on 31st May, 1921.

Both the Judges have looked askance at the defence and have rejected the defendant's plea of acquiescence as an afterthought. The site in dispute was formerly in the occupation of one Babulal Brahman as a building site and his house stood on it. He sold it to the defendant for Rs. 300 by a registered deed dated 31st May, 1921. The plaintiffs who together with defendant No. 2 constitute the whole proprietary body instituted the present suit on 18th October, 1922, for ejectment of the defendant on the ground that Babulal had no right to sell the site, and consequently the defendant

acquired no right to occupy it against their will

The plaintiffs' cause of action accrued on 1st June, 1921. They alleged that they demanded possession of the vacant site several times till 1st August, 1922, but without success. On 7th December, 1922, the defendant put in a written statement alleging that he purchased the house together with the site from Babulal with the full knowledge and consent of all the plaintiffs and defendant No. 2 also who on transposition later on became plaintiff No. 9; that after his purchase he re-built the house and made improvements *bona fide*, that the plaintiffs had full knowledge of this fact but never objected to the building of the house. He, therefore, contended that the plaintiffs were estopped from claiming the site after demolishing his house.

On 7th December, 1922, certain facts were ascertained by Court from the parties. The defendant then stated that he commenced to build upon the site soon after his purchase and completed it about two months ago, at a cost of about Rs. 300. Plaintiffs replied that they never consented to the defendant's possession or purchase as alleged. They denied that the defendant rebuilt the house on the site in suit and incurred the alleged expenditure; they alleged that the defendant was asked to vacate the site soon after the purchase but the latter refused to vacate.

After these pleadings parties opened negotiations for a compromise, and as Rambhau, defendant No 2, was not served plaintiffs gave him up on 9th January, 1923, and took time to effect a compromise out of Court. The defendant, however, remained absent at the next hearing and the case proceeded *ex parte* against him; the *ex parte* order was, however, subsequently set aside, the terms of the compromise recorded and as the Court thought it was necessary to examine plaintiffs, it gave an order for their personal presence in Court on 10th April, 1923. That day defendant did not press the compromise as a bar to the decision of the suit on its merits and the case accordingly went to trial on the merits, therefore, the plaintiffs thought of re-impleading Rambhau the discharged defendant, and with his consent made him a co-plaintiff No. 9 on 16th June, 1923. The array of parties was thus made proper and completed on 16th June, 1923, and it was then and not till then that a properly constituted suit by all co-proprietors was before the Court. Defendant naturally turned this opportunity to his advantage and filed a written statement on that very day raising the following among other pleas:—

"(2) Para 2 of the plaint is admitted; that the defendant purchased the house of Babulal on 31st May, 1921, under the following circumstances:—

(*a*) The defendant had purchased a *padti* land and paid Rs. 85 as *nazrana* to the plaintiff Ramsingh and took possession of the *padti* land.

(*b*) The defendant was then in need of making another house for his son who was married and wanted to live separate in food on account of family quarrel.

(*c*) The defendant collected materials to build the house when about two years ago the plaintiff requested the defendant not to build the house and consented to the purchase of the house of Babulal for Rs. 300 in lieu of the *padti* plot and re-built this house with the materials collected for building the house on the *padti* land. This cost the defendant Rs. 300 and the *nazrana* paid for *padti* land was set off in that purchase.

(3) Plaintiff and Rambhau had full knowledge and this house was re-constructed under their advice and hence they were estopped from claiming the site after demolishing the house.

* * * * *

(7) Plaintiffs cannot now resile from their contract and take advantage of their own fraud. Defendant files the deed, dated 3rd June, 1917, to support his claim."

The plaintiffs' Pleader was given time for a reply and the plaintiff No. 1 Ramsingh was ordered to be personally present in Court on 29th June, 1923, which was fixed for the settlement of issues. He, however, did not attend in person and plaintiffs' Pleader Mr. Ghate made a statement admitting that the defendant paid Rs. 85 to the plaintiffs as *nazrana* for a *padti* site granted to the defendant as per receipt dated 3rd June, 1917, (Ex. D-2). It was, however, denied that the plaintiffs got back the site on consenting to the defendant's purchase of the house in suit. The allegations in paras. (2) (*b*) (*c*) and (3) were also denied. It was asserted that the *padti* site taken on 3rd June, 1917, by the defendant continued in his possession as before even after 3rd June, 1917. Plaintiff Rambhau denied knowledge of the defendant's purchase of the *padti* site and the house in suit, and

asserted that he never consented to any of the transactions. The only issues framed with reference to these pleas were Nos. 1, 2 and 3 which were reproduced below.

"(*i*) Whether the defendant purchased the house with the consent of the *Lambardar* Ramsingh as pleaded in para. (2) (*c*) of the additional written statement!

(*ii*) Whether the defendant re-built the house with the consent and knowledge of the plaintiffs !

(*iii*) Are the plaintiffs estopped from claiming possession of the site in suit as pleaded?"

I think the learned District Judge was right in observing in para. 3 of his judgment that "This was obviously a case where the examination of the parties themselves was desirable. The trial Judge had realised this when he ordered that plaintiff No. 1 should attend in person." Plaintiff Rambhau was not examined either as a party or as a witness in the case. The District Judge, therefore, rightly concluded that "the defendant was somewhat prejudiced" as "He would not summon Ramsingh as a witness when he has been ordered to attend by the Court." As regards Ramsingh's omission to go into the witness-box and the defendant's omission to move in the matter and the Court's failure to enforce its order, he remarked that "This is unsatisfactory, and on the whole * * the appellant is entitled to some consideration. It seems to me to have been the duty of Ramsingh to have entered the witness-box. In fact the only witness for the plaintiff was the man who was formerly made a defendant." (This is a mistake. Gangaram was examined as P. W. No. 1, Rambhau and not he was the former defendant). These observations give an impression to me that in the opinion of the District Judge the disposal of the case by the first Court was on the whole not satisfactory. In spite of this he shared the view of the first Court that the plea about the *nazrana* raised in the written statement dated 16th June, 1923, was suspicious and an afterthought. I am not prepared to uphold this kind of disposal of the matters involved in a case of this kind. Really speaking, the written statement dated 16th June, 1923, which was by way of amplication of the pleas already raised but concisely stated in the previous written statement dated 7th December, 1922, could not be looked upon as raising an altogether 'new-matter', or, a plea which could be termed as an 'afterthought.' On the contrary it appears to me that,in spite of the above amplification by the defendant made voluntarily and of his own accord, there were still left several points on which the defendant and the plaintiffs should have been examined.

A plea of consent to a transaction must always be distinguished from a plea of ratification. Consent imports either an express or implied agreement to waive one's own election to avoid transaction which two or more other persons are negotiating or are about to enter into; as such it precedes the transaction and gives strength to it so as to enable the parties to that transaction to complete it on its basis. Whereas a ratification is subsequent in point of fact and time to the transaction which is voidable. It was consequently necessary for the trial Court to focus the contentions of the parties with proper attention to this point of distinction. The pleas raised by the defendant in both the written statements were in substance two, (1) of consent to the purchase before it was concluded and (2) of acquiescence and estoppel arising out of the alleged consent prior to the transaction, and also out of subsequent conduct and standing by, *i. e.*, the want of objection to the defendant's outlay of consideration expenditure on improvement of the premises he purchased. It must be remembered that in order to sustain a plea of acquiescence and to raise the bar of an equitable estoppel it is incumbent upon the party relying on it to show that the conduct of the owner whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that he had, by plain implication, contracted that the right of occupation under which the defendant originally obtained possession of the land, should be changed into a perpetual right of occupation; as held in *Beni Ram* v. *Kundan Lal* (1), acquiescence by the landlord was a question of legal inference drawn from the facts found.

There is a distinction between a case where the acquiescence alleged occurs while the act acquiesced in, is in progress, and another, where the acquiescence takes place after the act has been completed. In the former case, the acquiescence is quies-

(1) 21 A. 496; 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec (N. S.) 1022 (P. C.).

cence under such circumstances that assent may be reasonably inferred from it. In the latter case, when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. A right of action has then vested in him, and mere delay to take legal proceedings to redress the injury cannot, by itself, constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent: *cf. Shyama Charan Baisya* v. *Prafulla Sundari Gupta* (2). It, therefore, follows that delay will necessarily count against any person who has shown his quiescence under circumstances from which assent may be reasonably inferred as a matter of legal inference. Assuming that the defendant's improvements were in progress to the knowledge of the plaintiffs, the law had cast on them a duty to raise their voice and restrain the defendant; if at that stage they remained quiet or abstained from objecting, and after the improvements were completed they raised their head and sought the Court's help for issuing a mandatory injunction to the defendant to dismantle the new structure on the improvements effected and deliver possession of their site in a vacant state, the Court might reasonably be justified, in view of the altered situation, in thinking that the plaintiffs were equitably estopped, from raising, their belated objection, lodged for the first time in the form of suit, on the ground that it was not preceded by a prior demand or objection, at the earlier moment when they became aware of the infringement of their rights in the village site.

This Court has laid down the law in *Narain* v. *Behari* (3) that the failure on the part of the landlord to raise an objection in time raises an implication, of a grant of a new license, or of the continuation, in favour of the transferee of the superstructure, of the one already enjoyed by the former occupant of a house site in the village *abadi*. If in the case of a person who acquires the superstructure merely, and remains in undisturbed occupation for some time, the equity raises the implication of a new license or of the continuation of the old, and thus bars the landlord's right of avoidance of the transfer, much more effectively should the bar operate against him, if he, knowing that the transferee having entered into possession of the house site (which really is the landlord's property) has commenced to expend labour and capital in improving it for his own benefit, keeps quiet over the affair, and thereby, impliedly encourages him to go on incurring the expenditure. What time and what conduct will suffice to raise such a bar is a matter which must always depend upon the particular circumstances of each case.

There is some slight indication in the pleadings of these matters, but the parties have not been properly examined, which must now be done.

The defendant raised the plea that Rs. 85 which were paid in respect of another site granted to him, were retained by the plaintiffs in lieu of their consenting to the transaction in suit, and by way of support, the defendant asserted that, that old site was abandoned by him, and that, the same was in plaintiffs' possession. The plaintiffs had denied this allegation of the defendant. This point of plaintiffs' possession over the site once granted was a very crucial point in the case. It does not appear to have formed the subject of any issue or decision in the Courts below.

It is again a question whether in this particular village the *Lambardar* has been exercising his statutory powers under s. 188, Land Revenue Act, unfettered by the concurrent or co-ordinate exercise of similar powers by the other co-sharers acting individually in themselves. This point has not been properly threshed out in the Court below.

In short all the *bar or bald pleas* are there, but there is no attempt to focus their contention by proper examination of parties by the Court, with advertence to the law bearing on the point. The trial is consequently vitiated and the real points being missed the decision is liable to be ignored even in second appeal: *Damusa* v. *Abdul Samad* (4) and *Tukaram* v *Chintaram* (5). The case is accordingly remanded

(2) 30 Ind. Cas. 161; 19 C. W. N. 882 at p. 886; 21 C. L. J. 557.

(3) 31 Ind. Cas. 307; 11 N. L. R. 126.

(4) 51 Ind. Cas. 177; 15 N. L. R. 97; 17 A. L. J. 700; 37 M. L. J. 36; (1919) M. W. N. 505; 21 Bom. L. R. 920; 10 L. W. 310; 24 C. W. N. 81; 47 C. 107; 46 I. A. 140 (P. C.).

(5) 92 Ind. Cas. 327; 20 N. L. R. 17; A. I. R. 1924 Nag. 91.

for trial *de novo* after proper examination of the parties on proper lines with advertence to the above remarks.

The appeal is allowed. The appellant will get a refund of Court-fees paid in this Court and in the District Judge's Court and the case is remanded to the Court of first instance. Costs exclusive of Court-fee paid on plaint hitherto incurred will remain as spent.

G. R. D. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 298 OF 1926.
January 20, 1927.
Present :—Mr. Justice Addison.

DEVI DAYAL—DEFENDANT—PETITIONER
versus
NARAIN SINGH AND OTHERS—PLAINTIFFS RESPONDENTS.

Contract Act (IX of 1872), s. 23—Monopoly to sell vegetables—Public policy—Suit by self-constituted panchayat, *frame of—Substitution of parties after limitation, effect of—Promissory note—Right to sue.*

Grant of a monopoly by a *panchayat* in favour of a person to sell vegetables in a village is opposed to public policy under s. 23, Contract Act. [p. 859, col. 2.]

Somu Pillai v. *Municipal Council, Mayavaram* (1), followed.

If a necessary party is joined as plaintiff or defendant after the time for the suit has run out the entire suit must be dismissed. Therefore, where in a suit brought in the name of a self-constituted *panchayat* without any legal powers, the members of the *panchayat* are substituted as plaintiffs by way of amendment after the expiry of the period of limitation for the suit, the suit must be dismissed as time-barred. [p. 859, col. 2; p. 860, col. 1.]

The members of a *panchayat* cannot institute a suit upon a promissory note which is executed in favour of the *Sirkar Daulatmadar* through one of its members. [p. 860, col. 1.]

Petition for revision of the decree of the Sub-Judge, exercising powers as Judge, Small Cause Court, Batala, District Gurdaspur, dated the 8th February, 1926.

Mr. *Arjan Das*, for the Petitioner.

Mr. *Muhammad Din Jan*, for the Respondents.

JUDGMENT.—This suit was brought in the name of the *panchayat*, Dharm Kot, which claimed the sum of Rs. 63 on a promissory note, dated the 25th May, 1919, executed by the defendant. This *panchayat* is a self-constituted body without any legal powers and obviously it could not bring a suit (see page 796 of Mulla's Civil Procedure Code, 8th Edition). After the period of limitation had expired, the Small Cause Court Judge allowed the suit to be amended by striking out the name of the plaintiff, that is, the *Panchayat* Dharm Kot, and by substituting the names of six persons, who alleged themselves to be members of this self-constituted body.

The plaintiffs' case was that they sold by auction to defendant the sole right to sell vegetables in the village for the sum of Rs. 84, Rs. 21 of which were paid by him while he executed a promissory note for the balance of Rs. 63. The defendant pleaded that the *panchayat* had no power to sell such a license, that he had not executed the promissory note in favour of the plaintiffs or in favour of the *panchayat*, and that the suit was barred by limitation. The Small Cause Judge, however, decreed the suit with costs and against this decision this revision has been admitted.

It was first contended that the creation of a monopoly in favour of the defendant to sell vegetables in the village was opposed to public policy under s. 23 of the Indian Contract Act and that, the agreement being void, the plaintiffs had no right to sue for the amount of the promissory note. There is clear authority for this proposition in *Somu Pillai* v. *Municipal Council, Mayavaram* (1). It was held in that case that even a properly constituted District Municipality had no power to create a monopoly in favour of one person. It was further held that any amount collected under this void agreement must be refunded. It follows, therefore, that the present suit should have been dismissed on the principle that the grant of the monopoly to the defendant was against the provisions of s. 23 of the Indian Contract Act, being in restraint of trade.

It is further contended that the suit was barred by limitation as the plaintiffs' names were only substituted after the suit was barred by limitation. This is also correct. There was no plaintiff at all until the plaintiffs' names were substituted after limitation had expired. A suit can only be brought in the names of all the members of an unregistered or unincorporated society. If a necessary party is joined as plaintiff or defendant after time for the suit has run out, the entire suit must be dismissed: (see

(1) 28 M. 520.

Rustomji's Law of Limitation, 3rd Edition, page 191). It may be the case that I would not interfere in revision merely because I hold that the suit was barred by limitation but in the present case, as I have already shown, other considerations also enter.

In the third place it was contended that the *panchayat* or the members of the *panchayat* could not sue on the promissory note in question as it was in favour of the *Sirkar Daulatmdar* through Jat Mal, a member of the *panchayat*, and not in favour of the *panchayat* or of the members of the *panchayat*. There seems to me also to be considerable force in this. There is no doubt that some members of the *panchayat* did grant the monopoly, on contention of payment of a certain amount, to the defendant, but the promissory note they took was not in their own favour but in favour of Government through one of their members. In my opinion only Government could authorise a suit on such a promissory note.

For the reasons given I accept this revision and dismiss the suit but leave the parties to bear own costs throughout.

R. L. *Revision accepted.*

A. N. A.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 34-B OF 1926.

December 20, 1926.

Present:—Mr. Hallifax, A. J. C.

BAJIRAO—PLAINTIFF—APPELLANT

versus

SHIVRAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 64, 65, 73, 74—Contract of sale—Rescission—Damages—Refund of earnest-money—Damages, whether can be set-off against earnest-money—Seller, when can claim damages—Vendor and purchaser—Duty of vendor to tender conveyance.

There is no special law in India with regard to the return of earnest-money on the breach of a contract for sale of land. Every case in which any question of earnest-money arises can be decided on the provisions of ss. 64 or 65 and 73 or 74 of the Contract Act. [p. 861, col. 2.]

When a contract to sell is rescinded, the seller must restore the benefit he has received under it, under s. 64 of the Contract Act if he rescinds it himself, and under s. 65, if the purchaser rescinds it. But, when he rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under s. 73, and even if he has suffered none, he can be awarded a reasonable amount as compensation not exceeding the earnest-money, if there is the usual agreement of forfeiture in the contract under s. 74. Either sum awarded as damages can be set-off against the amount of the earnest-money he has to refund. [p. 861, col. 2.]

It is the duty of a vendor of immoveable property to offer a proper conveyance to the purchaser and to call upon him to pay the purchase-money. [p. 860, col. 2.]

The question of the payment of damages to the seller can arise only if the purchaser is responsible for the breach of contract. [p. 861, col. 2.]

Appeal against the decree of the Sub-Judge, First Class, Morsi, dated the 23rd March, 1926, in Civil Suit No. 150 of 1924.

Mr. *G. L. Subhedar*, for the Appellant.

Messrs. *R. R. Jayawant*, R. B., and *V. N. Herlekar*, for the Respondents.

JUDGMENT.—On the 30th of July, 1922, the first three defendants agreed to sell a field and a half share in another to the plaintiff-appellant by the 31st of January, 1923, for Rs. 5,555 which was to be paid by the cancellation of a decree held by the plaintiff by which these defendants had to pay him Rs. 1,935 and the cancellation of a debt of Rs. 120 due by them as rent of a field and by the payment of Rs. 2,500 in cash. The sum of Rs. 2,055 due on the decree and for rent was treated as paid and called "earnest-money" which the plaintiff agreed to forfeit if he failed to carry out the contract. The sale-deed was never executed, and on the 25th of April, 1923, these defendants sold one of the fields, that of which they owned the whole, to the 4th defendant. On the 3rd of November, 1924, the plaintiff filed the suit out of which this appeal arises for specific performance of the contract of July, 1922, claiming in the alternative a sum of Rs. 5,000 as damages.

It was found in the lower Court that the plaintiff broke the contract. Even if that is a fact, a matter which has to be decided now, the basis of the finding is undoubtedly wrong. It is that the plaintiff has failed to prove that he went to the defendants during January, 1923, taking Rs. 3,500 with him, and offered that sum to them. The agreement to sell makes the money payable before the Sub-Registrar," not before the execution of the sale-deed. Also it was the duty of the sellers to seek out the purchaser with a proper sale-deed.

I am satisfied on the evidence that the plaintiff did go to the defendants twice during that last month of the period fixed

in the contract to call on them to carry it out, and also that he was able and willing to pay them the Rs. 3,500 on the execution of the sale-deed, though he was not bound to do so till it was registered. One of the strongest pieces of evidence on this point is Ex. P.-4, a lawyer's letter of the 20th of February, 1923, sent by these defendants in reply to a similar letter of the 9th of the same month sent to them by the plaintiff. The plaintiff's letter is not produced, and the defendants' is to the following effect: "The statement in your letter that you came with the money twice in January is untrue; we were willing to carry out the contract, but 'you did not get a sale-deed executed, saying you had no money.'" The necessary inferences from this seem obvious.

But the defendants have made no attempt to support the allegation in that letter that the plaintiff expressly refused to carry out the contract; they deny it and say he never said anything about it till nine days after the end of January. Even if that is true, it is still they who broke the contract; it was their business to offer him a proper conveyance and call on him to pay the balance of the purchase-money, which they admittedly never did.

In respect of the 4th defendant it has been held that there is no proof that he had notice of the contract to sell to the plaintiff. There is certainly no evidence of its having been brought to his notice, and he denied that he had any knowledge of it. There seems a good deal of reason for believing that denial to be false, but it is among the artificialities of the administration of justice that it has to be accepted as true. It is on this ground that the plaintiff has in this Court withdrawn his prayer for specific performance of the contract. He has further reduced his claim for Rs. 5,000 as damages to a prayer for what is called a "refund of his earnest-money," admitting eventually that if he broke the contract he would not be entitled to get the whole of it back.

The matter is perfectly simple and was explained in *Lachmi Narayan* v. *Damodardas* (1). It is almost always obscured, as was done in this case, by supposing there is some special law in respect of earnest-money. The term is not used in the law of India, as far as I know, and it is certainly not defined, but practically every case in which any question of earnest-money arises can be decided on the clear provisions of s. 64 or s. 65 and s. 73 or s. 74 of the Contract Act. When a contract to sell is rescinded the seller must restore the benefits he has received under it, under s. 64 if he rescinds it himself and under s. 65 if the purchaser rescinds it, that is to say, he must refund the earnest-money. But when he rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under s. 73, and even if he has suffered none he can be awarded a reasonable amount as compensation not exceeding the earnest-money, if there is the usual agreement of forfeiture in the contract, under s. 74. Either sum awarded as damages can be set off against the amount of the earnest-money he has to refund.

The question of the payment of damages to the seller can, of course, only arise if the purchaser is responsible for the breach of the contract, and here it has been found that the sellers broke it. The benefit they received under the contract they broke was the cancellation of the liability to pay to the plaintiff Rs. 2,055, with interest after the 30th of July, 1922, and this must be restored. The plaintiff has in this Court asked for interest at the very moderate rate of 6 per cent. per annum.

The decree of the lower Court will be set aside, and in its place a decree will issue ordering the first three defendants to pay to the plaintiff the sum of Rs. 2,055 and compound interest thereon at 6 per cent. per annum from the 30th of July, 1922, till the date of payment, and also all the costs incurred by him in both Courts.

On behalf of the 4th defendant Ramchandra, the purchaser from the other defendants, it is urged that the plaintiff ought to pay his costs in both Courts. He is a resident of the village in which the land is situated and the other defendants live, and if he did not know of the agreement to sell to the plaintiff, as he says, he laid himself open to trouble by his own carelessness. Further, he delayed the progress of the suit for a year by obvious evasions of service of sum-

(1) 81 Ind. Cas. 282; 20 N. L. R. 192; A. I. R. 1925 Nag. 109.

mons, failing to appear when summons was served on him, and then appearing and getting the *ex parte* order against him set aside. There seems as little justification for setting it aside as for allowing the other defendants, before it was set aside, to take the plea that he was a purchaser in good faith without notice of the prior contract. The defendant Ramchandra will pay his own costs throughout.

G. R. D. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 661 OF 1926.

January 22, 1927.

Present:—Mr. Justice Addison.

BUTA—DEFENDANT—PETITIONER

versus

TIRLOK CHAND—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 34—Production and proof of account books—Plaintiff's vague statement as to dealings, whether sufficient proof.

The production and proof of account books and a general statement by the plaintiff that there were dealings between him and the defendant is not sufficient evidence of any particular item charged against the defendant. [p. 863, col. 1.]

Ganga Ram v. *Kaka Ram* (1), *Abdul Ali* v. *Puran Mal* (2), *Firm Gokal Mal-Ramchand* v. *Firm Nath Mal-Gulzari Mal* (3), *Ganeshi Lal* v. *Firm Mangat Ram-Atma Ram* (4) and *Abdul Haq* v. *Firm Shivji Ram-Khem Chand* (5), followed.

Petition for revision of the decree of the Sub-Judge, First Class, Gujrat, dated the 19th April, 1926, reversing that of the Sub-Judge, Fourth Class, Gujrat, dated the 21st January, 1926.

Mr. *Jamna Das*, for the Petitioner.

Messrs. *Joti Sarup* and *Gullu Ram*, for the Respondent.

JUDGMENT.—Plaintiff alleged that defendant borrowed from him Rs. 44-15 and attached his thumb-mark to an entry against this amount in his *bahi*. He accordingly brought the present suit for Rs. 95 principal and interest. Defendant pleaded that this debt had been paid off and that he had paid Rs. 148 to the plaintiff on the 10th June 1925, for which sum plaintiff gave him a receipt. He further urged that the plaintiff had taken advantage of him and made him pay much more than was due. Defendant accordingly counter-claimed for Rs. 59-1. The plaintiff replied that the receipt for Rs. 148 had been granted by him but that this payment was in settlement of another account. The trial Judge held that the plaintiff had not established any other account and decreed the defendant's counter-claim. On appeal the Senior Sub-Judge held that the other account had been proved and setting aside the order of the trial Judge gave plaintiff a decree for Rs. 95. Against this decision the defendant has applied on the revision side to set aside the decree of the Appellate Court and to dismiss the plaintiff's suit. He has not asked that a decree should be given to him for his counter-claim.

The sum of Rs. 44-15, constituting the principal of the amount in suit, was the first transaction in the accounts put in by the plaintiff, an entry as regards this item being thumb-marked by the defendant. The plaintiff has proved that there are dealings entered in his account books thereafter. He has put in copies of his *khata* and *roznamcha bahis* as regards these dealings. None of the subsequent entries bear any thumb-mark. Besides proving his account-books, the plaintiff in the witness-box stated generally that there were subsequent dealings. Apart from that there is no evidence to establish that this was the case. Further it is clear that there was only one *khata* account and not two separate *khata* accounts, as stated by the plaintiff after the defendant's pleas were put in. The plaintiff's plea, therefore, that the sum of Rs. 148 was in payment of a sum due on another account is not correct.

The principal question, however, is whether the plaintiff has proved any dealings subsequent to the advance of Rs. 44-15 the entry regarding which was duly thumb-marked by the defendant. It was held in *Ganga Ram* v. *Kaka Ram* (1) that where the plaintiff can easily produce independent and trustworthy evidence in support of entires in their account books, it would be unfair to accept as sufficient proof the entries uncorroborated by any evidence other than a somewhat vague statement by one of the plaintiffs. A somewhat similar ruling is *Abdul Ali* v. *Puran Mal* (2). In *Firm Gokal Mal Ramchand* v.

(1) 22 Ind. Cas 403; 47 P. L. R. 1914; 53 P. W. R. 1914.

(2) 25 Ind. Cas. 560; 82 P. R. 1914; 277 P. L. R. 1914.

Firm Nath Mal Gulzari Mal (3) it was held that the statement of a *Munim*, who made daily balances each day was not sufficient proof of the plaintiff's claim on book account when the actual items were not paid in his presence. In *Ganeshi Lal* v. *Firm Mangat Ram-Atma Ram* (4) the plaintiff's account books were proved and two witnesses were examined. One *Munim* said that dealings took place in his presence between the plaintiff and defendants and that a particular payment was also once made by the defendant in his presence. Another *Munim* said that the defendant has taken away goods in his presence. It was held, however, that this was not sufficient evidence that any single article charged against the defendants was supplied to them. See also *Abdul Haq* v. *Firm Shivji Ram-Khem Chand* (5).

In the present case there are only the account books and the general statement of the plaintiff that there were subsequent dealings. Following the above rulings I must hold that that the dealings were not proved under s. 34 of the Indian Evidence Act. I, therefore, accept the revision and dismiss the plaintiff's suit. The parties will bear their own costs throughout.

R. L. *Revision accepted.*

(3) 75 Ind. Cas. 812; A. I. R 1923 Lah. 431.
(4) 76 Ind. Cas. 157; A. I. R. 1924 Lah. 540.
(5) 71 Ind. Cas. 259; A. I. R. 1922 Lah. 338 at p. 343.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 112 OF 1926.
December 15, 1926.
Present:—Mr. Findley, J. C.

NARAYAN AND OTHERS—DEFENDANTS—APPELLANTS
versus
VITHOBA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. III, para. 11—"Alienate", meaning of—Transfer in future, whether prohibited—Sale—Agreement to sell whether can be implied from void sale—Right in personam—*Part performance, principle of, whether applicable to void sales—Mortgage—Mortgagee, when entitled to possession—Sale of village—House and* kotha, *whether pass to purchaser—Presumption.*

The word "alienate" in para. 11 of the Sch. III of the Civil Procedure Code is used *ejusdem generis* with the preceding words "mortgage, charge and lease" and the provision does not prohibit the transfer in future of interest in property in respect of which proceedings before the Collector are pending. Agreements to sell such property are not affected by the pendency of the Collector's proceedings. [p. 861, col. 1.]

A contract to convey immoveable property in future for a certain amount is only a personal contract and gives rise to a right *in personam* which may be satisfied either by the performance of the specific act or by giving compensation. [p. 864, col. 2.]

If the sale of property is statutorily void an agreement to sell enforceable in law cannot be implied to exist separately and independently of the sale itself and it cannot be given effect to because the sale no longer exists and the agreement is merged in the sale. [p. 865, col. 1.]

The equitable doctrine of part performance cannot be applied to the case of a transaction which is void *ab initio* and not merely unenforceable in law owing to a mere defect of form or absence of formality normally necessary to make it legal. [p. 865, col. 2.]

A mortgagee has no right to the possession of property mortgaged unless and until he forecloses and he cannot, therefore, keep out of possession a person to whom the property has been sold by the mortgagor. [p. 866, col. 1.]

A house and a *kotha* in a village are appurtenant to it and in the absence of any words excluding them from the operation of a sale of the village, they cannot be retained by the vendor. [*ibid.*]

Second appeal against the decree of the District Judge, Nagpur, dated the 23rd November, 1925, in Civil Appeal No. 188 of 1925.

Mr. *M. R. Bobde*, for the Appellants.
Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—The plaintiffs, Vithoba and Sambhaji, brought this suit in the Court of the first Subordinate Judge, Second Class, for possession of a 2-anna share in *Mouza* Devali and a fourth share in the house and *kotha* specified in para. 6 of the plaint. Nago, Ramnath and Maroti, now deceased, whose widow is *Musammat* Gaji, owned an 8 anna share in the village as well as in the house and *kotha* in question. The plaintiffs rely on a sale deed, dated 30th June 1924, (Ex. P 1) executed by Nago in their favour. On 22nd March, 1917, Ramnath, Nago and *Musammat* Gaji, widow of Maroti, had sold their 8-anna share and the house and *kotha* to Dhanu, the father of defendants Nos. 1 and 2, Narayan and Govinda. Defendants Nos. 3 and 4 are the nephews of defendants Nos. 1 and 2, and all the four defendants constitute a joint Hindu family. Dhanu and all the defendants have been in possession of the 2-anna share and of the house and *kotha* in question since the sale in their favour. It, however, transpired in another suit that the sale in favour of Dhanu was effected

while Collector's proceedings were pending in respect of Nago's 2-anna share. The plaintiffs, in those circumstances, came to Court claiming the subjects as stated.

The Subordinate Judge, on the issues which arose on the pleadings of the parties, held that the sale-deed of 30th June, 1924 had been duly executed for consideration. He further held that the doctrine of part-performance did not apply to the case, inasmuch as the sale-deed in the defendants' favour was void *ab initio*; that no separate agreement to sell could be implied from the sale-deed in the defendants' favour and that, even if there had been a previous oral agreement to sell, it could not revive after the sale-deed was found to be void. On these findings decree was granted in respect of the 2-annas share to the plaintiffs, but the relief as regards the house and *kotha* was refused, because in the opinion of the Subordinate Judge these had not come under the purview of the Collector in the execution proceedings.

The defendant appealed to the Court of the District Judge, Nagpur, and the plaintiffs filed a cross-objection with reference to the disallowance of the relief as regards the house and *kotha* in question. The learned District Judge allowed the cross-objection but dismissed the appeal, and the defendants have now come up on second appeal to this Court.

A long and elaborate argument has been addressed to me on the assumption that there was in the present case an agreement to sell. Even admitting that the sale in Dhanu's favour was a void one, it has been urged that, with reference to para. 11, Sch. III of the Civil Procedure Code, the said provision does not prohibit the transfer in future of an interest in the property but only lays an embargo against the transfer of the present interest therein. This was the principle laid down in *Muhammad Sayeed* v. *Muhammad Ismail* (1), by Stanley, C. J., and Banerji, J. The word "alienate" in para. 11 of the Schedule quoted above was held to be used *ejusdem generis* with the preceding words "mortgage, charge and lease." I see no reason to differ, as at present advised, from the interpretation put by the learned Justices on the provision in question. It has been urged on behalf of the appellants that the position in the present case was exactly the same, that, if there was an agreement to sell, no present interest in the property was created: *cf.* s. 54 of the Transfer of Property Act, cls. (5) and (6), and *Avula Charamudi* v. *Marriboyina Raghavulu* (2). In the latter case the learned Justices pointed out that such a contract as one to convey an immovable land in future for a certain amount is only a personal contract and gives rise to a right *in personam* which may be satisfied either by the performance of the specific act in question or by the giving of compensation.

The learned District Judge, in dismissing the appeal of the defendants, relied on the decision of Stanyon, A. J. C., in *Salu Bai* v. *Rajat Khan* (3), which case undoubtedly goes against the present appellants. It has been urged in this connection that the observations made by the learned Additional Judicial Commissioner at page 147* of the judgment went beyond the scope of the case and were unnecessary. I have been referred in this connection to the decision of their Lordships of the Privy Council in *Harnath Kuar* v. *Indar Bahadur Singh* (4). The facts of that case were peculiar. The transfer therein was held to be invalid since the vendor at the time only had an expectancy. Nevertheless, their Lordships held that under s. 65 of the Indian Contract Act the purchase-money was recoverable. Similarly in *Narayan* v. *Motisa* (5) Prideaux, A. J. C., held that on equitable grounds when a contract was discovered to be void and when the vendor and vendee had in reality done nothing illegal with their eyes open but were only caught by the fiction that they should have known the law, restitution of the purchase-money should be made. It is difficult to see, however, what precise application these cases have in the present instance.

I am far from denying that if in the present case there was any real evidence as to a separate agreement to sell in future, such agreement would have created a right *in personam*, which might possibly

(1) 8 Ind. Cas. 834; 33 A. 233; 7 A. L. J. 1176.

(2) 28 Ind. Cas. 871; 39 M. 462 at pp. 469 and 470; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596.

(3) 42 Ind. Cas. 200; 13 N. L. R. 130 at pp. 144 to 146 (F. B.).

(4) 71 Ind. Cas. 629; 45 A. 179; A. I. R. 1922 P. C. 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 O. C. 223; 33 M. L. T. 216; 5 P. L. T. 281; 2 Pat. L. R. 237 (P. C.).

(5) 78 Ind. Cas. 343; 20 N. L. R. 87; A. I. R. 1924 Nag. 132.

*Page of 13 N. L. R.—[*Ed.*]

be enforced or upheld in favour of the appellants: *cf. Burjorji Cursetji Panthuki* v. *Muncherji Kuverji* (6) and *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (7) and I am equally prepared to admit that such an agreement would not fall within the bar laid down in para. 11 of Sch. III of the Civil Procedure Code. But what are the actual facts in the present case? The Pleader for the defendants, in his oral statement on 2nd February, 1925, pleaded specifically that there was no separate oral agreement as such to sell. What was urged was that the sale-deed having been held to be inoperative in respect of the 2-anna share in suit, that, in itself, constituted an agreement to sell. In a further statement made on 18th February, 1925, the same Pleader averred that there had been no separate agreement to sell after the sale-deed of defendants. We are, thus, left with the problem as to whether in the case of this sale, which was statutorily void, an independent agreement to sell can be implied to arise out of the transaction. I have not the slightest hesitation in answering this question in the negative. As pointed out by the Subordinate Judge, every sale necessarily implies a previous agreement to sell, although here "previous" may only mean a moment or two before. Moreover, even if we assume, there was such an agreement, it was obviously an agreement to sell there and then and not at any future date; and the sale being invalid and void, it seems to me clear that the connected agreement, which was an *ad hoc* one only having reference to that sale on the day in question, necessarily merged in the sale also and perished along with the said sale-deed.

I find myself in full agreement with what are, in my opinion, the very pertinent observations of Stanyon, A. J. C., made at pages 145-147* of *Salu Bai* v. *Rajat Khan* (3), quoted above. The vendor, at the time he entered into the sale transaction in question and on the pleadings it must necessarily have been at that time the agreement to sell also took place, was incompetent to contract. Very obviously, the attempt to deduce from the evidence what may be called a theoretical agreement to sell is a hopeless one in the circumstances of the present case. The whole transaction stood or fell together and, in the circumstances of the present case, both were undoubtedly void. I need hardly add that the position would have been entirely different if there had been an agreement to sell after the Collector's proceedings had ended, and in this sense it may be true that although the person incompetent to contract is incompetent to transfer, the converse always cannot be implied, *viz.*, that a person incompetent to transfer is incompetent to contract. For these reasons I find myself in full agreement with the finding arrived at by the learned District Judge in para. 2 of his judgment.

The next point, which has been pressed on behalf of the appellants, is that the equitable doctrine of part-performance applies to the present case. Dhanu and the defendants after him have admittedly been in possession of the subjects as a consequence of the sale-deed of 22nd March, 1917. It has been suggested that the plaintiffs are, therefore, debarred from disturbing the defendants who are in possession in consequence of a transaction which was entered upon and carried out by the parties thereto. *Muhammad Musa* v. *Aghore Kumar* (8), *Venkayyamma Rao* v. *Venkatanarasimha Appa Rao* (9) and *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (7) have been relied on in this connection. A perusal of these cases will show that they are not, in reality, parallel to the present case in any respect. Here, the flaw in the defendants' position is not a mere defect of form or the absence of some formality normally necessary The transaction was one which was void *ab initio* and no recourse to equity can be had with the object of defeating a law, or of enforcing what is expressly forbidden by law. It would be misapplication, indeed, of the principles of equity to apply in the present the equitable doctrine of part-performance. Any such application would have the direct and immediate effect of setting at naught both the letter and spirit of the law as contained in para. 3 of Sch. III of the Civil Procedure

(6) 5 B. 143; 3 Ind. Dec. (N. S.) 96.

(7) 76 Ind. Cas. 886; 46 M. 919; 45 M. L. J. 528; A. I. R. 1924 Mad. 271; 33 M. L. T. 53; (1924) M. W. N. 14 (F. B.).

(8) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(9) 34 Ind. Cas. 921; 39 M. 509; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L. J. 279; 43 I. A. 138 (P. C.).

*Pages of 13 N. L. R. [*Ed.*]

Code. I fully agree with the finding of the learned District Judge in this connection and must reject the proposition which has been advanced on behalf of the appellants.

The next ground of appeal, which has been argued on behalf of the appellants, is that, even if the sale and the so-called agreement to sell go by the overboard, the defendants are entitled to fall back on their mortgage which in consequence revives, and it has been suggested that the plaintiffs' remedy was not to sue for possession but to claim redemption of the defendants' mortgage. I am wholly unable to appreciate this proposition and know of no reason why the plaintiffs were not entitled to come to Court, as they have done, and claim possession under their sale-deed (Ex. P. 1). A separate suit on the mortgage has, I am informed, been instituted and the rights of the parties with reference to the mortgage will be more suitable and satisfactorily disposed of therein. Moreover, until the mortgagee forecloses, he cannot get possession, and I know of no authority for the view that the mortgagee, can, on the grounds stated, keep the plaintiffs-respondents out of possession: *cf. Hargu Lal Singh* v. *Gobind Rai* (10).

The final point, which has been urged on behalf of the appellants, is that the decree of the first Court should be restored in respect of the house and *kotha*. The Subordinate Judge excluded the house and *kotha* on the ground apparently that they were not appendages to the village share, while the learned District Judge held otherwise and decreed the plaintiff's claim in that respect In my own opinion, the house and *kotha* must be clearly regarded as incidental to, and bound up with, the 2 anna share in question: *cf.* s. 8 of the Transfer of Property Act and *Shiolal* v. *Nanhelal* (11). In the absence of any words excluding the house and *kotha*, which were obviously appurtenant to the share, these two subjects cannot, in my opinion, be retained for the benefit of the appellants.

In the final ground of appeal, which was not, however, argued before me, it is urged that the order of the lower Appellate Court as to costs was inequitable and unjust. For my own part, I concur in the opinion expressed by the learned District Judge and do not think any question of equity arises in this connection. The plaintiffs in the present suit are doing no more than enforcing what are their legal rights and, in those circumstances, I disagree with the Subordinate Judge in thinking that they should be deprived of their costs.

These findings govern the appeal which is dismissed. The appellants must bear the respondents' costs. Costs in the lower Courts as already ordered.

G. R. D. *Appeal dismissed.*

(10) 19 A. 541; A. W. N. (1897) 154; 9 Ind. Dec. (N. s.) 350

(11) 17 Ind. Cas. 129; 8 N. L. R. 123 at p. 127.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 11 OF 1925.

July 15, 1926.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

KALIPADA BASU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FORT GLOSTER JUTE MANUFACTURING CO., LTD.—DEFENDANTS—RESPONDENTS.

Part performance—Applicability of the doctrine—Right to specific performance, whether should be subsisting—Doctrine, whether creates title—Exchange of lands—Delivery of possession—Subsequent dispossession—Absence of registered deed—Transfer of Property Act (IV of 1882), s. 54—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit, effect of—Limitation Act (IX of 1908), Sch. I, Arts. 142, 143, 144—Possessory title

The defendant took forcible possession of a portion of plot A belonging to the plaintiffs. The latter sued for recovery of possession. The defendant agreed to give plot B in exchange and the plaintiffs withdrew their suit in 1916. The plaintiffs were put in possession of plot B but no deed of exchange was drawn up. The defendant wanted the remaining portion also of plot A and on his agreeing to pay for the same the plaintiffs put him in possession of this portion. In 1918, the defendant dispossessed the plaintiffs of plot B and refused to pay for the portion of plot A as agreed upon. The plaintiffs, in 1921, sued for recovery of possession of (1) the first portion of plot A on declaring their title thereto or for plot B in exchange with a duly executed conveyance of the same, and (2) for the remaining portion of plot A after demolition of the structures built by the defendant:

Held, (1) that the prayer for execution of a conveyance relating to plot B was barred by limitation; [p. 869, col. 2.]

(2) that the prayer for recovery of possession of the same on declaration of title came within Art. 142 of the Limitation Act and was not, therefore, barred; [*ibid.*]

(3) that the plaintiffs had no right to recover plot B as there was no registered instrument of exchange; [p. 872, col. 1.]

(4) that the claim to recover the first portion o

plot A was barred under O. XXIII, r. 1, Civil Procedure Code, inasmuch as the plaintiffs had not obtained leave to institute a fresh suit; [p. 873, col. 1.]

(5) that the order of dismissal passed in on withdrawal did not affect their right to recover the second portion of plot A; [*ibid.*]

(6) that the claim to recover the second portion of plot A was not barred by limitation nor by the fact that the defendant had built structures thereon. [p. 873, col. 2.]

The doctrine of part performance is applicable only in those cases where specific performance can be obtained. [p. 871, col. 2.]

[Case-law reviewed.]

Estoppel arising out of the equitable doctrine of part performance will not create a title in persons in whom it does not otherwise exist. [p. 872, col. 1.]

Mere previous possession, though peaceful and lawful, for less than the statutory period will not entitle a plaintiff to recover possession of land even though the person who has dispossessed him is not able to establish any title over the disputed land. [p. 872, col 2.]

Nisa Chand Gaita v. *Kanchiram* (27) and *Naba Kishore Tilakdas* v. *Paro Bewa* (28), followed.

Appeal against the decree of the Subordinate Judge, Howrah, dated the 24th of September, 1924.

Dr. *D. N. Mitter*, Babus *Promotho Nath Bandopadhya* and *Surja Kumar Aich*, for the Appellants.

Sir *P. C. Mitter*, Messrs. *Sisir Kumar Ghosal* and *Krishna Lal Banerjee*, for the Respondents.

JUDGMENT.

Mukerji, J.—The plaintiffs are the five sons of one Tarak Nath Bose, deceased. Tarak Nath Bose and Hare Krishna Bose were two brothers. The latter died in 1881 leaving a widow, who also died on the 7th November, 1921. The former died on the 9th September, 1921.

The plaintiffs' case appears to be as follows:—The properties described in Schedule *ka* to the plaint belonged to the joint family of the said two brothers. They consist of two items, plot No. 1 being 4 *bigahs* 10 *cottahs* of land held in *mokurrari* right under a deity Sree Sree Iswar Dakshina Ray, and plot No. 2 being 3 *bighas* of land held in *lakheraj* right. The plaintiffs are now the owners of the said properties. In 1916 the defendant Company took forcible possession of a *bigha* of land out of plot No. 1 of Schedule *ka* and erected cooly huts thereon, and upon that Tarak Nath Bose, who was then an employee under the said Company, instituted a suit, being Suit No. 364 of 1916, for declaration of title, recovery of possession and mesne profits and for a permanent injunction restraining the defendant company from erecting any structures thereon and for other reliefs. Tarak Nath Bose also instituted criminal proceedings in connection with this forcible dispossession. The Company then prevailed upon Tarak Nath Bose to withdraw from the suit agreeing to give Tarak Nath Bose a plot of *jote* land 6 *bighas* in area and described in Schedule *kha* to the plaint and to excavate for him a tank 100 feet square and also to erect a boundary wall round his homestead. On this agreement being reached Tarak Nath Bose withdrew from the suit which was eventually dismissed on the 8th April, 1916. The execution of a formal deed of exchange which was agreed upon at the time was, however put off. The Company gave Tarak Nath Bose the land aforesaid which the latter continued to be in possession of by cultivation thereof. In 1917 the Company wanted to have some more lands and there were negotiations between them and Tarak Nath Bose for the purchase of plot No. 2 of Schedule *ka*, as the result of which Tarak Nath Bose made over possession thereof to the Company, it being arranged that the Company would pay its proper price. The Company thus took possession of this plot as well, and erected structures thereon. Subsequently the Company asked for and obtained the documents relating to the two plots Nos. 1 and 2 in order to execute the deed of exchange and the *kobala*, but thereafter did nothing in that direction. Thereafter in 1918 the Company dispossessed Tarak Nath Bose from the land of Schedule *kha*. This led to open rupture between the parties and in order to put Tarak Nath Bose into further trouble the Company instituted a suit against him for ejecting him from his homestead. Tarak Nath Bose filed a written statement denying the Company's right to eject him and characterizing the suit as malicious and as being the outcome of the grudge which the Company bore against him for his refusal to part with the homestead for which, he alleged, the Company had offered a price of Rs. 6,000 which was inadequate. In the said written statement Tarak Nath Bose also set out what the Company had done in respect of plots Nos. 1 and 2 of Schedule *ka*. The suit ended in a compromise, dated the 16th April, 1919, under which the Company purchased the homestead for Rs. 6,000 and there was a condition in the compromise that both parties would amicably

settle between them the dispute relating to the said two plots. This dispute, however, was not settled as agreed upon and Tarak Nath Bose eventually died.

After the death of Tarak Nath Bose on the 14th December, 1921, the plaintiffs instituted the present suit. The main prayers in the plaint were as follows :—

(*ka*) That possession of the whole of the land described in Schedule (*ka*) below may be given to the plaintiffs upon a declaration of their title thereto.

(*kha*) If for any reason the Court holds the above-mentioned contract to be enforcible regarding the 4½ *bighas* of land described in plot No. 1 of Schedule (*ka*), then possession may be given to the plaintiffs of the property of Schedule (*kha*), upon a declaration that they are entitled to get possession of the same and a decree may be passed for execution of a proper deed of exchange in respect of the same and for payment of the sum of Rs. 1,800 for digging a tank and for erecting the compound wall.

(*ga*) That the defendant Company may be ordered to return to the plaintiffs all the documents, etc., regarding the *lakheraj* (rent-free) property mentioned in plot No. 2 of Schedule. (*ka*).

(*gha*) That the defendant Company may be ordered to remove all the structures and other things that they have on the same land.

On the plaint being filed the Company filed a written statement on the 20th February, 1922, traversing almost every allegation made in the plaint. This statement consists of thirty paragraphs, verified by one Bepin Behari Ganguli who described himself as the *gomastha* of the Company for the *mehal* in suit. The statement, however, was afterwards found to be defective as some necessary matter was omitted from it on account of inadvertence and this necessitated the filing of a further statement on behalf of the Company which they filed, verified again by the said *gomastha*, on the 17th March, 1922.

These pleadings gave rise to fourteen issues, most of which were found in favour of the plaintiffs by the Subordinate Judge. The learned Judge found in favour of the plaintiffs' title to the lands of Schedule *ka* and gave them relief in the shape of a declaration to that effect. The other prayers of the plaintiffs were rejected. The plaintiffs have accordingly appealed to this Court.

It is somewhat difficult to follow the learned Judge's reasoning which led him to refuse the other prayers in the plaint, because he has not dealt with those prayers separately. Nor has the learned Judge kept in view the distinction between the plaintiffs' case as regards the two plots of Schedule *ka*. On the whole the reasons which weighed with the learned Judge, as far as I am able to gather from his judgment, are these :—As regards prayer *kha* of the plaint, he seems to have held that the prayer was one for specific performance of a contract, the cause of action for which accrued in June, 1918, and the suit having been filed more than three years after such accrual, the relief was barred; he has said nothing about prayer *ga*; as regards the prayer for recovery of possession of the lands of Schedule *ka*, it is not at all clear whether he considers the same barred by limitation, but in any event he is clearly of opinion that "law and equity will stand in the way of plaintiffs' getting *khas* possession;" and as regards prayer *gha* though he says nothing about it specifically, it fails as a corollary to the plaintiffs' failure to recover *khas* possession of the land of Schedule *ka*.

I shall presently deal with the grounds urged on behalf of the appellants in support of the appeal, but before I do so I desire to deal with some of the contentions urged on behalf of the respondent Company, because if these contentions succeed, the judgment of the learned Judge must stand.

The first contention which the respondent Company attempted to urge is to the effect that they are entitled to the lands of Schedule *ka*, as being the present *zemindars* of the *mehal*, as these lands were *chakran* lands which had been given to the *pujari* of the deity Siva and as they have been surrendered in their favour by the son of the late *pujari*. Apart from the merits of this contention which I find wholly unsupported by any evidence except the evidence of one Basanta Choudhury who says he is the son of the late *pujari* and who professes to have made the surrender, and whose evidence on the face of it is absurd and untrustworthy, the respondent Company are, in my opinion, not competent to challenge the plaintiffs' title

for which a declaration has been made by the learned Judge in plaintiffs' favour, they not having preferred any appeal from that decree. The next contention of the respondent is to the effect that there was no such agreement between the parties under which according to the plaintiffs' case there was exchange of plot No. 1 of Schedule *ka* with the lands of Schedule *kha* in 1916, that there was no such exchange as was alleged on the plaintiffs' behalf, that there were no negotiations relating to plot No. 2 of Schedule *ka* and no making over of possession in respect of that plot nor any delivery of title-deeds, and that, generally speaking, the plaintiffs' story is a myth. The plaintiffs have sought to prove the agreement relating to the exchange by direct evidence as well as by evidence showing that in point of fact they were in possession of the Schedule *kha* lands for some time, that is to say, from the latter part of 1916 to some time in 1918 when they were dispossessed.

[His Lordship refered to the evidence and proceeded as follows:—]

On consideration of the facts and circumstances of the case I agree with the learned Judge in holding that the agreement upon which the plaintiffs rely has been proved. I also hold in agreement with him that the plaintiffs' case as to the circumstences, under which plot No. 2 of Schedule *ka* was made over to the defendant Company as alleged on behalf of the plaintiffs, is substantially true. It is impossible to account for the transfer of possession of this plot on any other hypothesis and indeed no alternative case, beyond a bare denial of plaintiffs' right and possession in this plot at any time, has not been put forward on behalf of the defendant Company. Moreover, Babu Tincouri Ghosh, a very respectable Pleader who is said to have taken a very important part in these transactions on behalf of the defendant Company, has not stepped into the witness-box, although it is evident that he was looking after the defendant Company's case. The only suspicion that I feel is as regards the delivery of the title-deeds; for while it is said in the plaint that the title-deeds of both the plots of Schedule *ka* were made over for the purpose of execution of necessary documents and the evidence indicates that all of them were made over at one and the same time, the prayer in the plaint is confined to recovery of the title-deeds of only plot No. 2 of that Schedule. I am not satisfied that the title-deeds were really made over and at any rate no details are forthcoming as to the nature and number of the title-deeds, if any, that were so made over. This being my view of the facts, I now proceed to deal with the grounds urged on behalf of the appellants in support of their appeal.

The appellants' first argument relates to their prayer *kha*. As regards this prayer it consists (*a*) of recovery of possession of Schedule *kha* land, on declaration of plaintiffs' title thereto, (*b*) of directions for the execution of a proper deed of exchange in respect of that plot and for payment of Rs. 1,800 for digging a tank and for erecting a compound wall. Portion (*b*) of this prayer in its essence involves relief for specific performance of a contract entered into so far back as 1916, and must, I think, be held to be barred by the three years' rule of limitation. As regards portion (*a*) of this prayer the learned Judge, in my opinion, has erred in holding that it is governed by the same rule. The cause of action was the dispossession in respect of this plot in 1918, and upon the allegation upon which the plaintiffs have come to Court, Art. 142 is clearly the Article which should be held to apply. The question then is whether the plaintiffs are entitled to succeed on the facts which have been established. It is clear that in order to succeed as regards this part of the case the appellants must establish their title to the Schedule *kha* plot. It has been urged on behalf of the appellants that in view of the part performance of the contract under which they were put in possession of this plot in exchange for plot No. 1 of Schedule *ka*, the omission to execute a formal deed of exchange was immaterial and equity will step in and complete any defect in the plaintiffs' title and will assist them in having their title declared and in recovering possession. In this behalf reliance has been placed upon the decisions of the Judicial Committee in the cases of *Imambandi Begum* v. *Kamaleswari Pershad* (1) and *Mahomed Musa* v. *Aghore Kumar* (2). On behalf of the

(1) 14 C. 104; 13 I. A. 160; 10 Ind. Jur. 468; 4 Sar. P. C. J. 732; 7 Ind. Dec. (N. S.) 72 (P. C.).

(2) 28 Ind. Cas. 930; 42 C. 801; 19 C. W. N. 250; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

respondents it has been argued that both these cases deal with transactions which took place before the Transfer of Property Act came into existence, under s. 54 of which a registered instrument is essential to the validity of a transfer and that the principle laid down in these cases cannot assist the plaintiffs. This argument has some force and weight of authority in its support. To deal with the question as to how far the doctrine of part performance may assist the plaintiffs in the present case it is necessary to examine the state of the authorities bearing upon the point.

In *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* (3) the transaction by which a mortgage was sought to be effected was of 1882 and the suit was instituted in 1895 and the argument before the Judicial Committee was that though the mortgage fell short of an actual transfer it showed a good contract for one, and the defendant might call upon the heir of the contractor to implement the contract. Their Lordships held that at the date of the deed a transfer such as that alleged could not be effected except by a registered deed as required by the Transfer of Property Act of 1882 and observed thus :—" Certainly if such a right exists it would be an answer to the plaintiffs' claim and the exact form in which it could be enforced need not be considered." A Full Bench of the Madras High Court in *Kurri Veerareddi* v. *Kurri Bapireddi* (4) had occasion to consider this last mentioned decision of the Judicial Committee and in that case they treated the observation quoted above as *obiter dictum*. The next decision to which reference need be made is that of the Judicial Committee in the case of *Mahomed Musa* v. *Aghore Kumar* (2). In that case there was a compromise in a suit between the parties in 1873 under which certain conveyances were to be executed, but the agreement of compromise was not registered nor embodied in the decree and no conveyances were executed, but the compromise was acted upon and carried out by all the parties to it and their successors-in-title for 30 or 40 years. Their Lordships held that even though the compromise and the decree taken together was considered defective or inchoate the acts of the parties had supplied all defects. Their Lordships observed :—" When the actings and conduct of the parties are founded upon, as in the performance or part performance of an agreement, the *locus pœnitentiæ* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in these legal forms to which finality attaches after the bargain has been acted upon." Shortly after another pronouncement was made by the Judicial Committee in the case of *Lakshmi Venkayyamma Rao* v. *Venkatanarasimha Appa Rao* (5). In this case their Lordships allowed specific performance of a conditional promise, which otherwise would have been but inchoate, but which by reason of the acceptance and performance of the condition, was held to have amounted to a complete contract. The suit in this case, however, had been filed within three years from the accrual of the cause of action. The learned Judges of the Madras High Court appear to have felt considerable difficulty in interpreting the aforesaid decisions of the Judicial Committee to which I have just referred and a Bench of that Court by a majority held that in the absence of a registered deed of exchange as required by ss. 54 and 118 of the Transfer of Property Act a defendant in a suit in ejectment could not rely upon the possession which the plaintiff had given him in part performance of a contract and that the plaintiff in the suit was not estopped by his conduct from recovering possession. [*Ramanathan Chetty* v. *Ranganathan Chetty* (6)]. The learned Judges in that case followed the Full Bench decision of that Court in the case of *Kurri Veerareddi* v. *Kurri Bapireddi* (4). In a recent Full Bench decision of that Court in the case of *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (7) in which *A* agreeing to sell his lands worth more than Rs. 100

(3) 24 M. 377; 5 C. W. N. 217; 28 I. A. 46; 7 Sar. P. C. J. 811 (P. C.).

(4) 29 M. 336; 1 M. L. T. 153; 16 M. L. J. 395 (F. B.).

(5) 34 Ind. Cas. 921; 39 M. 509; 20 C. W. N. 1054; 14 A. L. J. 797; 31 M. L. J. 58; (1916) 2 M. W. N. 23; 20 M. L. T. 137; 4 L. W. 58; 18 Bom. L. R. 651; 24 C. L. J. 279; 43 I. A. 138 (P. C.).

(6) 43 Ind. Cas. 138; 40 M. 1134; 6 L. W. 300; 22 M. L. T. 173; 33 M. L. J. 252; (1917) M. W. N. 757.

(7) 76 Ind. Cas. 886; 46 M. 919; 45 M. L. J. 528; A. I. R. 1924 Mad. 271; 33 M. L. T. 53; (1924) M. W. N. 14 (F. B.).

to *B* received the consideration and put *B* in possession but did not execute a conveyance, and then sued to eject *B* from the land, it was held that performance by way of delivery of possession and an enforceable right on *B*'s part to specific performance are good defences to the action, and the learned Judges in this decision purported to follow the decision of the Judicial Committee in the cases of *Lakshmi Venkayyamma Rao* v. *Venkatanarasimha Appa Rao* (5) and *Mahomed Musa* v. *Aghore Kumar* (2) and to overrule the decisions in *Kurri Veerareddi* v. *Kurri Bapireddi* (4) and *Ramanathan Chetty* v. *Ranganathan Chetty* (6). In the same case the Division Bench after the expression of opinion of the Full Bench overruled the contention that the doctrine of part performance is limited to cases when the right to sue for specific performance is not barred on the date of the subsequent suit. The Allahabad High Court in the case of *Salamat uz-zamani Begam* v. *Masha Allah Khan* (8) appears to have held the parties down, under somewhat similar circumstances, to the contract which in that case was a contract for exchange and was partly executed by mutual delivery of possession and dismissed the plaintiff's claim to recover possession from the defendant, though on account of want of a proper deed of exchange and title still remained in the plaintiff, and the time for specific performance of the contract had expired. The principle of this decision appears to have been approved of in a more recent decision of that Court in the case of *Ram Sewak Rai* v. *Sheo Naik Rai* (9). The Bombay High Court has also applied this principle in the case of *Sandu Valji* v. *Bhikchand Surajmal* (10) in which other cases of that Court have also been referred to as having adopted it. In this last mentioned case there was an agreement arrived at between the parties which had been acted upon for eleven years prior to the suit, and it was held that though the defendants' right to specific performance was barred, the plaintiff according to the equitable principle of part performance which makes the contract binding between the parties was not entitled to succeed. So far as the Calcutta High Court is concerned the position seems to be that while there is no doubt that the rightful owner is estopped in a suit for recovery of possession from setting up his own title by reason of the contract which had been performed in part, there is some, though very slight, conflict of judicial opinion on the point as to whether this doctrine may be applied without reference to the question whether the right to claim specific performance of the contract is or is not still subsisting. The English authorities indicate that the doctrine is applicable only in those cases where specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined [*Manchester Brewery Co.* v. *Coombs* (11) and *Potter* v. *Potter* (12) which was relied upon by the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar* (2).] This limitation as to the applicability of the doctrine has been recognised in *Bibi Jawahir Kumari* v. *Chatterput Singh* (13), *Singheeram Poddar* v. *Bhagbat Chander Nundi* (14), *Secretary of State for India* v. *Forbes* (15), *Bepin Behari Mitter* v. *Tinkouri Pathak* (16), *Khagendra Nath* v. *Sonatan Guha* (17), *Syam Kishore De* v. *Umesh Chandra Bhattacharjee* (18), *Gajendra Nath Dey* v. *Ashraf Hossain* (19), *Pitambar Gain* v. *Ram Charan Moral* (20) and was implicitly recognised by Jenkins, C. J., in *Puchha Lal* v. *Kunj Behary Lal* (21). On the other hand, the doctrine has been applied without reference to the question whether the right to claim specific performance was or was not subsisting in the cases of *Meher Ali Khan* v. *Aroatannessa Bibi* (22) and *Mahammad Shafikul*

(8) 43 Ind. Cas. 645; 40 A. 187; 16 A. L. J. 98.
(9) 73 Ind. Cas. 945; 45 A. 388; 21 A. L. J. 294; A. I. R. 1923 All. 433.
(10) 75 Ind. Cas. 118; 25 Bom. L. R. 381; 47 B. 621; A. I. R. 1923 Bom. 473.
(11) (1901) 2 Ch. 603; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299.
(12) (1750) 1 Ves. Sen. 437; 27 E. R. 1128.
(13) 2 C. L. J. 343.
(14) 6 Ind. Cas. 632; 11 C. L. J. 543.
(15) 17 Ind. Cas. 180; 16 C. L. J. 217.
(16) 9 Ind. Cas. 374; 15 C. W. N. 976; 13 C. L. J. 271.
(17) 31 Ind. Cas. 987; 20 C. W. N. 149.
(18) 55 Ind. Cas. 154; 24 C. W. N. 463; 31 C. L. J. 75.
(19) 69 Ind. Cas. 707; 27 C. W. N. 159; 36 C. L. J. 48; A. I. R. 1923 Cal. 130.
(20) 76 Ind. Cas. 365; 28 C. W. N. 157; A. I. R. 1924 Cal. 483.
(21) 20 Ind. Cas. 803; 18 C. W. N. 445; 19 C. L. J. 213.
(22) 67 Ind. Cas. 167; 25 C. W. N. 905.

Huq Chowdhury v. *Krishna Gobinda Dutta* (23). The former of these two decisions is that of a learned Judge sitting singly and the exceptional circumstances of the latter case have been pointed out in the case of *Pitambar Gain* v. *Ram Charan Moral* (20) and it has been explained in this case how that decision does not lay down any exception to the limitation as regards the applicability of the doctrine in cases only where specific performance can be obtained. The preponderance of authority, therefore, is in favour of the limited applicability of the doctrine.

It is clear, however, that estoppel arising out of the equitable doctrine of part performance will not create title in the plaintiffs if otherwise they had none The Judicial Committee in the case of *Maung Shwe Goh* v. *Maung Inn* (24) referred to s. 54 of the Transfer of Property Act and it would seem that their Lordships were of opinion in considering whether a contract creates a charge upon or interest in land one has to go by the Statute and not upon any principle of English equity. It is true, as has been pointed out in this Court in the case of *Jnan Chandra Das* v. *Rajani Krishna Pal* (25) and in decisions of other High Courts as well, that the Judicial Committee did not consider in that case whether the equitable doctrine of part performance was inapplicable in this country by reason of s. 54 of the Transfer of Property Act; still in a case where, as here, the plaintiffs seek to recover possession on the strength of their title, they cannot succeed when there has been no transfer by a registered deed such as is necessary under the section. [See *Jagadbandu Saha* v. *Radha Krishna Pal* (26).]

The appellants, no doubt, came upon the land quite lawfully and were in peaceful possession thereof, having been put in possession by the rightful owners, the defendant Company. It is conceivable, if the defendant Company are estopped by reason of the contract which was partly performed fully on the part of the appellants' predecessor and in part on behalf of the defendant Company or by reason of some other equitable principle based on their conduct in relation to the land, to take the view that the defendant Company are no better than trespassers. Under such circumstances a question may arise whether prior peaceful and lawful possession may not furnish good title as against a trespasser. Even in those circumstances, however, in view of the decision of this Court in the case of *Nisa Chand Gaita* v. *Kanchiram* (27) which, notwithstanding several dissentient views, is now held to have laid down a principle which is well-settled, so far as this Court is concerned [see *Naba Kishore Tilakdas* v. *Paro Bewa* (28)], the plaintiffs cannot succeed. The result then is that the plaintiffs' prayer *kha* must fail in its entirety.

I now come to deal with prayer *ka* which involves a consideration of the two plots of Schedule *ka*. As regards plot No. 1 the plaintiffs were dispossessed by the defendant Company at first in respect of one *bigha*, out of it and thereafter the plaintiffs' father put the defendant Company in possession in respect of the rest. The defendant Company have no title to this plot. They had promised to have deed of exchange made in order to effect a transfer which would create their title. There was part performance of the contract on their behalf by reason of the plaintiffs' father being put in possession to the *kha* Schedule lands. From this land the defendant Company subsequently dispossessed the plaintiffs, thereby undoing what they had done in the shape of part performance. I fail to understand how any question of three years' limitation can arise upon the facts or how any question of limitation at all can possibly arise. I do not agree with the appellants' contention that Art. 143 of the Limitation Act applies, for in that case some contract which would entitle the plaintiffs to this plot by reason of a forfeiture or breach of condition thereof or some facts which would invoke the operation of s. 119 of the Transfer of Property Act will have to be proved. At the same time I fail to see why the plaintiffs' suit for recovery of possession should be held to be barred taking the cause of action as having accrued in 1916. The dis-

(23) 47 Ind. Cas. 428; 23 C. W. N. 284; 28 C. L. J. 77.

(24) 38 Ind. Cas. 938; 44 C. 542; 21 C. W. 500; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 5 L. W. 532; 10 Bur. L. T. 69; 44 I. A. 15 (P. C.).

(25) 41 Ind. Cas. 850; 22 C. W. N. 522.

(26) 4 Ind. Cas. 414; 36 C. 920.

(27) 26 C. 579; 3 C. W. N. 568; 13 Ind. Dec. (N. S.) 972.

(28) 74 Ind. Cas. 283; 50 C. 23; A. I. R. (1922) Cal 198.

possession was partly in 1916 and partly subsequent thereto when the defendant Company made up their minds to retain possession of it to the exclusion of the plaintiffs. So far as the one *bigha* of land which formed the subject-matter of Suit No. 364 of 1916 is concerned, the plaintiffs' claim must be held to be barred, by reason of O. XXIII, r. 1 (3), Civil Procedure Code, no leave having been obtained for the institution of a fresh suit based on the same cause of action; but I am not prepared to accept the respondents' contention that the order of dismissal passed in that suit affects the remaining portion of plot No. 1. The authority upon which the respondents have relied in this connection, namely, the decision in the case of *Achuta Menon* v. *Achutan Nayar* (29), if it purported to lay down a general rule, is one from which I would respectfully dissent, and indeed that decision has since been overruled by a Full Bench in the case of *Pandilla Palli Singa Reddi* v. *Yeddula Subba Reddi* (30).

Then I pass on to plot No. 2 of Schedule *ka*. The case as regards this plot seems to be still more clear. The plaintiffs must bs taken to have been dispossessed in respect of this plot in 1917 or thereafter when the defendant Company began to possess it as being their own property. It is urged on behalf of the respondents that as the plaintiff No. 3 has stated in his evidence that the price had been settled at Rs. 1,000 per *bigha* and the Company had been put in possession, the plaintiffs' only remedy is to sue for the consideration. I have read the evidence of plaintiff No. 3 with some degree of care and I am not at all sure that the statement that he made was one about which he had any personal or definite knowledge. He followed it up by saying: "My eldest brother knew that the price was fixed at Rs. 1,000 a *bigha*." In any case it is only a piece of evidence and not an admission by which the other plaintiffs are bound. On a consideration of the whole of the evidence I am not prepared to hold that there was any completed contract as a result of which the defendant Company was put in possession and I am, therefore, of opinion that a claim for the consideration is not the plaintiffs' only remedy.

(29) 21 M. 35; 7 Ind. Dec. (N. S.) 381.
(30) 35 Ind. Cas. 185; 39 M. 987; 31 M. L. J. 48; 20 M. L. T. 62; (1916) 2 M. W. N. 1; 4 L. W. 1.

As regards these two plots the learned Judge, as I have already stated, has given another reason for refusing the plaintiffs' claim, namely, that a decree for possession in respect of these plots would offend against law and equity. This has been sought to be supported on behalf of the respondents on the ground that they have built structures on the land. It will be seen, however, that as soon as there was dispossession of one *bigha* out of plot No. 1, Tarak Nath Bose sought the assistance of the Court and the Company took possession of the rest of that plot on a promise from which they eventually resiled. As regards plot No. 2 they obtained possession promising to pay for it which they never did. If they built any structure on the plots as they appear to have done, at considerable costs, the difficulty is entirely their own creation and they can hardly look to the plaintiffs to be re-imbursed. It is sufficient to say that there is not a word in the evidence suggesting that the plaintiffs induced any belief in the mind of the defendants that the latter had a title to either of the plots. Indeed this position is directly antagonistic to the Company's case as set forth in their elaborate pleadings.

I turn now to prayer *ga* of the plaint. This prayer must be rejected in view of my finding relating to plaintiffs' story as to the delivery of the documents.

The only other prayer that need be considered is prayer *gha*. In my opinion the plaintiffs are entitled to have the directions which they ask for under this head.

An elaborate argument was advanced on behalf of the respondents on the ground of limitation, it being urged that the plaintiffs cannot recover possession as the defendant Company are their landlords and the suit has been instituted more than two years after dispossession. This argument need not be considered as it relates, if at all, to Schedule *kha* land, the claim as regards which must for the reasons already stated fail.

The result then is that, in my opinion, the decree passed by the learned Subordinate Judge in so far as it dismisses the plaintiffs' claim for *khas* possession of the lands of Schedule *ka* is set aside, and in lieu of it they will get a decree, in addition to the declaration already made by the learned Subordinate Judge, for *khas* possession of

the lands of that Schedule with the exception of the one *bigha* of land covered by the Suit No. 364 of 1916, and also a declaration in terms of prayer *gha* of the plaint. The decree of the Court below as to costs will stand and the plaintiffs will also get their costs in this appeal.

Greaves, J.—I agree.

A. N. A. *Appeal allowed in part.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 646 OF 1926.
January 17, 1927.

Present:—Mr. Justice Addison.

MESSRS. KARAM CHAND-SANT RAM THROUGH KARAM CHAND AND SANT RAM—DEFENDANTS—PETITIONERS

versus

DAYA NAND-DAMODAR DAS—PLAINTIFFS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Perverse decision of fact—Wrong view of limitation—Revision—Limitation Act (IX of 1908), Sch. I, Arts 64, 83—Suit by commission agent—Account stated and balance struck—Limitation.

A wrong decision on a question of limitation is not a ground for interference in revision under s. 25 of the Provincial Small Cause Courts Act. [p. 874, col. 2.]

Even where a suit is brought by a commission agent if the account was stated and a balance struck the suit is governed by Art. 64 and not by Art. 83 of the Limitation Act. [*ibid.*]

A perverse decision on a question of fact can be set aside in revision under s. 25 of the Provincial Small Cause Courts Act. [*ibid.*]

Petition for revision of the decree of the Judge, Small Cause Court, Delhi, dated the 12th July, 1926.

Mr. *G. S. Salariya*, for the Petitioners.

Mr. *Kishen Dayal*, for the Respondents.

JUDGMENT.—The plaintiff firm as commission agents supplied the defendant firm with certain goods. When the dealings ceased, the accounts were stated and the defendant firm struck a balance of Rs. 430-14 in the books of the plaintiff firm. The plaintiff firm then sued the defendant firm, stating that Rs. 150 only had been paid. They claimed Rs. 378-0-6 for the balance unpaid together with interest. They obtained a decree in the Small Cause Court for Rs. 360 and against this decision this revision petition has been admitted.

The case of the defendant firm was that Rs. 280 had been paid at Delhi in *Sambat* 1979 and later Rs. 150 was paid at Gangapore in full settlement of the claim. It was also pleaded that the suit was barred by limitation as it was a suit by commission agents and, therefore, fell within Art. 83 of the First Schedule to the Limitation Act. The Small Cause Judge, however, held that the suit fell within Art. 64 as accounts had been stated between the parties.

The petitioners' Counsel first argued that the suit was barred by limitation. In my opinion, as accounts were stated and a balance struck the Court below was correct in holding that Art. 64 applied Besides a wrong decision on a question of limitation is not *per se* ground for interfering in revision as was held in *Ghasita* v. *Sultan* (1).

The next point taken was that the judgment of the Court below was perverse in holding that the receipt for Rs. 150 was not in full settlement of the account between the parties. This question requires serious consideration. The defendant firm examined two witnesses who proved that two men came from Delhi to collect the debt for the plaintiff firm and they have both deposed that at that time the receipt in question for Rs. 150 was given in full settlement of the account between the parties. It is also in their evidence that the return third class fare for one man from Delhi to Gangapore City is only Rs. 7 whereas in the accounts of the plaintiff firm a sum of Rs. 16 8 is debited for the expenses of the person who went to Gangapore City in connection with this account. This means that two persons undoubtedly went. In the Official Railway Guide Book Rs. 7-2 is the ordinary third class return fare from Delhi to Gangapore City. It must, therefore, be held that two men did go to collect this debt.

The defendants' statements is to the effect that the body of the receipt was written by one of these persons, namely, Madan Mohan, while Data Ram signed the receipt. The plaintiff stated that Data Ram was his agent and that he did go to collect money from the defendant firm. He added that Data Ram had gone out of Delhi. He denied employing a man of the name of Madan Mohan. He admitted that part B of the receipt was written by his agent Data Ram but he could not say who wrote the first part A of the receipt.

(1) 11 Ind. Cas. 445; 93 P. R. 1911; 151 P. W. R. 1911; 226P. L. R. 1911.

I have seen this receipt. The first portion is written in *Deva Nagri* characters while the second portion is written in *Mundi* characters. The plaintiff, therefore, admits that the writing in the *Mundi* characters was by his agent, Data Ram, but he stated that he did not know who wrote the other portion. But what was written by Data Ram is merely the signature, which could not stand by itself. He has, therefore, merely admitted the signature to the receipt while stating that he does not know who wrote the body of the receipt. As he had failed without sufficient cause to produce his admitted agent, Data Ram, it must be held in face of the above evidence that the sum of Rs. 150 was taken in full satisfaction of the account. This means that the defendants' case that Rs. 280 were previously paid in Delhi was correct.

The exact words written by Data Ram are as follows: "*dastkhat Data Ram Munim ropaya 150 ankan 150 rokra liya babat Daya Nand-Damodar Daske.*" If this had been the only receipt the signature would have come last. It is the usual thing for the person signing the receipt to add the amount received again, though this has been written in the body of the receipt. This is all that Data Ram did and it must be presumed that he knew what the receipt was which he signed. When the plaintiff has admitted his signature it was upon him to prove that Data Ram was deceived or that Data Ram was not authorised to settle the account as he did. No such attempt has been made. In these circumstances the plaintiffs' suit should have been dismissed. I accept the revision petition with costs and dismiss the plaintiffs' suit.

R. L. *Revision accepted.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 16 OF 1925.

January 25, 1926.

Present:—Justice Sir William Ewart Greaves, KT., and Justice Sir George Claus Rankin, KT.

NATIONAL COAL CO., LTD.—DEFENDANT—APPELLANT

versus

GYAN RANJAN BHATTACHARYA—PLAINTIFF—RESPONDENT.

Companies—Articles of Association—Borrowing powers—Construction—Borrowing in excess of powers—Duties of strangers—Presumption of regularity of internal affairs—Benefit to Company, effect of—Subrogation.

Where the Articles of Association of a Company give borrowing powers in a certain manner, the share-holders and the Corporation itself are entitled to say that the safe-guards of the Articles should be observed. [p. 883, col. 1]

A person dealing with a Company must take the Articles to be such as appears at the office of the registrar of Companies to be in force. If the Directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution inasmuch as such a resolution, if passed, would be registered. [p. 884, col. 1.]

Irvine v. *Union Bank of Australia* (3), followed.

The principle that a Company is liable in equity to refund money improperly borrowed by its Directors on its behalf but in fact *bona fide* applied in discharging debts or liabilities of the Company cannot be applied where the debt or liability discharged is an item in unsettled accounts expressly challenged by the Company.

Appeal against the decree of Mr. Justice C. C. Ghose, dated the 3rd February, 1925.

Facts appear from the following

JUDGMENT.

C. C. Ghose, J.—(*February 3, 1925.*)—The plaintiff has instituted this suit for the recovery of a sum of Rs. 5,000 with such interest thereon as may be allowed by the Court and the action has arisen under this following circumstances:—

The plaintiff alleges that on the 24th September, 1923, he lent and advanced to the defendant Company a sum of Rs. 5,000. The loan was obtained from the plaintiff through one Jogendra Nath Mookerjee, who was one of the Managing Directors of the defendant Company. A *hundi* was executed by the defendant Company in favour of the plaintiff, whereby the defendant Company agreed to re-pay the said sum of Rs. 5,000 after 90 days. The plaintiff further alleges that the loan in question was duly confirmed by the defendant Company at a meeting of their Directors held on the 10th October, 1923, and that the said sum was utilized by the defendant Company in its business. The plaintiff demanded of the defendant Company re-payment of the said sum, but the defendant Company notwithstanding demands has failed and neglected to pay the said sum or any portion thereof. The *hundi* is annexed to the plaint and is marked Ex. A.

The defendant Company in their written statement state that the plaintiff is a cashier under the said Jogendra Nath Mookerjee in the latter's firm of Patel and Mookerjee and that the said Jogendra Nath Mookerjee ad no authority to borrow money on be-

half of the defendant Company or to execute any *hundi*, or otherwise create any liability, so as to bind the defendant Company. The defendant Company do not admit that there was any loan as alleged by the plaintiff and they deny that they ever agreed to re-pay the said sum of Rs. 5,000 after 10 days as alleged by the plaintiff. They further add that the said Managing Director having had no authority to execute the *hundi* in question on the 24th September, 1923, the plaint discloses no cause of action. Lastly, it is alleged that the plaintiff is a mere *benamdar* of the said Jogendra Nath Mookerjee, who owed money to the defendant Company and who has really set up the plaintiff to urge a false claim against the defendant Company. In these circumstances the defendant Company urge that the suit should be dismissed with costs.

On these pleadings the following issues were settled between the parties:

1. Does the plaint disclose any cause of action?
2. Was the *hundi* executed by the defendant Company?
3. Had J. N. Mookerjee authority to accept or draw the *hundi*?
4. Did the plaintiff pay the sum of Rs. 5,000 to the defendant Company?
5. Was the money or any portion of the money utilized by the defendant Company?
6. Was the *hundi* duly presented 90 days after sight?
7. Is the plaintiff entitled to interest?
8. Did the defendant Company ratify and confirm the loan?
9. Is the defendant Company estopped from questioning the authority of Mookerjee?

These being the issues, I turn to the oral evidence in the case. The first witness on behalf of the plaintiff is Jogendra Nath Mookerjee. He, as stated above, was one of the Managing Directors of the defendant Company. He stated that the moneys which are the subject-matter of the present case were borrowed through him of the plaintiff for and on behalf of the defendant Company, in order to meet the expenses of the colliery. He showed from the entries in the Cash Book of the defendant Company that if this sum of Rs. 5,000 had not been borrowed in the month of September, 1923, there would have been a debit balance on the 1st of October, 1923, in place of the credit balance of Rs. 1,268-15-10. He states further that a meeting of the Directors was held on the 10th October, 1923, at which the question of the loans obtained from the plaintiff on the 3rd September, 1923, and 24th September, 1923, was discussed and a resolution such as it appears in Ex. A, *viz.*, "that the loan on *hundis* for Rs. 10,000 and Rs. 5,000 respectively dated the 3rd September, 1923, and the 24th September, 1923, contracted by Mr. J. N. Mookerjee on behalf of the Company is hereby ratified and confirmed" was passed by the Directors. The witness suggested that the resolution as recorded in the Minute Book of the Directors was not the resolution which was passed by the Directors. He added that a clerk named Fanindra Bhusan Roy used to write the Minute Book of the Directors and that all the minutes in the said Minute Book, except those of the 10th October, 1923, had been written by Fanindra Bhusan Roy and that so far as the Minutes of the meeting of the 10th October, 1923, were concerned, it appeared to him that they had been written by Satya Charan Srimani. The witness added that on various occasions he had had as Managing Director to borrow money for the purposes of the Company and that no question of ratification or confirmation ever arose, but that as he was leaving the Company shortly after the date of the present loan, he had the matter brought to the notice of the Directors at their meeting of the 10th October, 1923. In cross-examination it was suggested that there was in fact no loan by the plaintiff, that the present suit was the result of a conspiracy between the plaintiff and the witness and that the plaintiff was a man of no means whatsoever, and that it was impossible for the latter to lend the sums he is alleged to have lent on the said two dates in September, 1923. The witness denied that there was any truth whatsoever in the suggestion in question, he admitted that among other creditors of the Company there were Messrs. Patel and Mookerjee, and that he was one of the partners in the said firm and that the other partners in the firm of Patel and Mookerjee had pressed him hard for re-payment of the moneys advanced by the said firm to the defendant Company and that the moneys borrowed from the plaintiff had gone to pay off the dues of Patel and Mookerjee. The witness was cross-examined at considerable length about his suggestion relating to the inaccurate record of

the resolution of the 10th October, 1923, in the Minute Book of the Company, but he adhered to what he had said in his examination-in-chief. In one particular the witness went further. He suggested that certain pages in the Minute Book had been torn off and that the resolution of the 10th October, 1923, relating to this matter as it appears in the Minute Book was a fabrication.

The plaintiff gave evidence and he proved that he lent the money in question to the defendant Company, of which the Managing Director was Jogendra Nath Mookerjee. In cross-examination it was sought to be suggested that the plaintiff was a man of no means whatsoever and that he could not have lent the two sums of Rs. 10,000 and Rs. 5,000 mentioned above, having regard to his position financially, as he was a mere cashier in the firm of Messrs. Patel and Mookerjee. It was also sought to be suggested that the plaintiff and Jogendra Nath Mookerjee had put their heads together to defraud the defendant Company of a sum of Rs. 5,000 and that, as a matter of fact, there were no just debts of the defendant Company which had to be paid off. The next witness, Fanindra Bhusan Roy, stated that he was a clerk employed by the defendant Company to write their Books of Accounts, prepare Balance Sheets, get accounts audited and attend meetings of Directors and share-holders and to write the Minutes of meetings of Directors, etc. He said that he was present at the meeting of the Directors held on the 10th October, 1923, and that the same was attended by Satya Charan Srimani, Jogendra Nath Mookerjee and Banku Behari Sen. The witness was shown Ex. A, and he proved that the same was in the hand-writing of Satya Charan Srimani. The witness said that he copied out Ex. A in the Minute Book but that the copy of the Minutes of the 10th October, 1923, as it appears now in the Minute Book, is not in his hand-writing but that the same is in the hand-writing of Satya Charan Srimani. In other words, the witness suggested that the record of the meeting of the 10th October, 1923, as it was written by the witness, had been changed and in place thereof had been substituted the record in the hand-writing of Satya Charan Srimani, as it appears now in the Minute Book. The witness left the Company's service at the same time as when Jogendra Nath Mookerjee retired from the Directorate, but he was careful to obtain a receipt from Satya Charan Srimani for the books and documents which he handed over to Satya Charan Srimani when he was coming away. In cross examination it was suggested to the witness that Ex. A was a mere rough pencil draft of resolutions proposed to be brought forward at the meeting of the Directors, but it was not the record of resolutions as finally passed by the Directors, and that the allegation that the Minute Book of the Company had been tampered with was without foundation.

On behalf of the defendant Company Satya Charan Srimani gave evidence. Shortly stated, his evidence was as follows: The Company came to be placed under the management of Messrs. Patel and Mookerjee sometime in 1915. In 1923, the Managing Directors were himself and Jogendra Nath Mookerjee. Jogendra used to look after the office in Calcutta and the witness used to manage the colliery. A meeting of the Directors was held on the 10th October, 1923, when it was brought to the notice of the Directors that Jogendra had drawn two *hundis* to meet the expenses of the colliery. These two *hundis* were in favour of the plaintiff. According to the witness this is what happened at that meeting: "Jogendra said that two *hundis* had been drawn to meet remittances to the colliery. We told him that he had no authority to borrow money. Thereupon Jogendra said that he had done so for the benefit of the colliery, otherwise the colliery had to be closed down. Thereupon I told him that if we could be convinced that he had borrowed the money for the benefit of the colliery we would not raise any technical objection but we would accept these *hundis*. I asked Jogendra to produce the cash book; he showed me the fair cash book; there was an entry in the credit side but no entry on the debit side. I wanted to look at the rough cash book. I was told that the rough cash book was mislaid and was not forthcoming. We then asked him about the *hundis*, as to where they were. He said they were with the money-lender: "Who is the money-lender"? I asked. He said that he did not know him but that the broker did. Thereupon we told him (Jogendra) that we would accept those loans after he had satisfied us." The witness goes on to state that the resolution as it appears now in the Minute Book was then adopted by the Directors. The wit-

ness's attention was drawn to Ex. A.; he stated that Ex. A was not a complete record of what took place at the meeting of the Directors; but it was a draft of the resolutions which were to be brought forward for discussion at the meeting of the Directors. In cross-examination the witness stated that when any of the draft resolutions appearing in Ex. A was passed by the Directors, the words "carried unanimously" were added in the draft to indicate that the resolution had been passed. The witness was asked as to why a resolution passed unanimously as would appear to have been the case (see Ex. A) was copied into the Minute Book not in the form as it was passed by the Directors but in a different form (see questions 83 to 97). The witness's answers on this point were neither clear nor convincing and he left on me the impression that he thought it was competent to him to alter the resolutions which had been passed by the Directors in any form he chose at the time when he proceeded to copy them into the Minute Book. The witness was taken through the various items appearing on the debit side of the fair cash book of the defendant Company for the month of September, 1923, and he admitted that the said debit items were in respect of payments which had been properly made by and on behalf of the defendant Company (see questions 248 to 263). The witness also admitted that to meet these payments, money had to be borrowed from outsiders in the absence of any money in the till. There was in fact no money in the till; and I think it is clear from the witness's answers to questions 264 to 271 that the witness felt that it was no use denying that the two sums advanced by the plaintiff in September, 1923, had been utilized by the defendant Company and that but for such utilization there would not have been any credit balance on the 1st October, 1923.

The next witness was the third Director of the Company, Banku Behari Sen. He said he was present at the meeting of the Directors held on the 10th October, 1923, and his account of what took place at the said meeting is as follows:—

"There was a heated discussion about this matter between Mookerjee and Srimani and both were in a very excited mood. I brought about a settlement between them. I said 'Mr. Mookerjee if you have advanced this money I will see that the loan is paid by the Company', and I asked Mr. Srimani to satisfy himself if the loan was taken for the Company. But as the account was not forthcoming at the time and Mr. Srimani could not be satisfied then and there I suggested 'let it be written that after examination or scrutiny it is found that the money was borrowed for the Company then the Company would pay and we would ratify and confirm it'." He stated that the entry was made by Srimani in his presence in the Minute Book and that during the meeting no one else was present besides the three Directors of the Company. In cross-examination he stated that Ex. A was written out at the meeting of the Directors, that is to say, that as the meeting proceeded to discuss the various resolutions that were brought forward, the Minutes as recorded in Ex. A were written out (see in this connection question 74 *et seq.*). As far as I can make out, the witness appeared to state that the second resolution as it appears in Ex. A was the subject of considerable discussion. It would appear from what the witness stated that at first the resolution as it appears in Ex. A was carried, but then Srimani raised a discussion on it after it had been passed and he expressed the opinion that he would not have the resolution in the Minute Book at all (see question 136). The witness stated that he brought about a settlement and the record of that settlement is to be found embodied in the resolution as it appears in the Minute Book.

I think the above may be taken to be a fair summary of the evidence in this case and on this state of the evidence it has been argued by Mr. H. D. Bose on behalf of the defendant Company that the suit must be dismissed on the ground that there is no evidence of presentation of the *hundi* as required by law. Now, to this there is a very clear answer. Exhibit G which is an affidavit made by Satya Charan Srimani on the 11th July, 1924, states distinctly in paras. 13 and 14 thereof that the *hundi* in question was presented to the defendant Company on the due date thereof and that payment was refused on certain grounds stated in the said affidavit. There being, therefore, this admission on the part of the defendant Company that the *hundi* had been presented for payment on the due date, it was not incumbent, in my opinion, on the plaintiff to give any further evidence of presentation; therefore,

the first issue must be decided against the defendant Company. The real and substantial question which has been the subject of debate before me in this suit is whether in the circumstances; disclosed, the Company are liable for the amount of the *hundi* but before I get to a discussion of this question, I may state at once that I am satisfied on the evidence that the plaintiff paid to the defendant Company through the Managing Director J. N. Mookerjee, the sum of Rs. 5,000, which is the subject of claim in this suit. Therefore, the fourth issue must be answered in the affirmative in favour of the plaintiff. The plaintiff's Counsel argued that the advance was a loan to the defendant Company and that the money advanced having been applied in discharge of the defendant Company's legal debts, the plaintiff was entitled in equity to recover the amount of the said advance from the defendant Company, notwithstanding the fact that J. N. Mookerjee had no authority to borrow the money on behalf of the defendant Company.

As regards the facts involved in this argument, the plaintiff's Counsel stated that from the evidence adduced it was clear that in or about September, 1923, there were two Managing Directors of the defendant Company, one being the witness Jogendra Nath Mookerjee and the other being the witness Satya Charan Srimani. It was also apparent that on various occasions before September, 1923, moneys had been borrowed by Jogendra Nath Mookerjee as Managing Director for and on behalf of the defendant Company; those moneys had been utilized for the purposes of the defendant Company. In September, 1923, there was an opening debit balance of Rs. 10,355-6-11 (see Ex. C-1.) The credits in September, 1923, amounted to Rs. 22,420-4-0 and the debits in the same month including the opening debit balance of Rs. 10,355-6-11, amounted to Rs. 21,151-4-2. leaving a credit balance of Rs. 1,268-15-10. The said credits included two sums of Rs. 10,000 and Rs. 5,000, which according to the plaintiff had been borrowed from him by the witness Jogendra Nath Mookerjee, as Managing Director of the defendant Company on the 3rd and 24th September, 1923, respectively. The defendant Company have raised no questions as regards the sum of Rs. 10,000 and I am informed that this sum has been re-paid to the plaintiff. The contention in the present suit is with reference to the sum of Rs. 5,000. The plaintiff's Counsel has shown from the cross-examination of Satya Charan Srimani that the moneys borrowed from the plaintiff have been utilized by the defendant Company in meeting the just debts of the defendant Company. It appears that a sum of Rs. 8,300 had to be paid to one Bansidhar Kanaria in re-payment of moneys advanced to the defendant Company by him (see question 248 in the deposition of Satya Charan Srimani). In addition thereto, the plaintiff shows that the defendant Company had to pay certain just debts by means of various payments appearing on pages 165 and 166 of the Cash Book of the defendant Company. These expenses (it is not necessary for me to set out the details) added to the said debit balance of Rs. 10,355-6-11, amounted to the said sum of Rs. 21,151-4-2. The plaintiff's Counsel asks—Out of what funds were these expenses met? He shows that these expenses could only have been met out of moneys which were borrowed from the plaintiff for and on behalf of the defendant Company because an analysis of the credits in the month of September, 1923, shows that if the two sums of Rs. 10,000 and Rs. 5,000, which were advanced by the plaintiff in September, 1923, were not taken into account, there would have been on the 1st October, 1923, a large debit balance, whereas, as a matter of fact, after meeting the expenses in September, 1923, there was a credit balance of Rs. 1,268-15-10. Therefore the plaintiff's Counsel contends that it is abundantly clear that the moneys advanced by the plaintiff had been utilized for the purpose of paying the just debts of the defendant Company. He also relies upon the fact that the balance sheet upon which the audit report was made had been prepared after taking into consideration the two sums which the plaintiff had advanced to the defendant Company and he argues thereupon that it cannot lie in the mouth of the learned Counsel for the defendant Company to contend that the moneys had not been utilized in manner contended for by the plaintiff. The plaintiff's Counsel further contends that the resolution of the Directors as it appears in the Minute Book was not the resolution as it was passed by the Directors, the suggestion being that Satya Charan Srimani, who was the other Managing Director, and who was unfriendly towards Jogendra Nath Mookerjee, had in

writing out the Minute Book written something which was not in accordance with the resolution as it appears in Ex. A and which was not the resolution passed by the Directors.

As regards this last point, I think I have indicated enough, what the case of the defendant Company is, but for facility of reference, I shall repeat the same here. The defendant Company contend that the sum of Rs. 5,000 was not required at all by the Company and that it had been appropriated by Jogendra Nath Mookerjee towards payment of the amounts alleged by him to be due by the Company to him and that this had been done without the sanction of the Directors. It is also contended that before the 10th October, 1923, the two other Directors, Satya Charan Srimani and B.V. Sen, had not been informed at all about the loans advanced by the plaintiff and that at the meeting of the Directors held on the last mentioned date it was brought to the notice of the Directors for the first time that two *hundis* for the said two sums had been drawn in favour of the plaintiff in order to obtain moneys from him for the purpose of meeting, it was alleged, the expenses of the colliery belonging to the defendant Company. It is further contended that at the said meeting of the Directors the following resolution was after discussion adopted by the Directors:—"That the loan secured on *hundi* for Rs. 10,000 and Rs. 5,000, dated 3rd September, 1923, and 24th September, 1923, respectively contracted by Mr. J. N. Mookerjee on behalf of the Company may be confirmed on scrutiny." It is then stated that the matter was enquired into further and it was found that the said sum of Rs. 5,000 had not been utilized at all for the purposes of the Company and that the same had been misappropriated by the witness, Jogendra Nath Mookerjee, who, as stated above, was one of the Managing Directors. The defendant Company thereupon refused to confirm the action of Jogendra Nath Mookerjee in borrowing the said sum of Rs. 5,000 and declined to pay the plaintiff the said amount.

As regards the power to borrow, whatever provision there is on the subject is to be found in Arts. 49 and 50 of the Articles of Association. Under Art. 49 the Managing Agents may from time to time with the approval of the Directors borrow from the members or other persons and may themselves lend any sum or sums of money for the purposes of the Company. Now in this case it is common ground that before the sums referred to above were borrowed from the plaintiff, the Managing Director, Jogendra Nath Mookerjee, did not get the sanction or the approval of the Directors, and, therefore, if the third issue in this case stood by itself, I should have had to answer it by saying that J. N. Mookerjee had no authority to accept or draw the *hundi* in suit, but the case has been put on the ground that the plaintiff is entitled in equity to recover the amount of the said advance from the defendant Company on the facts set out above, and I must, therefore, examine this argument. I find as a fact that the moneys which were borrowed from the plaintiff were intended to be an advance to the defendant Company and were utilized for the purpose of paying the debts for which the defendant Company had incurred legal liability, and I hold, therefore, that the plaintiff is entitled to recover the amount of the said advance from the defendant Company. In Lindley on Companies, 6th Edition, Vol. I, pages 292, 293, the law is stated thus:—"One person may be benefited by a contract made by others without being himself in any way bound by it. A loan to *A* cannot be recovered from *B* simply because the money lent has come into his hands. So, if the Directors of a Company enter into a contract which is not binding on the Company, either upon the ground that the contract is *ultra vires*, or upon any other ground, the Company is not liable on the contract simply because it has had the benefit thereof." Lord Lindley then mentions certain exceptions to the general rule, and afterwards deals with the equitable doctrines sought to be applied to the present case as follows:—"From these doctrines there has been developed a rule to the effect that a Company is liable in equity to refund money improperly borrowed by its Directors on its behalf but in fact *bona fide* applied in discharging debts or liabilities of the Company which could have been enforced against it. At first this equitable doctrine was based on the principle of subrogation, the person making the advance being held entitled in equity to stand in the place of the creditor paid off; and this view prevailed until it was found to lead to consequences which showed it to be erroneous. The underlying principle

in the case of Companies which have borrowed in excess of their powers is that if the money so borrowed has been applied in discharging the legitimate liabilities of the Company, such borrowing has not, in fact, increased the Company's liabilities, and the Company has not, in substance, exceeded its powers ; in equity, therefore, the advance is treated as valid to the extent of its legitimate application." The law is stated in similar terms by Lord Lindley in his treatise on Partnership, 8th Edition, page 234. The doctrine is founded on the right of the lender to stand in equity in the place of those creditors whose claims have been paid off by his money and the most notable application of this doctrine in recent times is to be found in the case of *Reversion Fund & Insurance Co.* v. *Maison Cosway Ltd.* (1) where the subject is discussed at great length by Buckley and Kennedy, L. JJ. The plaintiff also is, in my opinion, entitled to rely on this, *viz.*, that if there is power to borrow with the approval of the Directors, a lender may assume that the requisite approval has been obtained. But the principle I rely upon, having regard to the facts of this case, is what has been laid down in the case of *Reversion Fund & Insurance Co.* v. *Maison Cosway Ltd.* (1). Put in other words, the principle is this, that where by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal and is applied for his benefit, the principal is liable to restore the amount or value of such money or property. Therefore, on the conclusion I have come to the plaintiff is entitled to judgment for the sum claimed by him. This conclusion really relieves me from the necessity of expressing any opinion on Issue No. 8, but since the matter has been discussed at great length before me, I feel bound to express my opinion on it. I find as a fact that Ex. A is the correct record of the resolutions passed at the meeting of the Directors held on the 10th October, 1923, and that the Minute Book is not a correct record of those resolutions. The result, therefore, is that, in my judgment, the plaintiff is entitled to a decree for Rs. 5,000. I think in the circumstances of this case I shall give him interest *pendente lite* at 6 per cent. The plaintiff is entitled to the costs of this suit on scale No. 2 including all reserved costs. Interest on judgment debt at 6 per cent.

(1) (1913) 1 K. B. 364; 82 L. J. K. B. 512; 108 L. T. 87; 20 Manson 194; 57 S. J. 144.

Messrs. *N. N. Sarkar*, *S. C. Bose* and *J. C. Sett*, for the Appellants.

Sir *B. C. Mitter* and Mr. *A. K. Roy*, for the Respondents.

JUDGMENT.

Greaves, J.—In this appeal the defendant Company appeals against a judgment of my learned brother Mr. Justice Ghose, decreeing the suit in favour of the plaintiff for a sum of Rs. 5,100-13-4 together with interest and costs. The suit was brought on a *hundi* dated the 24th September, 1923, which is in these terms :—"Ninety days after sight without grace we promise to pay Babu G. R. Bhattacharjee or order the sum of rupees ten thousand only for value received." It is signed for and on behalf of the National Coal Co., Ltd., J. N. Mookerjee as Managing Director, and accepted as due on the 22nd December, 1923, by the same gentleman, J. N. Mookerjee. The learned Judge in the Court below has found first that there was presentation to the Company ; and I think he was entitled to so find, having regard to the affidavit of Srimani which is an exhibit in the case. Secondly, he has found that the plaintiff paid to the Company through J. N. Mookerjee a sum of Rs. 5,000 which was claimed in the suit; thirdly, that these monies were utilised for paying the debts for which the Company had incurred legal liability, and fourthly, he has found, that the plaintiff's version as to what passed at the Director's meeting held on the 10th October, 1923, is correct and that the entry in the Minute Book is not correct. The effect of this last finding he holds is to establish the plaintiff's contention that Mookerjee's borrowing of the sum of Rs. 5,000 was confirmed by the Directors of the Company. As a result of these findings the learned Judge has applied the equitable principle that as legal liabilities of the Company had been paid off out of the money advanced the plaintiff was entitled to stand in the place of those creditors who had been paid off with such monies.

The main contentions urged on behalf of the appellant are as follows: (1) That the Directors as a body under the Articles of Association had no power to borrow and consequently the Directors' meeting of the 10th October, 1923, had no power to ratify the borrowing; (2) there was no present-

ment to the acceptor or notice of dishonour to him and, therefore, no cause of action is disclosed on the pleadings; (3) that on the facts the equitable doctrine applied by the learned Judge had no application and (4) that the Company were guarantors and not principal debtors and that if the sum in suit was taken by Mookerjee and spent to recoup himself for the money advanced by him to the Company, the plaintiff had not, in fact, paid the Company's debts, as it was really money advanced to Mookerjee himself. The findings of the learned Judge as to the *factum* of the advance and as to the correctness of the entries in the Minute Book as to the resolution of the 10th October, 1923, were also called in question and we were asked to hold that on the facts and circumstances of the case the equitable principle applied by the learned Judge should not have been applied. In my view the learned Judge was justified in finding on the evidence that the advance was made and that the plaintiff's version of the resolution of the 10th October, 1923, was correct and I do not think we should be justified on the evidence in differing from those findings.

The two main points which arise in this appeal are, first, whether the Directors had any power to borrow, and secondly, whether if there was no such power in the Directors, the plaintiff was entitled to be put in the place of the creditors of the Company who had been paid off with this money. As to the first point if there was no such power no question of ratification arises as there was admittedly no ratification by the Company itself. The first point involves an examination of the Memorandum and Articles of Association which so far as I can see was not placed before the learned Judge *in extenso* with the result that he was probably misled as to what they contained. Turning to the Memorandum and Articles of Association I find that under cl. 3 (*h*) of the Memorandum the Company had power to make, accept, endorse, discount, execute and issue promissory notes, bills of exchange and other negotiable instruments. Under sub-cl. (*j*) of the same clause there is power given to borrow and raise money in such manner as the Company shall see fit and in particular by the issue of or upon bonds, debentures, bills of exchange, promissory notes or other obligations. Article 1 of the Articles of Association excludes the provisions of Table A. The next two Articles to which I desire to refer are Arts. 49 and 50 to which the learned Judge in the Court below has referred. Article 49 gives the Managing Agents power to borrow with the approval of the Directors from the members of the Company or from other persons and also provides that they may themselves lend any sum or sums of money for the purpose of the Company. Article 50 provides that the Managing Agents may with the approval of the Directors raise and secure the re-payment of such money in such manner and upon such terms and conditions as they think fit *inter alia* by making, drawing, accepting and endorsing on behalf of the Company any promissory notes or bills of exchange. Turning next to Art. 83 which comes under the heading "management" I find that the business of the Company is to be carried on by the Managing Agents subject to the control and supervision of the Board of Directors, the first Managing Agents being the Planters Stores. Article 84 provides that the Managing Agents shall subject to the cantrol and supervision as aforesaid have the power to draw, accept, endorse and negotiate on behalf of the Company all such bills of exchange, promissory notes, *hundis*, cheques, drafts and such like. Article 85 provides that the Company may at any time or times after the first Managing Agents cease to be the Managing Agents, appoint a Manager or Secretary instead of Managing Agents and the last portion of the Article provides that until otherwise determined by the Company in General Meeting the Managing Agents, Manager or Secretary for the time being shall have the like powers and perform the like duties as are conferred and imposed by the Articles upon the first Managing Agents. Article 106 authorises the Directors to delegate any of their powers to Managing Agents or Committees consisting of such members of their body as they think fit. Article 112 provides that the responsibility of the Managing Agents for the due and proper performance of the Company's business shall not be lessened or abrogated by the existence of the Board of Directors, the functions of such Board being to advise with and control the Managing Agents. Article 106 provides that the Directors may from time to time entrust to and confer upon a Managing Director for the time being such of the powers exercisable under these presents by the Directors as

they think fit. I think these are the only material Articles and it seems, therefore, clear that under the Articles themselves no power is given to the Directors to borrow money on behalf of the Company. Now, it appears that the first Managing Agents ceased to be Managing Agents some years ago and that no Managing Agents have been appointed in their place nor has the Company appointed, as it was entitled to do under Art. 85, any Manager who as I have already stated under the provisions of that Article might be entrusted with the same powers as the Managing Agents. On behalf of the respondent two arguments have been addressed to us based on this. The first argument is that in the absence of Managing Agents or a Manager the Directors have an inherent power to borrow money on behalf of the Company. My own view is that, if the Articles had been silent as to who was to exercise the borrowing powers, in a Trading Company this will probably be so though I should like to reserve consideration of the question as to whether this is so, if there is no general delegation of the Company's powers to the Directors such as are ordinarily to be found in properly drawn Articles of Association. But I think if, as here, the Articles give borrowing powers in a certain manner, the share-holders and the Corporation itself are entitled to say that the safeguards of the Articles should be observed. Now, under these Articles, as I have already stated, the powers to borrow are in the Managing Agents or in the Manager if in fact a Manager was appointed. I think it may well be that it was the object of the framers of these Articles to provide certain safeguards in regard to borrowing, that is to say, to give those powers to the Managing Agents or the Manager and to have a controlling power in the Directors and I do not think it possible to say that you can abrogate the Articles so as to remove the safeguards which are laid down therein. I, therefore, think that upon a true construction of the Articles of Association of this Company the Directors in the present state of Articles had no power to borrow.

The second argument that has been raised is that the plaintiff as a stranger to the Company is entitled to assume that a valid resolution of the Company had been passed entrusting those powers to the Managing Director or the Managing Directors. I am not prepared to accede to this argument. This would involve an alteration of the Articles themselves and I do not think that any one dealing with the Company is entitled to assume that such an alteration had been made. Such alteration could only be made by a special resolution which has to be filed with the Registrar of Joint Stock Companies and any one dealing with a Company is fixed with notice of the powers of the Company under its Articles and of any modification in those powers created by any special resolution which has been passed. I think that this statement of the law is in accordance with the authorities and it is only necessary to refer to one or two of them. In the case of *Biggerstaff* v. *Rowatt's Wharf* (2) the head-note states that "persons dealing *bona fide* with a Managing Director are entitled to assume that he has all such powers as he purports to exercise, if they are powers which according to the constitution of the Company a Managing Director can have." As I have pointed out, without an alteration of the Articles of Association no Managing Director has power to borrow under the Articles before us. The next case to which I would refer is the case of *Irvine* v. *Union Bank of Australia* (3). This, I think, is also an authority for the proposition I have just stated and Sir Barnes Peacock in delivering the judgment in the case states (at page 379*) "In the present case, however, the Bank would have found that, by the Articles of Association, the Directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the Directors by Art. 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of s. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint Stock Companies, in pursuance of s. 53 of the Companies Act, and would have been found amongst his records." The whole of the law is, if I may say so, admirably summed up in Vol. 1, Palmer's Company Precedents, 11th Edition, page 81 which is edited by the late Sir Francis Palmer himself. The pages to which I would refer

(2) (1896) 2 Ch. 93; 65 L. J. Ch. 536; 74 L T. 473; 44 W. R. 536.

(3) (1877) 2 A. C. 366; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 682.

*Page of (1877) 2 A. C.—[*Ed.*]

are pages 79, 80 and 81 and at the bottom of page 81 occurs this passage, "A person dealing with the Company must take the Articles to be such as appears at the office of the Registrar of Companies to be in force. If the Directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution, for such a resolution, if passed, would be registered." Then the learned author refers to *Irvine* v. *Union Bank of Australia* (3) to which I have just referred.

Suppose, therefore, in this case that the plaintiff was entitled to assume that a valid resolution of the Company had been passed appointing a Manager who under the Articles had the power of borrowing to which I have referred, he is met with this difficulty that the promissory note or *hundi* is signed not by any Manager of the Company but by the Managing Director who according to the Articles, according to my reading of them, had no power to borrow whatsoever. So I do not think that this is a case in which one is entitled to say that the plaintiff was justified in assuming that the internal regulations of the Company had been so used as to confer a power of borrowing upon the Managing Director having regard to the terms of the Articles to which I have referred. I, therefore, think, as I have already stated, that there was no power to borrow and the plaintiff was not entitled to assume that the Managing Director had such powers.

This, however, does not dispose of the case for one has got to consider whether the equitable principle to which the learned Judge has referred in his judgment, which is not disputed, has any application to the facts and circumstances of the present case. This involves a consideration of the accounts which are in evidence and especially of the account for September. That account starts with a debit balance of Rs. 10,355-6-11 which according to the system of book-keeping and accounting employed was due or claimed by Patel and Mookerjee or by Mookerjee alone. Patel and Mookerjee seem to have had some association with the Company for the Company's accounts were kept in their rough cash book and were subsequently transferred to the Company's books.

So far as the debit balance of the 31st of August is concerned I think that there is no doubt that this was challenged at page 87 of the paper-book. In question and answer No. 235, Srimani a Director of the Company, states that he does not admit the debit balance of Rs. 10,000 but he admits the sum of Rs. 8,300. That, however, is not a debit balance but represents the expenses incurred by the Company during the month of September the details of which are set out in the September account. You start, therefore, with the fact that the debit balance is not admitted and there is no doubt that there was at this time a claim as against Mookerjee for the difference between Rs. 9 which was the contract price for the coal supplied to the East Indian Railway Company and Rs. 8-4 which was credited to the Company in respect of this coal. That this was a genuine and *bona fide* claim there can be no doubt. A reference to *Q.* 160 in Mr. Mookerjee's evidence shows that this is the case and this is further emphasized by his answer to *Q.* 230, and the same point is raised in the evidence of Srimani in *Q.* 75 at page 73. *Q.* 74 is as follows: "*Q.* You remember that there was a contract with the East Indian Railway Company? *A.* "Yes." *Q.* 75 "While he was Managing Director did you at any time know that Patel and Mookerjee were making a profit of 12-annas per ton? *A.* "No." That there were other matters as between Mookerjee or Patel and Mookerjee and the Company still unsettled is clear from the auditor's letter of the 27th of September, 1924, which appears at page 172 of the paper-book where certain items are called in question and the claim for the difference between Rs. 9 and Rs. 8-4 is emphasized.

Some point was sought to be made as to the difference between Patel and Mookerjee as a firm and Mookerjee himself; but on the facts that are before us it is difficult to make any such difference.

I think, therefore, that there is no doubt that not only the debit balance of Rs. 10,355-6-11 was challenged but that there were various items between the parties which were still unsettled, and I think, therefore, in this state of things that it would be impossible to apply the equitable principle which the learned Judge refers to in his judgment and which he himself has applied.

Two other points were, however, urged on behalf of the respondent; first, the question of estoppel; and, secondly, the question of acquiescence; and the learned Counsel who appeared for the respondent argued that if we were against the respondent we should remand the case in order that the question of estoppel might be considered. But I do not think it is open to us to do this. Issue No. 9 of the issues which are set out fully in the judgment of the learned Judge expressly raises this question of estoppel and it does not seem to me that on the evidence any question of estoppel is made out.

Then it was sought to argue that the Company had acquiesced. I am afraid the unfortunate Company in this case never had any chance of acquiescing or otherwise for I cannot find on the evidence in the case that any proper meeting was held, that any proper accounts or balance sheets were circulated to the share-holders or that the share-holders were ever kept informed of the circumstances, and position of the Company. In these circumstances, I do not see how the share-holders or the Company can be said to have acquiesced in anything that was done or purported to be done on their behalf by the Managing Director.

The only question that remains is the question of presentment which was raised by the learned Counsel for the appellant. I do not think it is necessary for us in the view I take to decide this question; but I should have been inclined, I think so far as I can see at the present time, to decide this in the plaintiff's favour having regard to the fact that Mookerjee was merely an accommodation acceptor; but I do not desire to express any final opinion on that point.

The result, therefore, is that I think that there was no power in the Managing Director to borrow and that there is no case made out for applying the equitable principle referred to in the judgment of the learned Judge.

In these circumstances, the appeal succeeds and the suit will be dismissed with costs here and below.

Either the War-bonds deposited by the defendant under the Court's order dated the 18th of March, 1925, will be returned or the value thereof will be refunded.

Rankin, J.—I agree.

It does not appear to me that upon the regulations of this Company it was possible for the borrowing power to be exercised by the Managing Director. The plaintiff was not bound to concern himself with what is called the indoor management of the Company but he was bound to concern himself with the external position as disclosed by the regulations. The instrument in question purported to be signed by Mookerjee as the Managing Director and the evidence of the plaintiff shows that he took Mookerjee to be exercising powers of the Managing Director. There is no evidence that Mookerjee purported to have any other type or kind of position and it seems to me, therefore, that one would be casting away altogether the principle that a stranger is obliged to look to the external position if we were to hold that in this case the doctrine allowed the plaintiff to succeed

As regards the question whether this loan has been applied to discharge liabilities due by the Company it is for the plaintiff to make out his equity. To my mind it is clear on the evidence and on the account that this loan was taken for the purpose of paying off Patel and Mookerjee and for no other purpose. The cross-examination of Jogendra makes that clear indeed. The result is that unless it can be shown by the evidence in this case that on the accounts between them Patel and Mookerjee did have money due to them from the Company the plaintiff's case is not made out. That question depends upon whether or not the balance carried over from August, 1923, to September, in the books is a true statement of the position. That balance was some Rs. 10,355. If that be established, then no doubt Patel and Mookerjee are shown to be creditors of the Company. But unfortunately serious questions have arisen between these parties as to the coal contract and it does appear *prima facie* that credits given to the Company by Patel and Mookerjee are not the same as the amounts due under the contract. It may be or it may not be that Patel and Mookerjee have a complete answer to that apparent discrepancy; but it is for the plaintiff to show what the state of accounts between these parties was; and until that matter and other much smaller matters are cleared out of the way the plaintiff has not established that Patel and Mookerjee had a good claim upon the account for the balance which they profess to show It did occur to me that certain items in these

accounts might be in a different position from the rest. This money was taken from the plaintiff on or about the 24th of September. The plaintiff was a cashier in Patel and Mookerjee on a salary of Rs. 30 a month. He was also employed in a firm which belonged to Mr. Mookerjee's brother apparently on a salary of Rs. 60. He has been found to have had money and to have made this loan as well as the loan of Rs 10,000 on the 3rd of September. But it is almost plain that it would suit Mr. Mookerjee very well if he could get what he was claiming and put it immediately into his pocket by giving to his cashier a greater right than he himself would have had, the right, namely, of a stranger suing upon negotiable instruments upon which the Company's name had been put. One has to scrutinize this transaction in the light of the fact that it may very well have been a convenient device, and when one does so one has to see whether in giving judgment for the plaintiff in this case one is not really prejudging the question of account between the Company on the one hand and Patel and Mookerjee on the other. I do not gather that Patel and Mookerjee at any time informed the Company that they were unwilling further to continue making advances on their behalf for carrying on the business. That they had the right to do so suddenly and at once may be doubted, but it nowhere appears that they ever intended to do so at this time. Mookerjee was intending to give up his connection with the Company. He was anxious to put his firm in funds so that they might continue without incurring the risk of a bad debt. The 1,500 rupees which was paid on the 25th of September and the two small items of Rs. 10 and Rs. 25 paid on the 28th and 29th and the balance item of Rs. 1,268 must be considered separately in the light of these facts. At one time we were told that the balance item was handed over to the Company in cash. Had that been so it appears to me that the plaintiff would have had a good case, at all events, to this amount. But it turns out that it was carried over to the next month's account and that the concluding account between these parties has not been put in evidence; and the matter rests there. If one assumes for the sake of argument that the debit balance of Rs. 10,355 is not proved and that Patel and Mookerjee may well have been indebted to the Company upon a true state o accounts, it does not seem to me that it is possible to regard these items of Rs 1,500, Rs. 10, Rs. 25 and Rs. 1,268 in any different way from the other items. In substance, this money was borrowed and used to pay off an alleged debt due to Patel and Mookerjee which has not been proved. The money came out of no banking accounts and went into no banking account. Patel and Mookerjee credited the Company with receipt of these sums. In these circumstances, I do not think that the plaintiff has established the equity upon which the learned Judge has given a decree.

I agree that this appeal should be allowed and the suit should be dismissed with costs.

A. N. A. *Appeal allowed.*

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 40 OF 1925.
May 24, 1926.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

RAM PRASAD SAH—PLAINTIFF—APPELLANT

versus

Musammat FULPATI KUER—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 109 (a)—Order refusing leave to sue in forma pauperis, *whether 'final order'—Appeal to Privy Council.*

An order refusing leave to appeal *in forma pauperis* is not a final order within the meaning of s. 109 (*a*) of the Civil Procedure Code and is not, therefore, appealable to the Privy Council. [p. 887, col. 1.]

Babu Sakan Sing v. *Gopal Chandra Neogi* (1), approved.

Per *Dawson Miller, C. J.*—Every order in one sense finally determines some right of the parties whether it be a right to appeal or whether it be a right to have an extension of time or whether it be any other kind of right; but before one can have a final decree or order there must be some final adjudication upon the subject-matter of the suit, that is to say the rights claimed by one party in the suit itself and denied by the other. [*ibid.*]

Application for leave to appeal to His Majesty in Council.

Mr. *S. N. Dutt*, for the Appellant.

Mr. *H. Imam* (with him Mr. *Ram Prasad*), for the Respondent.

JUDGMENT.

Miller, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of a Division Bench of this Court refusing leave to the petitioner to appeal *in forma pauperis*. The

petitioner claims that the order of the Court refusing leave to appeal *in forma pauperis* was a final order which was appealable to His Majesty in Council under s. 109 (*a*) of the Civil Procedure Code. The only question is whether the order passed on that occasion is a final order or not. In my opinion it is clearly not a final order which is appealable to His Majesty in Council. The order did not in any way finally determine the rights of the parties. It was merely an interlocutory order prescribing the procedure under which the plaintiff's appeal should be conducted. The Court in fact having refused the application for leave to appeal *in forma pauperis* granted the appellant time in which to pay the Court fee; and had he been able or willing to pay the Court-fee then his appeal would have proceeded in the ordinary course. His rights as an appellant with regard to the subject-matter in dispute in the appeal were, therefore, in no way determined by the order passed from which it is now sought to appeal. The case of *Babu Sakan Sing* v. *Gopal Chandra Neogi* (1) has been referred to by Mr. Hasan Imam on behalf of the respondent in which it was decided by a Full Bench of the Calcutta High Court that in the converse case, where the Court grants leave to appeal *in forma pauperis* such an order is not appealable to His Majesty in Council, on the ground that it is not a final order, and that case appears to me to have been rightly decided. The only argument addressed to us is that the decision does determine the right of the party to appeal *in forma pauperis* and, therefore, it is a final adjudication of that right. That, however, is not the class of right with regard to which finality must exist in order to make it a final decree or order. Every order in one sense finally determines some right of the parties whether it be a right to appeal or whether it be a right to have an extension of time or whether it be any other kind of right; but before one can have a final decree or order there must be some final adjudication upon the subject-matter of the suit, that is to say, the rights claimed by one party in the suit itself and denied by the other. The rights claimed in the present suit are rights as to a partition of what is alleged to be joint property. The order passed by the Division Bench of this Court in no way determined anything connected with those rights. For these reasons I think that this application must be rejected. The respondent is entitled to his costs of this appplication.

Foster, J.—I agree.

A. N. A. *Application rejected.*

(1) 8 C. W. N. 296 (F. B.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 736 OF 1924.

June 24, 1926.

Present:—Mr. Justice B. B. Ghose and Mr. Justice Cammiade.

ABANI NATH MUKERJI—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Cess Act (IX B. C. of 1880), ss. 15, 40, 182—Re-valuation under s. 15—Omission to serve notice on holder, effect of—Period from which re-valuation takes effect—Rules under s. 182, r. 30, whether ultra vires.

In order to levy cesses on any estate where the matter falls within the provisions of s. 40 the procedure laid down in that section is imperative and unless it is followed the taxing authority cannot impose any burden of taxation on any person. [p. 888, cols. 1 & 2.]

Section 40 is applicable only where there is any cess to be levied in the district as a whole, that is if there is a district re-valuation; and where there is a re-valuation only of an estate or a tenure in any district it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of s. 40. [p. 888, col. 2.]

The period from which a re-valuation under s. 15 of the Cess Act takes effect is that prescribed in r. 30 of the rules made by the Board of Revenue under s. 182 of the Act. The said rule is not *ultra vires*. [p. 889, col. 1.]

Appeal from the decree of the District Judge, Hughly, dated the 21st December, 1923, reversing that of the Subordinate Judge of that District, dated the 22nd August, 1921.

Babus *Rupendra Kumar Mitter* and *Shyama Das Bhuttacharjya*, for the Appellant.

Babu *Surendra Nath Guha*, for the Respondent.

JUDGMENT.—This appeal by the plaintiff raises a question of some importance with regard to the procedure relating to assessment of cesses on re-valuation of an estate under s. 15 of the Cess Act,

We must at the outset say that the facts of this case reveal considerable irregularities in the office which was concerned with the levying of rates under the Cess Act.

In this case it appears that there was a re-valuation of the estate of the plaintiff in the years 1914 and 1915. But cesses were realised at the old rate till March, 1919, and although there was a re-valuation of the estate no one discovered that cesses were being realised at the old rate for a period of about three years. It seems that somebody woke up on the 28th March, 1919, and found that the rates were being realised at a rate considerably below the re-valuation made in the years 1914 and 1915 and demand was made for the increased rate for three preceding years which the plaintiff refused to pay. There were proceedings before the Revenue Authorities which were unsuccessful, and the plaintiff was compelled to pay a sum of Rs. 1,600 odd which was realised by the certificate procedure.

This suit has been brought for the purpose of a declaration that the plaintiff was not bound to pay the amount assessed on re-valuation by reason of the failure of the Revenue Authority to serve notice under the last paragraph of s. 40 of the Cess Act and for recovery of the amount which the plaintiff had been compelled to pay in excess of the old rates and also for a declaration that the certificates lodged against him up to January 1919 are void.

The Subordinate Judge who tried the case in the first instance passed a decree in favour of the plaintiff. On appeal by the Secretary of State for India in Council that judgment has been reversed.

Two questions have been urged against the judgment of the learned District Judge on behalf of the appellants. The first question is that the provisions of s. 40 of the Cess Act are mandatory and imperative and the failure to comply with the provisions of that section renders the levy of the rates void; and secondly, that cesses could not have been realised on re-valuation from after the year of the completion of the re-valuation. In the present case the re-valuation was made of a particular estate belonging to the plaintiff under s. 15 of the Cess Act and we have to construe the Act having regard to that fact in view. As at present advised we are of opinion that in order to levy cesses on any estate where the matter falls within the provisions of s. 40 the procedure laid down in that section is imperative and unless it is followed the Taxing Authority cannot impose any burden of taxation on any person.

But in the present case the difficulty arises from the fact that there was re-valuation only with regard to this particular estate and we are unable to hold that s. 40 applies when there is re valuation of only one particular estate. The section commences with these words: "When the rate of road cess and public works cess to be levied in any district shall have been determined for any year and published in the *Calcutta Gazette* as provided in s. 155, the Collector of the district" shall do certain things. If these provisions are scrutinized it would appear that they provide for the procedure to be adopted with reference to the whole district, that is to say, the Collector must cause the rate so determined to be published by affixing a notification in some conspicuous place in his office in every Civil Court, in every Police Station and in the office of every Sub-Divisional Officer within the district and he shall cause such rate to be proclaimed by beat of drum throughout the district and shall also cause to be served a notice on the holder of every estate within the district and so on. It is argued strenuously on behalf of the appellant that it would not be proper to confine this procedure to a case where cess is to be levied on the entire district, but ought to be made applicable also where there is a re-valuation of a part of a district or of an estate. But it seems that there cannot be the same reason for the publication and service of notices where a particular estate is concerned and not an entire district. Because when only an estate is re-valued it is to be presumed that the owner of the estate, who only is concerned in the matter, will take proper steps in order to acquaint himself as regards the matter of re-valuation. However that may be, we cannot make any surmise as to what was the intention of the Legislature. We must construe the section as it stands and as the section stands. We must hold that s. 40 is applicable only where there is any cess to be levied in the district as a whole, that is, if there is a district re-valuation; and where there is a re-valuation only of an estate or a tenure in any district it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of s. 40. That being so

we are unable to hold the levy of the rate is unauthorised in this particular case.

Then comes the question whether the Revenue Authority was justified in levying the cess in 1919 from the year 1916. That matter must be governed according to law or any rule which has the effect of law. Under s. 12 it is the Board of Revenue which has to fix a date from which the re-valuation is to take effect. Section 15 may be taken to be a supplement to that section. But there is no provision in s. 15 as to the period from which the re-valuation is to take effect. That is provided in r. 30 made by the Board of Revenue under the authority given by s. 182 of the Cess Act.

It is contended on behalf of the appellant that r. 30 is *ultra vires* of the Act. But cl. (1) of s. 182 is quite general and we cannot say that that rule is *ultra vires* of the law. Although we feel that it is a hardship on the plaintiff to have to pay back cess for three years on account of some negligence in the office of the Taxing Authority we cannot say that this realisation of the cess is illegal.

We must, therefore, dismiss the appeal with costs.

A. N. A. *Appeal dismissed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 525 OF 1924.

June 29, 1926.

Present:—Mr. Justice Adami and Mr. Justice Kulwant Sahay,

EAST INDIAN RAILWAY COMPANY, LTD.—DEFENDANT—APPELLANT

versus

KEDARNATH SETH—PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), s. 80—Through booking—Non-delivery of goods—Liability of Company to which goods are not delivered.

Where goods are booked through over the Railways of two or more Railway Companies, a Company other than the one to which the goods are delivered cannot alone be made liable for compensation for non-delivery of goods in the absence of a finding that the goods were lost in course of transit on the Railway of the Company sought to be made liable.

Appeal from the decision of the Subordinate Judge, Ranchi, dated the 2nd February, 1924, reversing that of the Munsif, Palamau, dated the 16th May, 1923.

FACTS.—Certain goods were delivered to the Great Indian Peninsula Raliway Co. for carriage. Part of the route to the destination lay through the Railway of the East Indian Railway Co. A suit for non-delivery of goods was instituted against both the Companies. The suit was dismissed. The plaintiff appealed against the East Indian Railway Co. alone. The appeal was allowed. East Indian Railway Co. preferred a second appeal.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Appellant.

Mr. *J. Imam* (with him Messrs. *N. K. Prasad* and *B. K. Prosad*), for the Respondent.

JUDGMENT.

Adami, J.—[His Lordship stated the facts and proceeded:—]

The goods were consigned under contract with the Great Indian Peninsula Railway Company. There is no finding or allegation that the bale was in fact lost in course of transit on the East Indian Railway or that the non-delivery was by the East Indian Railway Company. The contract being with the Great Peninsula Railway Company and the complaint being that the goods had not been delivered, the East Indian Railway Company alone could not be made liable or perhaps be made liable at all. Section 80 of the Indian Railways Act makes this quite clear. The suit as framed by the plaintiffs should have been brought against the Great Indian Peninsula Railway Company and it was as against the Great Indian Peninsula Railway Company that the appeal should have been filed. It is unnecessary to enter into the question as to the liability of the Railway Companies for the loss or non-delivery or even the question of wilful neglect in this case. The decree of the lower Appellate Court against the present respondents, the East Indian Railway Company, must plainly be set aside, because the East Indian Railway Company could not be made liable alone for the non-delivery of the goods.

This appeal is allowed, the decree of the lower Appellate Court set aside, and the suit dismissed with costs throughout.

Kulwant Sahay, J.—I agree.

A. N. A. *Appeal allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JURISDICTION No. 210 OF 1925.
August 13, 1926.
Present:—Mr. Tyabji, A. J. C.
MESSRS. S. L. BALMOKAND—RESPONDENTS I
versus
MESSRS. UTTAMCHAND BRIJLAL—RESPONDENTS II.

Arbitration Act (IX of 1899) ss. 8, 9—Appointment of arbitrators—Vacancy, mode of filling—Award on time-barred claim, validity of.

The question whether in filling a vacancy s. 8 or s. 9 of the Arbitration Act applies depends not upon whether one arbitrator ultimately acts or two but whether the submission provides for the appointment of one arbitrator by concurrence of both parties or of two arbitrators one by each party independently of the other. [p. 891, cols 1 & 2.]

When a submission provides that the reference shall be to two arbitrators and an arbitrator appointed by one of the parties is duly declared to be the sole arbitrator and he thereafter refuses to act, the vacancy is to be supplied by the parties under the provision of s. 9 of the Arbitration Act. [p. 891, col. 1.]

A claim which at the time of reference to arbitration is time-barred under the provisions of the Limitation Act can validly form the subject-matter of a reference. [p. 894, col. 1.]

In the matter of the Arbitration Act (5), dissented from.

Application by respondents II to set aside an award.

Mr. *E. V. Castollino*, for Respondents. I.

Mr. *Kundanmal Dayaram*, for Respondents II.

JUDGMENT.—This is an application by the 1st respondents that an award should be filed in this Court. The 2nd respondents object to the award and in effect submit that it should be set aside. Both respondents are firms. For convenience I will speak of them as though they were individuals.

Two rather important questions arise one having reference to the construction of the Arbitration Act; and the other to the Law of Limitation.

The first point that arises is whether in the circumstances that have taken place it was in the power of the 1st respondent to appoint the arbitrator who has made the award or whether an application should have been made to the Court for the appointment of an arbitrator. The decision depends upon the construction of ss. 8 and 9 of the Indian Arbitration Act, 1899 (Act IX of 1899).

The facts that I am about to state have either been admitted or proved before me. The witness who was called by the 1st respondent gave his evidence in a very satisfactory manner and I accept it.

In 1921 the 1st and the 2nd respondents entered into a contract, the main purpose of which was the sale and purchase of priece-goods. The contract contained a clause (the 28th) for reference to arbitration in the following terms:

"All disputes regarding this contract must unless amicably settled be referred to the arbitration of two European merchants to be approved by you (respondents I) at Karachi or in Amritsar at your (respondent I's) option one to be nominated by each party. Should the arbitrators not agree they will nominate an umpire and the award of the arbitrators, surveyors or their umpire shall be final and binding on me us (respondents II) and you (respondents I) so much so that this shall be considered a rule of Court of Justice. 'All expenses of survey to be borne by the party in default."

The 1st respondent alleged that there was a breach of the main contract on the part of the 2nd respondent and brought a suit for compensation. After the suit had proceeded for two years the 2nd respondent relied on the arbitration clause and had the suit stayed. I am informed that the suit is still pending.

The 1st respondent then proceeded to give effect to the arbitration clause. He gave notice to the 2nd respondent that he had appointed one Statham as his arbitrator and called upon the 2nd respondent to appoint his arbitrator. As the 2nd respondent failed to appoint his arbitrator the 1st respondent in accordance with the provisions of s. 9, cl. (*b*) of the Arbitration Act, served the 2nd respondent with a written notice to appoint his own arbitrator, and on the expiry of the seven days the 1st respondent appointed the arbitrator appointed by himself, *viz.*, Statham, to act as sole arbitrator in the reference.

On this occasion Statham refused to act as arbitrator. Then the 1st respondent purported to appoint one Penn Simpkins as arbitrator and invited the 2nd respondent in the same manner as before to appoint an arbitrator. The same course was followed and on the failure of the 2nd respondent to nominate his arbitrator Penn Simpkins was nominated sole arbitrator

by the 1st respondent. There was some error as regards the appointment of Penn Simpkins because the reference to him gave a wrong name instead of the name of the 2nd respondent. In any case Penn Simpkins also refused to act; whatever may have been the cause of his refusal whether the mistake as to the name of the 2nd respondent or the fact that the abritrator was leaving India or both.

Thus for the second time the arbitrator's office became vacant. The 1st respondent then for the third time made his appointment selecting Statham as his arbitrator for the second time and for the third time called upon the 2nd respondent to appoint an arbitrator. He again failed to do so upon which Statham was duly appointed by the 1st respondent to act as sole arbitrator under cl. (*b* of s. 9). The validity of the first appointment of Statham as the arbitrator by the 1st respondent is not questioned; nor of the steps leading up to his becoming the sole arbitrator on that occasion. But what is objected to, is the subsequent procedure by which at first Penn Simpkins and finally Statham (for the second time) was appointed arbitrator by way of substitution and declared to be sole arbitrator.

The argument that the procedure followed by the 1st respondent was not open to him was put before me under many different forms and aspects but I think they are all included in the consideration of the question whether where the submission provides that the reference shall be to two arbitrators and an arbitrator appointed by one of the parties is duly declared to be the sole arbitrator and he thereafter refuses to act—whether the then vacancy has to be supplied in accordance with s. 8 of the Arbitration Act or in accordance with s. 9. Under s. 8 an application has to be made to the Court, and the Court appoints the arbitrator; under s. 9 the appointment may be made by a party whether originally or by way of substitution.

It seems to me that when ss. 8 and 9 are read together it becomes clear that s. 8 is meant to be applied to a case where the reference provides for a single arbitrator or where the question is with reference to the appointment of an umpire or a third arbitrator. What is important to note is that the question whether s. 8 or s. 9 applies, depends not upon whether one arbitrator ultimately acts or two but whether the submission provides for the appointment of one arbitrator (by the concurrence of both parties) or of two arbitrators (one by each party independently of the other). Most of the arguments on behalf of the 2nd respondent disregard this decisive consideration. The 1st respondent did not contend that on the arbitrator appointed by him having become sole arbitrator and on his subsequently refusing to act or becoming incapable of acting he (the 1st respondent) acquired the right of substituting another person as sole arbitrator without again calling upon the 2nd respondent to nominate his arbitrator. The 1st respondent took the whole proceedings as having been nullified by the fact that the arbitrator did not act after he was oppointed sole arbitrator. In my opinion the fact that Statham became the sole arbitrator did not prevent him from retaining (for the purposes of s. 8 and 9) his character as one of two arbitrators nominated by one of the two sets of respondents. Nor for the said purposes did that fact alter the provision of the submission that the reference was to be to two arbitrators (which circumstance attracts s. 9 of the Arbitration Act and precludes the operation of s. 8). It seems to me, therefore, that the procedure adopted by the 1st respondent was correct and that the final appointment of Statham as arbitrator originally on behalf of the 1st respondent and subsequently as sole arbitrator was valid and proper.

Against the view that s. 8 applies only to cases where the submission provides that the reference shall be to a single arbitrator cl. (*b*) sub-s. (1) of s. 8 has been relied upon. The argument addressed to me is that cl. (*b*) must apply to the present case even if the clause applies only to the appointment of a single arbitrator inasmuch as cases such as the present deal with the appointment of a single arbitrator for the arbitrator appointed by one of the parties is here made the sole arbitrator; that (whatever may be the case with the rest of s. 8) there is nothing in this clause which shows that "an appointed arbitrator" may not be one of the two arbitrators provided for in the reference and if cl. (*b*) of s. 8 is applied to the facts of this case it appears that the appointment of the arbitrator could have been made (if at all) only by the Court and that in no case had the 1st respondent any power to appoint but

that in the events that have happened the conditions required for appointment by the Court were not fulfilled; so that in the present case neither the 1st respondent nor the Court could have appointed.

As I have already stated, the argument overlooks that the applicability of ss. 8 and 9 depends on the provisions in the submission whether it contemplates the appointment of a single arbitrator or two arbitrators. Their applicability does not depend on the question whether ultimately two arbitrators become empowered to conduct the arbitration proceedings or one.

But since the argument was pressed upon my consideration I shall attempt to apply the provisions of cl. (*b*) of s. 8 to such a case as the present, *viz*, where though the submission initially provides that the reference shall be to two arbitrators yet ultimately only one arbitrator becomes empowered to act and the question arises how an arbitrator has to be appointed by way of substitution of such sole arbitrator.

Clause (*b*) of s. 8 contains three conditions:

1. That an appointed arbitrator neglects or refuses to act or is incapable of acting or dies or is removed—this condition is *ex hypothesi* fulfilled in the present case.

2. The submission must "not show that it was intended that the vacancy should not be supplied." It is admitted that in this case the submission does not show that the vacancy should not be supplied.

3. The third condition is that "the parties do not supply the vacancy." The 2nd respondent contends that the whole procedure adopted by the 1st respondent is void because this condition has not been fulfilled. It is argued that in this case it is not the fact that both the parties did not supply vacancy that the only person who failed was the 2nd respondent. The futility of this argument becomes evident as soon as it is definitely formulated. The truth is that here "the parties" were never intended initially to appoint. The provision for supplying a vacancy is introduced by the Arbitration Act. It is only by straining words of the Act that they can be interpreted as meaning that the parties had to concur in supplying the vacancy of either of the two arbitrators for which the submission provides. The natural meaning is that each party had individually to supply the vacancy. If his own arbitrator neglected or refused to act—and it follows that the vacancy had to be so supplied notwithstanding that the arbitrator appointed by one of the parties may acquire an additional character by becoming entitled to act as sole arbitrator. But if the words of the Act have to be strained to mean that both parties have to supply the vacancy then by parity of interpretation it is the parties that have supplied the vacancy for in one sense it was both the parties whose volition supplied the vacancy caused by the arbitrator's refusal or failure to act the volition of the 2nd respondent having been exercised by his refusal to take the steps which he was entitled to take refusing to take any steps in one way in which volition can be exercised.

In the result If we assume that s. 8, cl. (*b*) applies still Statham's final appointment was valid and the Court did not become empowered to appoint under s. 8 (2). For on the assumption in question, I must hold that here the "parties" did supply the vacancy and the Court becomes empowered to appoint only if the parties do not supply the vacancy.

The objection, therefore, on the ground of the invalidity of the appointment of the arbitrator must, in my opinion, be disallowed.

I come now to deal with the second point raised before me, *viz.*, that the award in the present case is of no effect inasmuch as it purports to deal with a claim which at the time when the arbitration proceedings were held was more than three years old.

I asked the learned Pleader who argued before me for the 2nd respondent (Mr. Kundanmal) which particular provision of the law relating to limitation he said was applicable to the case. He was unable to refer to any rule or enactment except Art. 115 of the Indian Limitation Act. That Article read with s. 3 of the Act provides that every suit instituted, appeal preferred and application made for compensation for the breach of any contract, express or implied, not in writing and not specially provided for in the Limitation Act shall be dismissed unless it is instituted, preferred or made within three years from the time when the breach of contract has occurred.

It is obvious that this Article cannot be applied directly to the case in point. The Court has not to deal here with a suit, appeal or application for compensation for a breach of contract but has to

file an award in arbitration proceedings. But it was argued that the Limitation Act must be applied by analogy; and that analogy points to the necessity for proceedings under an arbitration clause to be taken within the same period after the disputes have arisen, within which a suit would have to be instituted.

It seems to me that this is an inaccurate and unsatisfactory method of considering the question. So far as the Courts are concerned the position in the present case is that the parties have entered into a contract for the sale and purchase of goods—a contract that includes cl. 28, an arbitration clause. In view of the Indian Contract Act, s. 28, exception (1) the effect of such a contract is that when there is an alleged breach of one part of the contract (*viz.*, the agreement to sell and buy) the other part of the contract (cl. 28) has to be given effect to for determining what judgment a Court of Law will pass; the right of action under such a contract only accrues after the award of the arbitrator inasmuch as only the amount awarded by the arbitrator is recoverable under the first exception to s. 28 in respect of the dispute so referred or to use the language of Lord Cranworth, L. C., the parties have entered into such a contract that no breach shall occur until after a reference has been made to arbitration: *Scott* v. *Avery* (1) and *Koegler* v. *Coringa Oil Co., Ltd.* (2).

The Indian Limitation Act (which deals with limitation in regard to suits, appeals and applications in Court) consequently can come into operation only after the award has been made (*cf.* Arts. 1 and 45 of the Indian Limitation Act). Time can only begin to run after the parties are empowered to come to Court and the parties are not empowered to come to Court till after the award is made, therefore, the provisions of the Limitation Act that could apply would be such Articles as Art. 158 or Art. 178. But the contention of the 2nd respondent is quite different. He desires that the Law of Limitation applicable to Courts should be applied to proceedings which have to take place as a condition precedent to the emergence of the jurisdiction of the Court. If the arbitration clause is interpreted in the sense indicated in *Scott* v. *Avery* (1) and the Indian Contract Act, s. 28 (the second paragraph of the exception 1 to s. 28 which has been repealed by the Specific Relief Act is worthy of note) then the present application is not analogous to a suit for damages for breach of contract (to which Art. 115 of the Indian Limitation Act refers) but it consists of proceedings for the recovery of the amount awarded by the arbitrator (*cf.* Art. 120 of the Indian Limitation Act) and time would commence to run when the award was duly made.

In any case it is obvious that the objection I am considering has no reference to any delay in taking such proceedings as could have been taken in Court. The objection refers to proceedings anterior to the time when the Court could intervene. It refers to the method in which the arbitrator made his award the law that he applied in making his award or the principles by which he conceived himself bound to be guided in coming to the conclusions which he formulated in his award. The 2nd respondent's grievance (if any) when truly stated is that the arbitrator has made a wrong award, inasmuch as he has proceeded to consider a claim that he should not have considered. The reason alleged why he should not have considered the claim is that if the claim had been brought for adjudication in Court the suit would have been barred.

In short the question placed before me is—in the language of Sir Erskin Perry, C. J. in the *Khojas' and Memons' case* [*Hirbai* v. *Sonabai* (3)] what law had been delivered to the domestic tribunal which the arbitration clause creates. For as Lord Macnaghten said: "Arbitrators may be Judges of law as well as Judges of fact" and he adds in the same sentence "an error in law certainly does not vitiate an award:" *Ghulam Khan* v. *Muhammad Hassan* (4). It is significant that the rule of law which is in question here is one of adjective law. But for the present it is enough to say that assuming that the arbitrator should have stated a case for the opinion of the Court or that his decision was wrong (which as I shall presently indicate would not appear to be the case

(1) (1856) 5 H. L. C. 811; 25 L. J. Ex. 303; 2 Jur. (N. S.) 815; 4 W. R. 746; 10 E. R. 1121; 101 R. R. 392.

(2) 1 C. 42; 1 Ind. Dec. (N. S.) 27.

(3) (1847) Perry O. C. 110 at p. 122; 4 Ind. Dec. (O. S.) 100.

(4) 29 C. 167 at p. 186; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

even had Art. 115 of the Limitation Act been applicable by analogy) these objections are not now open to the second respondent.

Reliance was placed upon a judgment reported in *In the matter of the Arbitration Act* (5). In that case (which seems to have been decided *ex parte*) the objections to the validity of the award were upheld. Two objections were taken. "The first which is discussed at length in the judgment was that the Official Receiver of the estate of an insolvent cannot take advantage of the clause for arbitration entered into by the insolvent. The decision on that point was fatal to the arbitration proceedings. Then the penultimate paragraph of the judgment deals with the second question propounded on page 25*, *viz.*, "the right of a party to submit to arbitration a claim for damages arising out of such contract after his right to sue for it is statute-barred" and the answer is thus given.

"The second objection is equally fatal to the award. The Official Receiver could only refer subsisting differences to arbitration, as he has purported to do. He clothed Mr. Brachi with authority to decide those disputes on 28th March, 1924, more than three years after the right to sue for recovery of the claim in dispute had accrued and the claim had become statute-barred. There were, therefore, no subsisting differences between the parties at the date of the reference. The applicant was not bound to go to arbitration. His simple answer to the claim was that the right to enforce thi alleged claim had been lost by lapse of time."

With the utmost respect, I am unable for the reasons I have already given to accept this. Apart from those reasons, a dispute or a difference does not cease to be subsisting because it is three years old, though the Indian Limitation Act may require the Courts to dismiss a suit based on the disputed claim. Nor is a right necessarily extinguished because it has not been enforced for the period referred to in the First Schedule of the Limitation Act unless the right claimed refers to the possession of property and s. 28 of the said Act is applicable or for some similar reason. Again a person may agree to pay a barred debt and *a fortiori* to submit to arbitration the significance of the Indian Contract Act, s. 25 (3) must not be overlooked. As I have already said it is not for me to say in these proceedings whether there was any such agreement.

But assuming that the principle of Art. 115 of the Limitation Act applies one party may contend and the other deny that a suit (or other legal proceedings in Court) would be barred. That question would be a "difference" or "dispute" and would have to be decided by the arbitrator. In some cases that would be a question of law in others of fact.

Speaking with reference to the facts of the present case I will assume for a moment that the arbitrator was bound to disregard any claim which could not be enforced by a suit. There is nothing to show that he did not do so. The question might have depended upon whether the 1st respondents were prosecuting with due diligence any civil proceedings under s. 14 of the Indian Limitation Act as they apparently were and whether, therefore, any portion of the time between the arising of the disputes and the commencement of the arbitration proceedings, should be excluded for the purpose of computing the period of limitation. Again it may be that the party in the position of a defendant has been absent from British India (s. 13 of the Indian Limitation Act) on which state of facts a decision was given by Kemp, A. J. C., between *James Finlay & Co.* and *Anandji Damodar** so that even if the disputes arose

(5) 95 Ind. Cas. 750; 19 S. L. R. 24 at p. 30; A. I. R. 1926 Sind 209.

*Page of 19 S. L. R.—[*Ed*]

*The judgment in the case cited above is appended below.—[*Ed.*]

SIND JUDICIAL COMMISSIONER'S COURT.
MISCELLANEOUS JUDICIAL CASE No. 170 OF 1918.
September 12, 1918.
Present:—Mr. Kemp, A. J. C.
MESSRS. JAMES FINLAY & CO., LTD.—RESPONDENTS I
versus
Seth ANANDJI DAMODHAR—RESPONDENTS II.

JUDGMENT.—This is an application to file an award under s. II of the Indian Arbitration Act.

It appears James Finlay & Co. sold 190 tons White Java Sugar to Seth Anandji Damodhar by 3 contracts of different dates between 17th March, 1913, and 30th July, 1913. *Miti khari* notice was sent on 3rd January, 1914, but the purchaser failed to take delivery. On 16th January, 1914, James Finlay & Co., claimed damages by their letter of that date sent to the purchaser by registered post. This was returned undelivered as the 2nd respondent had left Karachi. Presumably he did not wish to face the music. It appears, however, that he had some immoveable property in Malir as in the present year the price of land rose. Second respondent returned here in April

more than three years ago it does not follow that a suit based on those disputes would be barred. Assuming that the answer to that question would have to affect his decision whether or not the suit would be barred would be a question for the decision of the arbitrator.

The objections to the award will, therefore, be disallowed and the award will be filed. The 1st respondents' costs will be paid by the 2nd respondents.

P. B. A. *Award filed.*

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this year. In the interval James Finlay & Co. had, on 30th January, 1914, written to him through the registered post at an address c/o one Meghji Parmanand, Kutch Mandvi where they heard he had gone. After 2nd respondent's return to Karachi in April, 1918, James Finlay &Co., sent him a notice on 1st May, 1918, calling upon him to go to arbitration and appoint his arbitrator within 7 days. This he failed to do. So on 14th May, 1918, James Finlay & Co., appointed Mr. Nicholas as his arbitrator. On 16th May, 1918, the arbitrators intimated by letter to 2nd respondent that they would proceed with the arbitration on 24th May, 1918. Second respondent admittedly received that intimation. On 22nd May, 1918, his Pleaders wrote to the arbitrators saying they were applying for an injunction. The arbitrators replied they would proceed on 24th May, 1918, unless an injunction was served on them.

On 24th May, 1918, 2nd respondent and his Pleader's assistant appeared before the arbitrators and admitted the claim but said it was barred by limitation. James Finlay & Co., replied that 2nd respondent was out of British India and so limitation was saved. The arbitrators, as their award shows, took evidence on this point and decided the claim was not barred. Second respondent did not ask for further time to call evidence and the arbitration proceedings came to an end by the publication of the award dated 25th May, 1918, which is now sought to be filed in this Court.

Second respondent's contention before me is that the contract for arbitration had fallen through and the claim was time-barred and the arbitrators had no jurisdiction to decide the dispute. Now there is nothing in the conduct of James Finlay & Co. to suggest to me that they had abandoned their right to go to arbitration and to compel 2nd respondent to do the same. They have explained why they took no steps to have an *ex parte* arbitration during 2nd respondent's absence from Karachi. They were afraid that the Court might hold that as the letter addressed to 2nd respondent here was returned undelivered, any *ex parte* arbitration proceedings they might hold were null and void. They further addressed a letter to 2nd respondent at Kutch Mandvi after he had run away. That they had not given up their right to an arbitration is further clear from the fact that the moment they knew of 2nd respondent's return here they called upon him to appoint his arbitrator. I, therefore, think the arbitrators had authority to act and that the clause for arbitration had not been abandoned nor had it lapsed by operation of law. Nor does it appear that this particular point was raised before the arbitrators. What was contended there was that the claim was barred not that the submission clause had fallen through. (See the award). But even if this point had been taken I am of opinion that the arbitrators had power to decide whether they had jurisdiction or not. They had power to find on the facts which would give them jurisdiction and provided their decision is not palpably wrong the Court will not interfere with it. See *Ghulam Khan* v. *Muhammad Hassan* (1). As a matter of fact I am of opinion they were right. The case in *Ram Kumar Singh* v. *Jagan Mohan Singh* (2) cited for the 2nd respondent has no application as it was found there specifically that the arbitration proceedings had been abandoned.

Nor was there anything to prevent the arbitrators from determining whether the claim was barred. That was clearly a dispute arising out of the contract. (See cl. 14 "Disputes of whatever nature, etc."). The 2nd respondent now says he has evidence to show he was inBritish India—Ahmedabad—during his absence from Karachi. Well, if he has, he should have produced it before the arbitrators. He appeared before them and was heard and did not ask for time to call evidence on the point of where he was staying. He cannot now be allowed to do so. It even appears he subpœned—one of the arbitrators but has not put him into the box.

I presume, therefore, that his intention was merely to annoy that particular arbitrator and if such should be the case I warn him that such action is an abuse of the procedure of the Court and likely to get him into trouble. No explanation has been offered me why the arbitrator after being subpœned was not called. Nor do I consider that such procedure redounds much to the credit of his legal advisers.

The 2nd respondent is entirely undeserving of any consideration. He ran away to avoid payment of a first liability without leaving any address where business letters could find him. On his return 4 years later he pleads limitation although he admits the amount is otherwise due.

Award filed. Second respondent to pay 1st respondent's costs.

(1) 29 C. 167; 29 I. A. 51; 6 C. W. N. 226; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(2) 9 Ind. Cas. 80; 33 A. 315; 8 A. L. J. 66.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 729 OF 1926.
February 2, 1927.
Present :—Mr. Justice Dalip Singh.
KARM CHAND—DEFENDANT—PETITIONER
versus
Musammat JASODHAN—PLAINTIFF—RESPONDENT.

Arbitration—Reference without intervention of Court—Remission of award to Umpire, legality of—Umpire deciding case on notes of arbitrators without notice to parties—Legal misconduct.

Where an award is made by an Umpire on a reference without the intervention of the Court, the Court has no power to remit the award to the Umpire. [p. 897, col. 1.]

Riaz-ud-din v. *Shuja-ud-din* (4), followed.

An Umpire is guilty of legal misconduct where he holds no enquiry and decides the case on the notes of the arbitrators without giving notice to the parties to adduce evidence or state their case on the evidence produced. [p. 896, col. 2.]

James Finlay & Co. v. *Firm of Asudamal Harbhagwandas* (2), *Dhanasing* v. *Ramchand*(5) and *Inre Broak* (6), followed.

Petition for revision of an order of the Additional District Judge, Lahore, dated the 24th July, 1926, reversing that of the Sub-Judge, Fourth Class, Lahore, dated the 21st April, 1926.

Mr. *J G. Sethi*, for the Petitioner.

Mr. *M. L. Puri*, for the Respondent.

JUDGMENT.—In this case there was a dispute between the parties as to the amount or number of ornaments in the possession of the petitioner which he has agreed to return to the respondent who was his wife. The parties agreed to refer the dispute to arbitration. Two arbitrators were appointed and it was agreed that if the arbitrators differed they were to appoint an Umpire and the decision of the majority was to prevail. The two arbitrators disagreed, one holding that the value of the ornaments was Rs. 400, the other holding that the value was Rs. 800 plus Rs. 40 on account of arrears of maintenance. An Umpire was thus appointed and he, without calling upon the parties or giving any notice to them, proceeded to give his decision in which he agreed with the second arbitrator's decision. Thereafter the respondent wished to make the award a rule of Court. Various objections were taken by the petitioner.

The trial Court held that the arbitrators had exceeded their powers in dealing with the question of arrears of maintenance which had not been referred to them. Following *Dhanpat Rai* v. *Kahn Devi* (1) it held that the award could not be filed. It also held on the authority of *James Finlay & Co.* v. *Firm of Asudamal Harbhagwandas* (2) that the Umpire had been guilty of legal misconduct because he held no enquiry and decided the matter on the notes of the arbitrators without giving notice to the parties to appear before him and to state their case and adduce evidence. It also held that the award of the second arbitrator with which the Umpire had agreed was illegal because the award itself stated that the arbitrator had based his award on private enquiries. It also held that the document was not properly stamped. As a result it dismissed the application to file the award.

In appeal the learned District Judge held that the Umpire had been guilty of legal misconduct and that the objection taken fell under para. 14 (*c*) of the Second Schedule of the Civil Procedure Code, but the Court ought to have remitted the award to the Umpire. As regards the arrears of maintenance it held that that amount was separable and following the Privy Council ruling *Amir Begam* v. *Badr ud-Din Husain* (3) it held that this was not a bar to filing the award.

In revision Counsel for the petitioner has urged that as the award was without the intervention of the Court the Court has no power to remit the award to the Umpire. He cited *Riaz-ud-Din* v. *Shuja-ud-Din* (4) a Single Bench ruling of this Court which, however, was upheld in Letters Patent Appeal. The decision of the Letters Patent Bench is not reported but I appeared in the case myself and I remember the arguments addressed to the Court. Two points arose in that case for decision:—

"(1) Whether the Court could correct an error of an arbitrator appointed without the intervention of Court;

(2) Whether it could remit an award to the arbitrator on the ground of illegality apparent on the face of it or on the ground of a decision in excess of the powers of the arbitrator. The appeal was dismissed by the Letters Patent Bench as stated above.

Counsel for petitioner next contended that it was legal misconduct on the part of

(1) 23 Ind. Cas. 422; 30 P. R. 1914; 11 P. W. R. 1914; 31 P. L. R. 1914.

(2) 12 Ind. Cas. 637; 5 S. L. R. 89.

(3) 23 Ind. Cas. 625; 36 A. 336; 18 C. W. N. 755; 1 O. L. J. 249; 12 A. L. J. 537; 17 O. C. 120; 16 B. 413; (1914) M. W. N. 472; 16 M. L. T. 35; 27 M. L. J. 181; 19 C. L. J. 494 (P. C.).

(4) 78 Ind. Cas. 1042; A. I. R. 1925 Lah. 86.

the Umpire to decide the case without giving notice to the parties or hearing their comments on the evidence produced. He has cited *James Finlay & Co.* v. *Firm of Asudamal Harbhagwandas* (2) and *Dhanasingh* v. *Ramchand* (5). These cases refer to an English case reported as *In re Broak* (6). Counsel for respondent has not shown me any ruling to the contrary.

Following these rulings and the ruling of our own Court reported in *Riaz-ud Din* v. *Shuja-ud-Din* (4) which is binding on me I hold that the Court had no power to remit the award to the Umpire and as the Umpire was guilty of legal misconduct the award could not be filed in Court. I, therefore, accept the revision, set aside the decree of the learned Additional District Judge and restore the decree of the first Court refusing to file the award. In the circumstances, however, I leave the parties to bear their own costs throughout. I note that the Counsel for the petitioner agrees to return the ornaments which he admitted were in his client's possession to the respondent.

A. N. A. *Revision accepted.*

(5) 83 Ind. Cas. 543; A. I. R. 1924 Sind 27; 17 S. L. R. 172.

(6) (1864) 33 L. J. C. P. 246; 16 C. B. (N. S.) 403; 10 Jur. (N. S.) 704; 10 L. T. 378; 143 E. R. 1184; 139 R. R. 547.

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE NO. 128 OF 1925.

July 12, 1926.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Maharaja GURU MAHADEO ASHRAM PRASAD SAHI BAHADUR—ASSESSEE

versus

THE COMMISSIONER OF INCOME-TAX BIHAR AND ORISSA.

Income Tax Act (XI of 1922), ss. 8, 12, 66—Interest on securities hypothecated to Bank as security for overdraft, whether taxable—'Received,' meaning of— Nimak sair, *whether liable to be taxed—Reference—Finding of fact—Interference.*

Certain Government securities were deposited with a Bank as security for overdraft. Some of them were endorsed over in favour of the Bank . A power-of-attorney was also given to the Bank authorising it to transfer any of these securities to itself or to others. The Bank collected the income from the securities and credited the same to the assessee from month to month and the interest on the overdraft was debited similarly. The owner was assessed on the income of the securities It was contended that the income from the securities, at least to the extent of the interest on the overdraft paid to the Bank should be deducted from his taxable income:

Held, (*i*) that the securities in no way ceased to be the property of the assessee and that the income from them was, therefore, a part of the income of the assessee; [p. 900, col. 1.]

(*ii*) that the income was 'received' by the assessee, as it was received by the Bank as his attorney and on his behalf, although the Bank had a charge over it; and [p. 901, col. 1.]

(*iii*) that the assessee was, therefore, liable to be assessed on the whole income. [p. 900, col. 2.]

Nimak sair, that is, income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre, where it is of a recurring nature, is similar to rent and royalties from the letting of coal and other minerals and is liable to be taxed as income from 'other sources' under s. 12 of the Income Tax Act. [p. 901, col. 1.]

A finding of fact arrived at by a Commissioner is binding on the High Court in a reference under the Income Tax Act where it is not vitiated by any improper process or by failure to give effect to some rule of law. [p. 901, cols 1 & 2.]

ORDER OF REFERENCE.—Under s. 66 (3) of the Indian Income Tax Act, I have the honour to refer the following questions to the Patna High Court. The questions framed by the Court are:—

"First, whether from the income of the assessee from his securities the amount of interest charged by the Bank on the overdraft of the assessee is deductible for the reason that the Bank holds the securities as a pledge and hypothecation against the overdraft allowed by them under express endorsement in their favour or under a power-of-attorney, and whether this income is governed by s. 8 or by s. 12 of the Act, and secondly, whether the income from *nimak sair* is not assessable under the law on the grounds that it is the price of the earth sold and is casual and is exempt under the Permanent Settlement Regulations."

2. The facts of the case are as follows:—

The assessee, Maharaja Guru Mahadeo Ashram Prasad Sahi of Hatwa, filed a return showing, *inter alia*, the following income:—

	Rs.	AS.	P.
Interest on securities, including debentures already taxed...	1,59,523	0	0
Interest on securities of the Government of India or of the Local Government that are to be income-tax free ...	2,310	0	0

Appended to the return was a detailed statement of the securities which make up these items. The former consists of the Calcutta Port Trust Debentures of 1897 and 1900, Calcutta Municipal Debentures of 1909-10 1912 and 1913, Government Promissory Notes of 1865, 1900-01, 1896-97 and 1865, and War Loan of 1929-47 and the latter consists of income tax free 5 year bonds of 1926. At the foot of the statement was the following declaration signed by the assessee himself: "I hereby declare that the securities on which interest as above specified has been received are my own property and were in the possession of the Imperial Bank, Calcutta, at the time when income-tax was deducted."

So far as these two items are concerned, assessment was made by the Income Tax Officer according to the return but I may mention that in review I allowed a deduction of Rs. 19,644, being the interest on a loan taken for the sole and express purpose of purchasing some of the securities.

The assessee now claims to deduct a further sum of Rs. 82,179 being the interest on an overdraft of nearly 13 *lakhs* granted by the Imperial Bank on security of the stocks in question. He states that nearly 5 *lakhs* worth of securities were endorsed in the name of the Bank and that the Bank holds a general power-of-attorney from him in respect of the rest.

3. It seems convenient to consider first the second part of the first question framed by the Court, namely, whether s. 8 or s. 12 of the Act applies to the income in question. Section 6 of the Act enumerates six heads of income chargeable to income tax, the second of these being interest on securities. Section 8 describes the head of income more fully and enacts that the tax shall be payable by an assessee under the head "interest on securities in respect of the interest receivable by him on any securities of the Government of India or of a Local Government or on debentures or other securities for money issued by or on behalf of a local authority or company." I submit that there can be no possible doubt that the debentures and other securities under consideration are securites within the meaning of ss. 6 (*ii*) and 8. Now, s. 12 enacts that the tax shall be payable by an assessee under the head "other sources" in respect of income profits and gains of every kind and from every source to which this Act applies if not included under any of the preceding heads. By the very words of the Act itself, s. 12 cannot apply to interest on securities within the meaning of s. 8. In my opinion, therefore, the sums in question are chargeable under s. 8 and not under s. 12.

4. If the income is chargeable, as I contend, under s. 8, then under that section the tax shall be payable in respect of the interest "receivable" by the assessee. The assessee argues that the interest is receivable by the Bank and not by him, because some of the securities are endorsed in the Bank's favour and in respect of the rest the Bank holds a general power-of-attorney from him. I would first refer the Hon'ble Court to the assessee's certificate quoted in paragraph 2 of the statement. He there definitely states that the securities are his own property. In the second place, in my review order of May 29, 1925, I arrived at a definite finding of fact that the interest in question was actually received by the assessee. This finding was arrived at after inspecting the assessee's pass-book voluntarily produced by him which showed that the interest on securities was credited to his account and that his account was debited with the interest due from him; so far from the interest not being receivable by him, it was in fact received by him. I submit that under the law the Hon'ble Court cannot go behind my finding of fact. Moreover under the law someone is chargeable to income tax in respect of these securities and if the assessee is not chargeable, the Bank must be. But if an attempt were made to charge the Bank, it would surely object that the interest was not received by it, as it had credited the assessee's account with the interest.

5. (*i*) The assessee's return of income showed Rs. 36,057 from other sources which includes Rs. 3,107 from *nimak sair* which he has given in the detailed explanation of the return. The figure was accepted and assessment was made according to the return. *Nimak sair* is the income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. This was admitted by the assessee's agent during the hearing of the review. In the statement appended to the return of income for the year 1923-24 *nimak sair* is alternatively described as "Income from letting out the right to collect earth for saltpetre." He thus ad-

mitted that it is not the price of earth sold. In a note appended to his return for 1925-26 it is stated that *nimak sair* should be exempt from taxation, because "it is a sort of ground-rent." The assessee is, therefore, giving different and irreconcilable descriptions of this source of income in order to evade his liability. I submit that my finding in review that *nimak sair* is not the price of earth for saltpetre is a finding of fact supported by the assessee's own statement.

(*ii*) Nor again is the income casual. It is shown in the return for 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition. A reference is invited to the decision of the Allahabad High Court in Miscellaneous Case No. 307 of 1924, *In the matter of Messrs. Chunni Lal Kalyan Das* (1), printed at page 179 of the Income Tax Manual. That decision is to the effect that a receipt is not necessarily casual because it only occurs once, the test is whether the nature of the transaction is non-recurring. I further submit that under s. 4 (3) (*vii*) a receipt is not exempt merely by being causal but must be both causal and non-recurring. The assessee's own return showed that this does in fact recur. In my opinion, therefore, the receipt from *nimak sair* is neither casual nor non-recurring.

(*iii*) As regards the question whether income from *nimak sair* is "exempt under the Permanent Settlement Regulations," I submit in the first place that no income is exempt under the Permanent Settlement Regulations which were passed long before the income tax was enacted. I assume that there is an implied reference to the decision of the Patna High Court in Miscellaneous Judicial Case No. 53 of 1923 [*Maharajadhiraj of Darbhanga* v. *Commissioner of Income Tax* (2)] that non-agricultural income of permanently settled estates is not liable to income tax if it was included in the assets of the estate at the time of the Permanent Settlement and that the real question is whether income from *nimak sair* is governed by that decision. Now, in the first place, the assessee has at no stage of the case either produced any evidence on this point or even applied for any opportunity to do so. The claim that this *sair* is governed by the Permanent Settlement was not made either in the appeal petition or in the application for review. There is thus no evidence whatever in support of the implicit allegation that *nimak sair* was included in the assets of the Hatwa Estate at the time of the Permanent Settlement. A reference to the Permanent Settlement Regulations of 1793 further shows that ordinarily only *jalkar*, *bankar*, *falkar*, and ground-rents of markets were allowed to the *zemindars* and all other *sairs* were prohibited. If, therefore, the present contention had been really before me in review, I should have been entitled to find as a fact that income from *nimak sair* was not included in the assets of the estate at the time of the Permanent Settlement and that it is, therefore, liable to be assessed to income tax.

6. On a point of procedure, I beg respectfully to point out that the Court has directed me to state a case on an alleged point of law that that was never raised before me. Section 63 (3) of the Act provides that the High Court may order the Commissioner of Income Tax to state a case when he has previously refused to state one on the ground that no question of law arose. In the present case I did not refuse to state a case on the question whether income from *nimak sair* was exempt under the Permanent Settlement Regulations because I was not asked to refer that question. The assessee did not in point of fact definitely frame the question that he wished to be referred; but as he did not even make the claim that is now put forward it is evident that this question of law was not even implicit in his application.

Mr. *K. P. Jayaswal* with him Mr. *H. Prasad*, for the Assessee.

Mr. *C. M. Agarwala*, for the Commissioner of Income tax.

JUDGMENT.

Miller, C. J.—This case comes before us under s. 66 of the Income Tax Act upon a case stated by the Commissioner of Income Tax. The assessee, the Maharaja Bahadur of Hatwa, complains in respect of two items upon which he has been assessed to income tax. The first item is the income upon certain Government securities valued at 41 *lakhs* of rupees which were deposited with the Imperial Bank to secure an overdraft which during the year of assessment has been taken at a sum of close upon 13 *lakhs* of rupees. The interest payable upon the overdraft amounted to Rs. 82,179. The securities which were

(1) 86 Ind. Cas. 189; 47 A. 368; 23 A. L. J. 65; L. R. 6 A. 198 Civ.; A. I. R. 1925 All. 469.

(2) 78 Ind. Cas. 783; 2 Pat. L. R. 25 Cr. (1924) Pat. 69; 3 Pat. 470; 5 P. L. T. 459; A. I. R. 1924 Pat. 474.

lodged with the Bank to secure payment of the interest upon that overdraft brought in an income in the way of dividends of Rs. 1,59,000. These dividends as they fell due were received by the Bank under a general power-of-attorney granted by the assessee to the Bank. They were credited to his account and from month to month the sums due for interest on the overdraft were in the same way debited to the assessee's account. The assessee contends that this source of income, at all events to the extent of Rs. 82,179, which represents the interest on the overdraft paid to the Bank, should be deducted from his taxable income. The argument put before us in the case is, in the first place, that these securities having been hypothecated to the Bank by way of security for the overdraft, are in fact no longer the property of the assessee and ought to be treated as the property of the Bank. The Bank, however, merely has a charge upon the interest of these properties to secure payment of the interest on the overdraft and possibly a charge upon the corpus to secure re-payment of the overdraft itself but the securities in no way cease to remain the property of the assessee and the dividends payable on the securities are undoubtedly part of the income of the assessee.

The main argument addressed to us is an argument based really upon the analogy of the deductions which are made in the case of a business where if the business concerned borrows money from the Bank in order to invest it in the business as part of its capital, then the interest payable to the lender upon the sum so borrowed may be deducted from the profits of the business. The principle in such a case is no doubt a sound one, and it has been recognised by the framers of the Income Tax Act but only in the case of income dervied from business. Under s. 10 of the Income Tax Act the tax is payable under the head "business" in respect of the profits or gains of the business carried on by the assessee, but from such profits or gains certain deductions are allowed in computing the taxable income. One of these deductions is,

"In respect of capital borrowed for the purpose of the business where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid."

It seems to me quite right and proper, and in fact it is the law, that where persons carrying on business have to borrow money for the working capital of their business, that which they have to expend in order to obtain the capital should be deducted from the actual profits which they make; but in the case of a private individual no such considerations necessarily arise. In the present case it cannot be said that the overdraft was in any way obtained for the purpose of carrying on any business or, except to the extent of about 3½ *lakhs*, for the purpose of investment producing profits which might be considered as income. In fact we do not know for what purpose the overdraft was taken with the exception of the sum named. Apart from that sum of 3½ *lakhs* it does not appear that any of it was invested. It is noticeable that in the corresponding section, which applies to the present case, namely, s. 8 of the Act, no such deductions are there mentioned. That section says.

"The tax shall be payable by an assessee under the head 'interest on securities' in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company."

Had it been intended that where a private individual borrows money either from his Bank, or from any other source, he should be entitled to deduct the interest thereon from his taxable income, I have not the slightest doubt that some provision would have been made to that effect in the Act, but in the other sections of the Act, apart from those dealing with income derived from business, we find no such exemption included. *Prima facie*, therefore, the assessee is bound to pay income tax upon all the profits which come under the head of "interest on securities." Section 4 of the Act states in very broad terms what sort of profits and gains are to be taxed. It provides that

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in s. 6, from whatever source derived, accruing or arising, receiving in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

The income in the present case clearly comes within that section and, unless the assessee can show that by some provision

in the Act he is entitled to deduct the sum claimed from his taxable income, he must *prima facie* fail. He is unable in the present case to show any such exemption coming within the Act itself. I have mentioned the fact that a sum of about 3½ *lakhs* of the overdraft was taken for investment. Those investments form part of the securities deposited with the Bank, and it is interesting to note that the interest on the loan to that extent amounting to Rs. 19,644 has been allowed by the Commissioner as a deduction from the taxable income. This appears to have been done under general instructions from the Central Board of Revenue. Under what provision of the Act it is done has not been discussed, but it seems fair and reasonable that such deductions should be made.

A further point which is of a technical nature was made on behalf of the assessee that the income was not really received by him. It was, however, received by his attorney and received on his account, and although his attorney had a charge upon it for the interest due upon the overdraft that makes it none-the-less income received by the principal. It was received by the agent on behalf of the principal. On this part of the case, therefore, I consider that the assessee's claim fails.

The other point relates to a sum Rs. 3,107 which comes under the head of "Income received from other sources." The actual source from which this income is derived is stated by the Commissioner in the case. It is called *nimak sair*, that is, income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. It appears that earth of this description is found upon the assessee's *zemindari*. The right to extract that earth is apparently let out to tenants and in return for that right the assessee receives something in the nature of rent or royalty. It was contended that this is merely casual income and non-recurring. That fact, however, seems to be concluded by the findings of the Commissioner. He states in his case that it is not casual income. It is shewn in the return for the years 1923-24, 1924-25 and 1925 26. It is thus clearly capable of repetition, and finally he says that in his opinion, the receipts from *nimak sair* are neither casual nor non-recurring. That is a finding of fact and unless that finding of fact was come to by some improper process or by failure to give effect to some rule of law it is binding upon this Court. It has not been shown to us that the facts before the Commissioner were not such as to justify him in coming to that conclusion and, therefore, by his conclusion we are bound.

It was further argued with regard to this part of the case that the income derived from this source is really not income at all, but in the nature of a sale of a part of the earth appertaining to the assessee's *zemindari*, in other words that it was a transfer of one kind of capital into another, namely, the transfer of this particular sort of earth into money. It is, however, of a recurring nature and it is not casual and in such cases it seems to me that it is quite impossible to distinguish the rents or royalties, whatever they may be called, arising from this source, from the rents or royalties arising from the letting of coal or other minerals in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface provided that it is not non-recurring or casual, and provided that it is not in the nature of a sale. On this point, therefore, I think that the assessee's case must fail.

The result is that the decision of the Commissioner of Income Tax must be upheld and this application must be dismissed. The Commissioner is entitled to his costs in this case.

Foster, J.—I agree.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1027 OF 1926.
February 1, 1927.
Present:—Mr. Justice Addison.

BUTA SINGH—VENDEE—DEFENDANT—APPELLANT
versus
RAHIM BAKHSH AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS

Punjab Pre-emption Act (I of 1913), s. 6—Sale of building in village abadi—*Pre-emption—Immoveable property, what is—Consent of proprietors—Sale by major brother of minor brother's share—Major brother's right to sell, question of—Necessary parties in pre-emption suit.*

The sale of a house by a *kamin* in the village *abadi*, the site of which belongs to the proprietary body is pre-emptible as what is sold is immoveable

property for purposes of pre-emption, and the question of consent by the proprietors does not arise in such a case.

In a suit for pre-emption where the sale is by a major on his own behalf and on behalf of his minor brother, the question of major brother's right to sell the minor's share does not arise as the necessary parties to such a suit are the pre-emptor and the vendee.

Second appeal from the decree of the Additional District Judge, Lahore, dated the 9th January, 1926, reversing that of the Sub-Judge, Third Class, Kasur, District Lahore, dated the 13th August, 1924.

Mr. *Badri Nath* for Diwan *Mehr Chand*, for the Appellants.

Mr. *Gulam Mohi-ud-Din*, for the Respondent.

JUDGMENT.—Siraj Din defendant No. 1 on his own behalf and on behalf of his minor brother, Miraj Din sold half a house in village Lullianai to Buta Singh, defendant No. 3 one of the *Jat* landlords of the village. Siraj Din and Miraj Din were owners of the superstructure with a right of residence, being *kamins* in the village. They only owned a half interest in the house in question the other half being owned by the plaintiffs who sued for possession by pre-emption making the vendee and the vendors parties to the suit, though, in my opinion, it would have been sufficient to make the vendee the sole party. The trial Court dismissed the suit, holding that the major brother could not alienate the share of his minor brother and that it had not been proved that the sale was for the benefit of the minor brother and also that as the site belonged to the village proprietors of whom the vendee was one and the sale was of the materials and the right of residence, the latter of which could not be sold, such a sale was void and not liable to pre-emption. On appeal, however, the learned District Judge decreed the suit on payment of a sum of Rs. 90, this amount not being disputed before him.

In this second appeal it was first argued that the major brother had no right to sell his minor brother's share and that, therefore, the sale was invalid and could not be pre-empted. The District Judge, however, has held that under custom the elder brother was the guardian of his minor brother and had the right to mortgage and sell his share. He further held that in this suit it was not necessary to consider whether the sale was for the benefit of the minor. This is correct law for the only necessary party is the vendee who admits the sale and no question arises in this suit as regards the validity of the sale. In any case the District Judge has found that by custom the elder brother had a right to sell as guardian of the minor brother and that finding cannot be challenged here except upon a certificate obtained under s. 41 of the Punjab Courts Act.

The next point taken was that defendants Nos. 1 and 2 had no right to sell the *malba* and the right of residence in half the house in question without consent of the village proprietors. Here, however, the sale was to one of the village proprietors and it must be presumed to be valid and with consent. Besides in this suit to which the vendee and the pre-emptors only are necessary parties this question does not arise.

There is also no force in the argument that the sale of the superstructure with the right of residence is not a sale which can be pre-empted under the Punjab Pre-emption Act. Immoveable property is defined in s. 3 (25) of Act X of 1897 where it is said that 'immoveable property' shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to earth. What was sold in the present case obviously comes within definition and it was held in *Banarsi Das* v. *Haji Abdul Ghani* (1) that a standing building was immoveable property under the General Clauses Act there being no definition of the term in the Pre-emption Act. The plaintiffs are co-sharers in the building that was sold and obviously under the Pre-emption Act they are entitled to pre-empt the sale, as ownership of the site under that Act confers no right of pre-emption.

There is also no force in the contention that the learned District Judge should have remanded the suit to the trial Court to decide the issues other than Nos. 1, 2, 4 and 6. He was perfectly entitled to decide the other issues himself. The only other point to be decided of any importance so far as evidence was concerned was for what sum the pre-emption should be allowed and this was admitted before him to be Rs. 90.

The appeal fails and is dismissed with costs.

R. L. *Appeal dismissed.*

(1) 1 Ind. Cas. 397; 10 P. R. 1909; 13 P. W. R. 1909; 24 P. L. R. 1909.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 1951 OF 1924.
January 3, 1927.

Present:—Mr. Justice Duval and Mr. Justice Mitter.

INDIA GENERAL NAVIGATION AND RY. Co., LTD.—DEFENDANTS—APPELLANTS

versus

GIRIDHARILAL GOBARDHONE DAS, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Carriers Act (III of 1865), ss. 9, 10—Notice under s. 10—Service on local agent, validity of—Through booking, legal incidents of—Liability of carrier to whom goods are delivered.

Where goods are addressed to a place beyond the scope of a carrier's business so that from one point he must forward them by another carrier, the carrier is responsible for the goods for the whole journey unless he limits his liability by agreement. [p. 905, col. 2.]

[The nature of a through booking contract discussed.]

Muschamp v. *Lancaster and Preston Junction Ry., Co.* (5) and *London and North Western Ry.* v. *Hudson & Sons* (13), followed.

In view of the absence of any provision in the Carriers Act corresponding to s. 140 of the Railways Act, a notice under s. 10 of the Carriers Act may be served on a local representative of the carrier. [p. 904, col. 1.]

River Steam Navigation Co. v. *Hazarimal Multan Mal* (1) and *British & Foreign Marine Insurance Co.* v. *India General Navigation & Ry. Co.* (14), explained.

Appeal against the decree of the District Judge, Bankura, dated the 2nd of July, 1924, reversing that of the Munsif, Third Court at that place, dated the 25th of August, 1923.

Mr. *Amulya Charan Chatterjee* and Babu *Prakash Ch. Pakrashi*, for the Appellants.

Sir *P. C. Mitter* and Babu *Ambicapada Chowdhury*, for the E. I Ry. Co.

Dr. *Bijan Kumar Mukerjee* for other Respondents.

JUDGMENT.

Mitter, J.—This is an appeal from the decree of the District Judge of Bankura which reversed the decree of the Munsif of Bankura. The India General Navigation and Railway Co., Ltd., and Rivers Steam Navigation Co, Ltd., have preferred this appeal which arises out of an action commenced by the plaintiffs' firm for recovery of damages for short delivery of goods. The plaintiffs' case is that one Rambilas Muralidhar consigned 129 maunds 31 seers of betel-nuts in 71 gunny bags to defendants-appellants at Daulat Khan Steamer Station for delivery to them at Bankura The defendant No. 4, appellant, undertook to carry the goods from Daulat Khan to Bankura *via* the Eastern Bengal Railway (defendant No. 3), the East Indian Railway (defendant No. 2) and the Bengal Nagpur Railway (defendant No. 1). The plaintiffs further alleged that when they went to take delivery of the goods at Bankura Station there was short delivery by 31 maunds 28½ seers of which the then current price was at Rs. 19 per maund; and that they exchanged correspondence with the different Companies from which it transpired that servants of defendant No. 2 misappropriated the same and the reason for making all the Railway and Steamer Companies parties to the action was stated to be the fact that the goods passed through the lines of all the defendant Companies. The claim was laid at Rs. 629. The defendants Steam Navigation Co. and another who are the appellants before us contended *inter alia* that the suit should fail for want of proper notice, that they made over the goods in good order to the Eastern Bengal Railway at Khulna on the 1st February, 1922, and that thereupon their liabilities ceased. The Munsif found that notices had been served on the defendant Companies according to the provisions of s. 77 of the Railways Act and that the loss of the goods in question occurred while the goods were in transit on the East Indian Railway (defendant No. 2) and passed a decree for the amount claimed against the East Indian Railway and dismissed the suit against the other Railway Companies as also against defendants Steam Navigation & Co. and another who are the appellants before us. The East Indian Railway appealed to the District Judge making the plaintiffs' firm alone as party respondent. Sometime after the period of limitation had expired for filing the appeal, defendant No. 4 was made a party respondent to the appeal. The appeal was heard and the appeal was decreed and the plaintiffs' suit was dismissed against the East Indian Railway Co., on the ground that notice under s. 77 of Indian Railways Act was not a proper notice as it was served more than six months after the delivery of the goods for carriage by the East Indian Railway Co. But a decree was made against defendant Steam Navigation Co. and another. It will be

noticed here that plaintiff preferred no appeal against the decree of the Munsif dismissing his suit against defendant No. 4. The lower Appellate Court in passing a decree against defendant No. 4 was evidently purporting to act under O. XLI, r. 33 of the Code of Civil Procedure and it may be a question if the defendant No. 4 could be added as a respondent if the period of limitation for filing an appeal against him has expired. However, as this point was not taken by the appellant in their memorandum of appeal nor urged before us, we do not think we should permit it to be raised. In second appeal the learned Advocate for the appellants raises two points: first, that the suit should have been dismissed against defendant No. 4 as there was no service of notice on them under s. 10 of the Indian Carriers Act (III of 1865). It is said that although notice was served on the local agents of the Company at Daulat Khan, no notice having been served on their agent at Calcutta the notice is invalid, and reliance is placed on *River Steam Navigation Co.* v. *Hazarimal Multan Mal* (1) in support of the contention. The second point raised is that as the goods were admittedly in order when the river journey was completed and the goods were made over to the Eastern Bengal Railway the liabilities of the defendant Steam Navigation Company ceased, as it is admitted by the plaintiffs that the loss occurred in transit over the East Indian Railway. To the first contention the learned Vakil for the respondents replies by arguing that the Carriers Act does nowhere state that the notice under s. 10 should be served on the agent at Calcutta and there is no such corresponding provision in the Carriers Act as we have in s. 140 of the Indian Railways Act and consequently the cases cited have no application. We think this contention of the learned Vakil for the respondents is well-founded and must prevail. All that the cases cited by the appellants lay down is that where notice under s. 10 of the Carriers Act has not been shown to have been duly served knowledge *aliunde* of the service of notice by the common carrier is not sufficient.

The second point raised by the appellants is one of considerable difficulty. The argument for the appellants assumes that there are a series of contracts with different Companies and there is not one contract with the Steam Navigation Company, or Rivers Steam Navigation Company at Daulat Khan. This argument receives considerable support from the decision of Mr. Justice Brett in *Norang Rai Agarwalla* v. *Rivers Steam Navigation Co.* (2) and of Mr. Justice Mitra and Mr. Justice Caspersz in *Gokal Chandra Das* v. *India General Steam Navigation & Ry. Co. Ltd.* (3) to this extent that so far as liability for any loss for the river portion of the journey is concerned it is to be governed by the Carriers Act and liability for any loss arising in the journey by rail is to be determined by the Indian Railways Act. As to how far this view about the differentiation of liabilities is right may be a matter open to question and we find indications of a contrary opinion in an elaborate and learned judgment of the learned Chief Justice in the case of *Dekhari Tea Co.* v. *Assam Bengal Ry. Co.* (4). In that case the learned Chief Justice observed as follows :—

"The facts here seem to me to be distinctly stronger than those in any of the leading cases which were decided with reference to contracts by Railway Companies to carry to places that were on other Companies' lines [*Muschamp* v. *Lancaster and Preston Junction Ry. Co.* (5), *Scothorn* v. *South Staffordshire Ry Co.* (6) and *Bristol and Exeter Ry.* v. *Collins* (7)], or to carry to a point beyond their own lines which involved transport by water [*Wilby* v. *West Cornwall Ry. Co.* (8)].

"Subject to any written documents, it is a question of fact for a Jury to say whether there was one contract or more than one. The basis, however, of the above decisions is that it would be a strained and improbable inference to hold that a sender on an ordinary 'through booking' transaction enters into a series of contracts

(1) 41 Ind. Cas. 919; 27 C. L. J. 294.

(2) 11 C. W. N. 1071; 34 C. 419.

(3) 11 C. W. N. 1076.

(4) 57 Ind. Cas. 406; 23 C. W. N. 998; 47 C. 6.

(5) (1841) 8 M. & W. 421; 2 Railw. Cas. 607; 5 Jur. 656; 13 L. J. Ex. 460; 58 R. R. 758; 151 E. R. 1102.

(6) (1853) 8 Ex. 341; 22 L. J. Ex. 121; 7 Railw. Cas. 810; 17 Jur. 214; 1 W. R. 154; 20 L. T. (o. s.) 225; 91 R. R. 527; 155 E. R. 1378.

(7) (1859) 7 H. L. C. 194; 29 L. J. Ex. 41; 5 Jur. (N. S.) 1367; 11 E. R. 78; 115 R. R. 106.

(8) (1858) 2 H. & N. 703; 27 L. J. Ex. 181; 4 Jur. (N. S.) 284; 6 W. R. 225; 30 L. T. (o. s.) 261; 115 R. R. 754; 157 E. R 290.

with carriers Nos. 1, 2 and 3, making each carrier except the last his agent to make a further contract, or treating him as the next carrier's agent to make a further contract with the sender. If it be said that though there is an entire contract with the first carrier for the whole journey, yet there may also be a contract with each of the other carriers for their own part of the transit, this, no doubt, is true. But as an inference it is still more elaborately improbable. It involves a contract and a parallel series of other contracts. This series has to be operated either by each carrier being treated as the sender's agent to contract with the next, which involves a doubtful scheme for the transmission of authority; or else by each carrier being treated as having made the previous one (or perhaps the first one) his agent to contract on his behalf, while himself being the previous carrier's agent to perform. Again this latter view is possible and in some cases it is right. Such a position is a *quasi*-partnership and is illustrated by *Gill* v. *Manchester Sheffield and Lincolnshire Ry. Co.* (9) and *Great Indian Peninsula Ry. Co.* v. *Radhakissen Khushal Das* (10). It has been put in argument that where for their mutual advantage two Companies are in the habit of handling through traffic for a reward to be divided in proportions, there is in substance a *quasi*-partnership and each is the agent of the other to contract. I do not agree. Mutual advantage is the pre-supposition in every contract and not the less so that it is often vitiated by mistake or sadly falsified by events. It is not of itself a principle of confusion which obliterates the distinction between a sub-contract to perform and an agent's or partner's authority to contract. The case of *Foulkes* v. *Metropolitan District Ry. Co.* (11), if the facts be considered, is no authority for any proposition so wide It was a case where the defendant Railway carried for the whole journey by their own rolling stock partly over their own line and partly over another as to which they had running powers. There was a body of evidence as to the relationship between the Companies and the position of the booking clerk who issued the ticket. It was not a case of carriage by successive Companies over their own lines."

It is true in that case the Steam Navigation Co. was made liable for loss due to their own negligence not on the basis of any contract with the owner of the goods but on the basis of their liability as common carrier under the Indian Carriers Act even in the absence of privity of contract with the owner. But the observations of the learned Chief Justice quoted above throw considerable light on the present controversy. The law in England is to the effect that where goods are addressed to a place beyond the sphere of the carrier's business so that from another point he must forward them by another carrier he is responsible for the goods for the whole journey unless he limits his liability by agreement. See *Shepherd* v. *Bristol & Exeter Ry.* (12) and *Muschamp* v. *Lancaster & Preston Junction Ry. Co.* (5).

We have in second appeal received in evidence a risk-note in form H tendered on behalf of the appellants which was executed by the present plaintiffs in favour of the Eastern Bengal Ry. Co, as through mistake the risk-note in another case was filed by the Eastern Bengal State Railway Co. But as the loss did not take place while the goods were in transit in Eastern Bengal State Railway the risk-note does not protect the defendants from liability even if we take the decision of Mr. Justice Brett in *Norang Rai Agarwala* v. *River Steam Navigation Co.* (2) to be a sound one. At one time in the course of argument it seemed to us that this fact of the execution of the risk-note in favour of Eastern Bengal State Railway Co., shows that there was one contract with the first carrier as also a separate contract with each of the other carriers for their own part of the transit, and as the loss occurred in transit over the East Indian Railway line the defendant Steam Navigation Co. were absolved from all liability. But as has been pointed out by the learned Chief Justice in the case of *Dekhari Tea Co.* v. *Assam Bengal Ry. Co.* (4) as an inference it is improbable as it involves a contract and a parallel series of contracts The District Judge has made the defendant

(9) (1873) 8 Q. B. 186; 42 L. J. Q. B. 89; 28 L. T. 587; 21 W. R. 525.

(10) 5 B. 371; 5 Ind. Jur. 646; 3 Ind. Dec. (N. S) 244.

(11) (1880) 5 C. P. D. 157; 49 L. J. C. P. 361; 42 L. T. 345; 28 W. R. 526.

(12) (1868) 3 Ex. 189; 37 L. J. Ex. 113; 18 L. T. 528; 16 W. R. 982.

Steam Navigation Co., Ltd liable for the negligence of the East Indian Railway Co., treating the latter as the agent of Steam Navigation Co., within the meaning of s. 8 of the Indian Carriers Act. Whether in the absence of the terms of arrangement between the different Companies it is impossible to infer that the East Indian Railway were the agents of the Steam Navigation Company may be a matter open to doubt. But, under s. 9 of the Indian Carriers Act, it is not necessary for the plaintiff to prove that "such loss, damage or non-delivery was due to the negligence or criminal act of the carrier, his servants or agents." It is difficult to say how the Steam Navigation Company and another can escape liability if the contract was one and indivisible contract with them, as the carrier would be responsible for any loss which occurred before delivery of the same to the plaintiffs. The view which we take receives support from the decision of the House of Lords in *London & North Western Ry.* v. *Hudson & Sons* (13). We have given our most anxious consideration to this case and we do not see our way to hold that defendant No. 4, *i. e.*, Steam Navigation Co. and another are not liable for the loss. The result is that the appeal fails and must be dismissed with costs.

Duval, J.—The facts of this case are that one Rambilas Muralidhar had made over certain bags of betel-nuts to the joint steamer agent of India General Navigation and Railway Company, Ltd., and Rivers Steam Navigation Co. at steamer station at Daulat Khan for their being sent to Bankura. The goods had to proceed by river to Khulna and thence across the Eastern Bengal Railway to Naihati and thence on the East Indian Railway to Asansole and the rest of the journey by the Bengal Nagpur Railway. It is admitted that some pilfering took place of the goods on the East Indian Railway and it is also clear that there was no risk-note under the Railways Act to cover the risk on either the Eastern Indian Railway or Bengal Nagpur Railway nor did the Steamer Companies limit their liabilities by taking any risk-note which they might have been able to take under the Carriers Act. Now the learned District Judge has given a decree against the Steamer Company after coming to certain findings of fact. He found that the East Indian Railway Company was acting as an agent of the Steamer Company to carry goods and, therefore, he held that as the goods were lost the Steamer Company which had entered into a contract to send the goods to Bankura were liable for the loss.

In appeal two points were taken. The first was that the notice issued to the Steamer Company was a bad notice under the Carriers Act. The notice was sent by post and was received by the joint agent of India General Navigation and Railway Company, Ltd., and Rivers Steam Navigation Company at Daulat Khan. He was the local representative of the two Companies and the plaintiff did not know when he consigned the goods by which Steamer Company his goods would be taken to Khulna. I cannot see that there could be a better service of notice than was served on the joint representative. I was referred to some remarks made in the case of *British & Foreign Marine Insurance Co.* v. *India General Navigation & Ry. Co.* (14), where it is stated that a notice by a letter to the Managing Agent would be a good notice, but that decision does not say that the notice such as was given here is not also a good notice. The essential of a good notice appears to be that it should reach the person who is liable to make good the loss. The local agent received the notice and in fact it is clear from the pleadings that the Companies were made aware of the claim lodged.

Now, the second point is whether the Railway Company is an agent of the Steamer Company. Here reference was made to the case of *Gokul Chandra Das* v. *India General Steam Navigation & Ry. Co. Ltd.* (3) and to the case decided by Mr. Justice Brett. As to these cases I may remark that there is no definite finding as to whether in point of law one Company is an agent of another and as to whether there were separate contracts. Those cases were decided with reference to the fact that the value and description of the articles lost were not expressly declared as the law required them to be declared. But it appears to me that the matter is really one of fact. The Judge has come to a finding, though I must admit that he has not dealt very much with the evidence, that the East Indian Railway was an agent of the

(13) (1920) A. C. 324; 89 L. J. K. B. 323; 122 L. T. 530.

(14) 9 Ind. Cas. 364; 15 C. W. N. 226 at p. 230; 38 C. 28.

Steamer Company. The present case, therefore, appears to me to be, strictly speaking, governed by the ruling in the case of *Muschamp* v. *Lancaster & Preston Junction Ry. Co.* (5) (which is still the law) that the proper person who is liable is the person to whom the goods were delivered and that the contract is not a divisible one and that it is really a matter for the Jury to decide with whom the contract really was.

I agree with the District Judge that in this case the Steamar Companies were the people who entered into a contract for delivery of the goods undamaged at the place of their destination using the Railway Companies as their agents and were liable to make good the loss.

In this view the appeal is dismissed with costs.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2776 OF 1925.

October 21, 1926.

Present:—Mr. Justice Harrison and Mr. Justice Fforde.

BHIM SINGH—DEFENDANT—APPELLANT

versus

BASHESHAR NATH GOELA, OFFICIAL LIQUIDATOR OF THE UNION BANK OF INDIA, LTD., DELHI, IN LIQUIDATION, PLAINTIFF AND DRAHAM NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 36—Companies Act (VII of 1913), s 235—Applications for compensation from Director for misfeasance—Limitation.

The limitation for an application under s. 235, Companies Act, to recover compensation from an ex-Director of a Company in respect of an alleged act of misfeasance is two years under Art. 36, Sch. I of the Limitation Act. [p. 908, col. 1.]

In the matter of the Union Bank, Allahabad Ltd. (1), dissented.

Bank of Multan v. *Hukam Chand* (2), *In re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's case* (3), followed

In re City Equitable Fire Insurance Co. (4), distinguished.

Miscellaneous first appeal from an order of the District Judge, Delhi, dated the 30th August, 1922.

Messrs. *Tek Chand* and *C. L. Mathur*, for the Appellants.

Lala *Moti Sagar*, R. B., and Lala *Mool Chand*, R. S., for the Respondents.

JUDGMENT.

Fforde, J.—This is a misfeasnace application brought by the Official Liquidator of the Union Bank of India Ltd., Delhi, under s. 235 of the Indian Companies Act (VII of 1913) asking that the several respondents be made to recoup the Bank for various losses incurred by their neglect and default in the management of the Bank's affairs.

The facts are very fully and clearly stated in the judgment of the Court below and for the purpose of this appeal I do not think it necessary to re-state them. The first question which we have to decide is whether or not this application is barred by limitation. It is admitted that the various misfeasances complained of took place more than three years before the date of the present application. The latest of them is alleged to have occurred on the 11th of June, 1914. Mr. Tek Chand who appears for one of the Directors contends that Art. 36 of the Indian Limitation Act (IX of 1908) governs this case. This Article provides a two years' period of limitation for a suit for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for in that Act, time to run from the date when the malfeasance or non-feasance took place. If this Article is held to apply the present application is admittedly barred.

Mr. Mool Chand on behalf of the liquidator contends that Article 120 applies which provides a six years' period for suits for which no period of limitation is provided elsewhere in the Schedule, and time is expressed to run from the date when the right to sue accrues. In the alternative, it is urged that Art. 90 applies, which relates to suits, other than those mentioned in Arts. 88 and 89, by principals against agents for neglect or misconduct, and provides a three years' time limit from the date when the neglect or misconduct becomes known to the plaintiff. Mr. Mool Chand argues that s. 235 of the Indian Companies Act confers upon a liquidator a new right, not previously possessed by the company or its share holders, to enforce claims of the nature provided by that section and that this right comes into effect from the date of his appointment. For this proposition

he has referred us to *In the matter of the Union Bank, Allahabad, Ltd*, (1) relying upon the following observations of Walsh, J., which appear at page 686* of the report. "It has been said that s. 235 creates no new rights, but as is pointed out in the latest edition of Buckley on Companies (1924), the statement is only partially accurate. No doubt, it provides machinery for enforcing claims which exist independently of the section, but so far as a liquidator is authorised by this section to apply, in the interests of creditors and depositors who have lost their money, to enforce a claim against the Directors under the section, it seems to me that a new right in him is created. If any Article is to be applied at all to the date from which the liability first came into existence by reason of the act of misfeasance, or breach of trust, which the person is proved to have committed, it seems to me that the only Article which at all fits the case is Art. 120, which provides a term of six years for every case not otherwise provided by the Act."

In adopting this view the learned Judge has expressly dissented from a decision of a Division Bench of this Court in *Bank of Multan* v. *Hukam Chand* (2) a Letters Patent Appeal, in which the Court held that an application under s. 235 of the Companies Act of 1913 to recover compensation from an ex-Director of a Company in respect of an alleged act of misfeasance or breach of trust, is by virtue of cl. (3) of the section, governed by Art. 36 of Sch. I to the Limitation Act, and is barred unless made within two years of the Act complained of. The learned Chief Justice in his judgment says at page 902†: "It must be remembered that s. 235 does not create any new rights or liabilities but simply provides a summary mode of enforcing rights which might otherwise have been enforced by suit. If any authority is needed on the subject I would refer to the judgment of James, L. J. in *In re Canadian Land Reclaiming and Colonizing Co. Coventry and Dixon's case* (3) which deals with the corresponding section of the English Companies Act. It is to be observed that s. 235 does not take away the remedy by suit but provides an alternative remedy by which the liquidator may enforce rights in expeditious manner without incurring the expenses entailed by a regular suit."

Since these cases were decided the matter so far as that point is concerned, has been finally set at rest by the decision of the English Court of Appeal: *In re City Equitable Fire Insurance Co.* (4) in which Pollock, M. R, at page 507* expresses himself as follows:

"Now the claim is brought in accordance with the procedure which is rendered available by s. 215 of the Companies (Consolidation) Act, 1908, and as an argument was presented to us for which some foundation could be suggested based in substance upon s. 215. I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abdundantly shown by *In re Canadian Land Reclaiming and Colonizing Co., Coventry and Dixon's case* (3), *In re Brazilian Rubber Plantations and Estates Ld.* (5) and *Cavendish Bentinck* v. *Fenn* (6). In *Cavendish Bentinck* v. *Fenn* (6) Lord Macnaghten gives in a sentence or so the principle of which the other cases are illustrations. He says: 'That section creates no new offence, and...it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity.' Then he goes on: 'It has been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the Company'."

This authority, endorsing the view held by this Court in the *Multan Bank case* (2) concludes the point so far as this Court is concerned. Mr. Mul Chand, however, has referred to another decision of this Court which at first sight appears to be at variance with the last mentioned case, namely, the case of *Daulat Ram* v. *Bharat National Bank Ltd. Delhi* (7). In that case it was held that a suit by the Bank against a local Director for recovery of loss through his negligence,

(1) 88 Ind. Cas. 785; 47 A. 669; 23 A. L. J. 473; L. R. 6 A. 425 Civ., A. I. R. 1925 All. 519.
(2) 71 Ind. Cas. 899; A. I. R. 1923 Lah. 58.
(3) (1880) 14 Ch. D. 660; 42 L. T. 559; 28 W. R. 775.
(4) (1925) Ch. 407; 94 L. J. Ch. 445; 133 L. T. 520; 40 T. L. R. 853; 17 Ll. L. Rep. 225.
(5) (1911) 1 Ch. 425; 80 L J. Ch. 221; 103 L. T. 697; 18 Manson 177; 27 T. L. R. 109.
(6) (1887) 12 A. C. 652 at p. 669; 57 L. T. 773; 36 W. R. 441; 57 L. J. Ch. 552.
(7) 79 Ind. Cas. 740; 5 Lah. 27; A. I. R. 1924 Lah. 435.

*Page of 47 A.—[*Ed.*]
†Page of 71 Ind. Cas.—[*Ed.*]
*Page (1925) Ch. D.—[*Ed.*

was governed by Art. 90 of the Limitation Act which prescribes three years as the period of limitation. It must be borne in mind, however, that in that case it was held that the Director in question had been acting as an agent for the Bank in respect of certain matters, and, accordingly, the suit was one by a principal against an agent for compensation for neglect of the latter in his conduct as such agent. It was not a suit for "compensation for any malfeasance, misfeasance or non-feasance independent of contract..." The proper distinction to be drawn between the *Multan Bank case* (2) and the case of the *Bharat National Bank* (7) is that one was a suit by a principal against an agent, and the other was an application for compensation for misfeasance in the nature of breach of trust independent of contract. So far as certain observations of mine contained in that judgment may be too taken to throw doubt upon the decision in the *Multan Bank case*(2) I need only say that the question of limitation governing an application under s. 235 of the Companies Act was not fully dealt with. In my opinion this application is governed by Art 36 of the Indian Limitation Act, and as none of the misfeasances averred are within two years the matter is barred by limitation. The preliminary objection, therefore, must prevail, the appeal be accepted with costs throughout and the application dismissed. The cross-objections must also be dismissed.

Harrison, J.—I agree that this application is barred by limitation. Not only does it disclose nothing beyond misfeasance, malfeasance and non-feasance, but in his statement at page 166 the liquidator has definitely defined and limited his position and made it impossible to substantiate the contention that the application can be governed by any Article other than 36.

R. L. *Appeal accepted.*

LAHORE HIGH COURT.

LETTERS PATENT APPEAL No. 298 OF 1926

February 4, 1927.

Present:—Sir Shadi Lal, Kt., Chief Justice, and Mr. Justice Broadway.

SEWA RAM, MINOR, THROUGH JANMI DAS—PLAINTIFF—APPELLANT

versus

HASSU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 1—Limitation Act (IX of 1908), Sch. I, Arts. 152, 156—Judgment pronounced without notice to parties—Appeal—Limitation, commencement of.

Where a judgment is pronounced in the absence of the parties or their Pleaders on a day of which they had no notice, the judgment cannot be said to have been pronounced in accordance with law and limitation for appeal begins to run not from the day on which it is announced but from the date on which the party or his Pleader receives intimation of the decision of the case against him. [p. 910, col. 1.]

Lalli v. *Sain Ditta* (1) and *Sagarmal Marwari* v. *Lachmisaran Misir* (2), followed.

Letters Patent Appeal against the judgment of Mr. Justice Abdul Raoof, passed in Civil Appeal No 12 of 1925, on the 13th October, 1926, affirming that of the District Judge, Dera Ghazi Khan, dated the 29th August, 1924.

Mr. *Amar Nath Chona*, for the Appellant.

JUDGMENT.

Shadi Lal, C. J.—This is an appeal under cl. 10 of the Letters Patent from a judgment of Mr. Justice Abdul Raoof who held that the appeal before him was barred by time as it was filed one day after the expiry of the period of limitation prescribed by law. In order to determine the question it is necessary to mention the dates which have a bearing upon it. The case was heard by the District Judge on the 4th August, 1924, but he did not pronounce judgment at once and fixed the 16th of August for the delivery of judgment. On that day he postponed the pronouncing of judgment to the 28th of August. It appears that no order was recorded on the latter date, and that the parties were not informed of any future day on which the judgment was to be pronounced. On the 29th of August he appears to have written the judgment and signed it but, as the parties were not present on that day, he directed a notice to be sent to the Pleader for the appellant informing him that his application had been dismissed. This notice was served

upon the Pleader on the 3rd September, 1924.

It is beyond dispute that if the period of limitation is to be counted from the 3rd of September, 1924, the appeal preferred by the appellant was not barred by limitation; and the question for consideration is whether the 29th of August or the 3rd of September is to be regarded as the *terminus a quo* for the period of limitation prescribed for the appeal.

Now, O. XX, r. 1 of the Civil Procedure Code prescribes that the Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their Pleaders. It is clear that the judgment in this case was not pronounced by the District Judge at once, and though due notice of the 16th of August was given to the parties, no judgment was pronounced either on that date or on the 28th August. As stated above, the judgment was written on the 29th of August and was dated the same day, but no notice of that date was given to the parties or their Pleaders. It is true that at the end of the judgment the word 'announced' is mentioned, but the record of the case makes it absolutely clear that it was not announced to the parties or their Pleaders. Indeed, the learned Judge adopted the peculiar procedure of directing a notice to be sent to the appellant informing him that his application has been dismissed. We must, therefore, take it that the judgment was never pronounced in accordance with law, and that the limitation can begin only from the date on which the appellant's Pleader received intimation of the decision of the case against him. The rule laid down by the Punjab Chief Court in *Lalli* v. *Sain Ditta* (1) and by the High Court of Patna in *Sagarmal Marwari* v. *Lachmisaran Misir* (2) applies to the present case. Following these authorities I hold that the appeal preferred by the appellant was not barred by limitation.

I would accordingly accept the appeal and setting aside the judgment of the Single Bench remit the case for decision on the merits. The Court-fee on the memorandum of appeal shall be refunded and the other costs shall be borne by the parties incurring them.

Broadway, J.—I concur.

R. L. *Appeal accepted.*

(1) 51 Ind. Cas. 239; 27 P. R. 1919.
(2) 75 Ind. Cas. 879; 1 Pat. 771; A. I. R. 1923 Pat. 129.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2302 OF 1926.

February 2, 1927.

Present:—Mr. Justice Dalip Singh.

SANDHI—DEFENDANT—APPELLANT

versus

KHAIR-UD-DIN AND ANOTHER—PLAINTIFFS AND UMAR-UD-DIN—DEFENDANT—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 5—'Shop,' definition of—House wherein carpenter resides and works, whether shop or business premises.

A shop is primarily a place where goods are bought and sold, it is not synonymous with "business premises" in the general sense of the word. The fact that a carpenter works in the place where he resides does not turn the building into business premises or a shop.

Second appeal from a decree of the District Judge, Jullundur, dated the 14th July, 1926, reversing that of the Subordinate Judge, Third Class, Nakodar, dated the 4th November, 1925.

Mr. *Ghulam Mohy-ud-Din*, for the Appellant.

Mr. *Jagan Nath Bhandari*, for the Respondents.

JUDGMENT.—This was a suit for pre-emption of a certain building. The plaintiff's right to pre-empt was admitted but the vendee contended that the building was a shop and not a house. The learned District Judge held that the building was used for residential purposes but at the same time the vendor and the vendee were both carpenters and used to work as carpenters in this building prior to and after the sale. He held that there was not a tittle of evidence that goods were bought and sold here. He, therefore, held that the building was a house.

In second appeal it is contended from the situation of the place which is not far from a bazar and which has shops round it, and on the authority of *Jhabban Lal* v. *Muhammad Umar* (1) and *Umar Bakhsh* v. *Abdul Karim* (2) that the place

(1) 95 Ind. Cas. 675; 6 Lah. 359; 2 Lah. Cas. 44; A. I. R. 1925 Lah. 544.
(2) 70 P. R. 1898.

is a business premises and, therefore, a shop. It seems to me that the rulings which lay down that a shop is primarily a place where goods are bought and sold are correct and that to extend the meaning to "business premises" in the general sense of the word is to make an unwarrantable extension of the meaning of the word "shop", but, in any case, I do not think that the fact that a carpenter works in the place where he resides, turns the building into business premises or into a shop.

The appeal fails and is dismissed with costs.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 795 OF 1926.
October 12, 1926.
Present:—Mr. Justice Addison.

HARNAM SINGH AND ANOTHER—DEFENDANTS—APPELLANTS
versus
RAM DITTA, MINOR, THROUGH HIS MOTHER KUBRAN—PLAINTIFF AND HAZARA SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom (Punjab) — Alienation—Ordinary debts — Necessity, proof of—Interest on debts, whether necessity—Father and son living together—Collusion.

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property, strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor does not expect to be sonless. [p. 912, col. 2.]

Interest on a just debt is also a necessity. [*ibid.*]

Chanda Singh v. *Mukand Singh* (3), followed.

Jhandu v. *Niamat Khan* (4), distinguished.

The mere fact that the plaintiff is a minor and he and his mother are living with the father does not mean that the suit is collusive. [p. 911, col. 2.]

Second appeal from the decree of the District Judge, Ferozepore, dated the 23rd December, 1925, reversing that of the Sub-Judge, First Class, Ferozepore, dated the 10th June, 1925.

Mr. *J. N. Bhandari*, for the Appellants.

Mr. *Gullu Ram*, for the Respondents.

JUDGMENT.—Hazara Singh sold 100 *kanals* of land on the 5th September, 1923, for Rs. 5,500 to Kabul Singh and Harnam Singh of the same village. At that time his wife was pregnant and a son was born to the vendor two months later. This son is the present plaintiff and he instituted a suit under the guardianship of his mother for the usual declaration that the sale was without consideration and legal necessity and should be held not to affect his reversionary rights. In the plaint and pleadings there was no allegation that Hazara Singh the vendor was immoral, or was recklessly extravagant or that he was wantonly contracting debts in order to destroy the interests of the reversioners. The two principal issues framed were (1) was the sale effected for consideration and legal necessity? and (2) is the persent suit collusive? The trial Court held that consideration and legal necessity had been established and, without purporting to decide the second issue as to the suit being collusive, dismissed the suit, when, however, it was discussing the first issue the trial Court made some remarks in order to lead up to the discussion as to necessity. These remarks practically amount to a finding that the suit was in reality instituted by the vendor as he was living with his wife and son.

The plaintiff appealed to the District Judge and before him the question of collusion was not taken by either party. He held that consideration had been established for the whole sum but that there was no necessity for more than half the amount. He, accordingly, decreed the claim except to the extent of items (*a*) and (*b*) and Rs. 80 under item (*h*). The sum which he held to be for necessity was Rs. 2,510. Against this decision the defendant-vendees have instituted this second appeal.

It was first argued that on the finding that the father had instituted the suit it must be held to be collusive and that it should have been dismissed on the authority of *Dad* v. *Lal* (1) and *Ajaib Singh* v. *Sham Singh* (2). There is, however, nothing to show that the suit is collusive except the fact that the minor and his mother are living with the father. That does not necessarily mean that the suit has been instituted by the father. In these circumstances as the minor has, undoubtedly, the right to sue I am not prepared to hold that the suit is collusive.

As regards the question of legal necessity the District Judge held that the father had been borrowing the items which he disallowed mostly at 24 per cent. from 1915

(1) 82 Ind. Cas. 626; 5 L. 389; 6 L. L. J. 334; A. I. R. 1925 Lah. 24; 1 Lah. Cas. 367.

(2) 85 Ind. Cas. 284; 6 Lah. L. J. 389; A. I. R. 1925 Lah. 127.

to 1920, all the loans being contracted for household expenses. As all the money was borrowed from persons resident in the village and one sum was borrowed from the vendees themselves and as the vendor held 100 *kanals* of land and had only one wife and a son, the District Judge held that all must have known that he did not require the money and that he was recklessly contracting debts. He, therefore, decreed the claim as regards those items though he found that they had been paid.

Items (*a*) and (*b*) were Rs. 2,280 and Rs. 150 for previous mortgages on 76 *kanals* of his total holding of 100 *kanals*. The second small mortgage appears to have been recent but the mortgage for the large sum appears to have been prior to any of the subsequent loans which have been disallowed. This means that the vendor had before they were incurred only 24 *kanals* of land, *i. e.*, 3 *ghamaons*, the produce of which was not more than 24 maunds of wheat. The District Judge did not notice this but considered that at the time these loans were contracted the vendor held 100 *kanals* of land.

The items disallowed are (*c*) Rs. 820, (*d*) Rs. 710, (*e*) Rs. 628, (*f*) Rs. 80, (*g*) Rs. 670 and half of (*h*) Rs. 162.

As regards item (*c*) Rs. 820 this was due on a bond of 1920 for Rs. 460 and at the time of the sale the sum due had risen to Rs. 820 on account of interest The 1920 bond of Rs. 460 was executed in lieu of two previous bonds of the year 1916 for Rs. 60 and Rs. 84. The sum due on them came to Rs. 460 by the time the new bond of 1920 was executed of the total amount, therefore, of this item only the sum of Rs. 144 was originally borrowed in 1916 from Jairam and Bishan Das. The vendor was never able to pay this amount and the sum due on this account rose to Rs. 820.

The item (*d*) Rs. 710 was due on a *bahi* account to Hazara Singh. The dealings were also of 1916. Rs. 200 were borrowed then and subsequent interest raised this amount to Rs. 710 in eight years' time.

The item (*f*) Rs. 80 was also borrowed from a third party and is a small amount.

The item (*g*) Rs. 670 consists of Rs. 400 borrowed from Arjan Singh in 1921 along with interest. He also is a third party.

The item (*h*) consists of the sale and registration expenses and usually is allowed.

The only other item is (*e*) Rs. 628. This sum consists of Rs. 160 borrowed from Kabul Singh one of the vendees in 1915 together with interest. Nothing was borrowed after 1921, but the small sums borrowed from 1915 had swelled to a large amount on account of interest up to 1923 when the sale was effected. The initial borrowings as regards the items disallowed amount to about Rs. 900 spread over a long period and in the beginning they were not large. Apart from the question of interest, therefore, it cannot be said that the vendees should have been put on their guard by the reckless borrowing of the vendor. It must also be remembered that his income was extremely small and the land which he held was only a small area. It was not even alleged in the plaint that he was immoral or was wantonly contracting debts and the oral evidence does not establish this to have been the case. The only material from which any conclusion can be drawn concerning this question is the fact that he borrowed Rs. 900 from 1915 onwards. In my opinion it cannot be said that he was either immoral, or recklessly extravagant, or that he was wantonly contracting debts in order to waste his property and thus injure his reversioners. Further, it has been held in *Chanda Singh* v. *Makand Singh* (3) that in the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor does not expect to be sonless. It was also held there that interest on a just debt is also a necessity. In these circumstances *Jhandu* v. *Niamat Khan* (4) does not apply. It laid down that an alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith, or where he and the antecedent creditor are in effect one and the same person. I have no hesitation in holding, therefore, that the items disallowed with the possible exception of item (*e*) were for legal necessity.

Item (*e*) is made up of the sum of

(3) 29 Ind. Cas. 761; 144 P. L. R. 1915; 61 P. W. R. 1915.

(4) 54 Ind. Cas. 842; 1 Lah. 472.

Rs. 160 borrowed from one of the vendees in 1915 *plus* compound interest at 24 per cent. This sum was advanced for household necessities. In the circumstances described this is not a large amount to have borrowed. Of the items in dispute, it was the first to be advanced. Owing to the fact that most of his property was mortgaged the interest accumulated and that explains why the alienor became heavily indebted. In my opinion this item was also for legal necessity.

I accordingly accept this appeal and dismiss the suit. The appellants will get their costs in this Court.

A. N. A. *Appeal accepted.*

PATNA HIGH COURT.

REFERENCE UNDER THE COURT FEES ACT, 1870.

June 9, 1926.

Present:—Justice Sir Jwala Prasad, KT.

Pandit DHANUKDHARI TEWARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANI SONAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7 (ii), (iv) (c), Sch. II, Art. 17—Suit for assessment of fair and equitable rent—Court-fee—'Other sums payable periodically,' construction of.

A suit for declaration of title and for possession or in the alternative for assessment of fair and equitable rent, is a suit for declaration of title and for consequential relief, and falls within s. 7, cl. (*iv*) (*c*) of the Court Fees Act. [p. 915, col. 1.]

Kashinath Narayan v. *Govinda* (1) and *Kali Charan Roy* v. *Kesho Prasad Singh* (4), followed.

Inasmuch as there is no particular provision in the Court Fees Act applicable to a suit for assessment of fair and equitable rent, Court-fee should be paid *ad valorem* under Sch. I of the Act. [p. 915, col. 2.]

Section 7, cl. (*ii*) of the Court Fees Act is not applicable to a suit for assessment of rent which implies that no rent was paid previously by the tenant. [p. 914, col. 2.]

The expression 'other sums payable periodically' in s. 7 (*ii*) of the Court Fees Act must be construed as implying sums payable of the nature of maintenance and annuities upon the rule of *ejusdem generis*. [p. 915, col. 1.]

A prayer for assessment of rent is not in the nature of a declaratory relief and does not come under Art. 17 of Sch. II of the Court Fees Act. [p. 915, col. 2.]

Plaintiff prayed for assessment of rent at Rs. 10 per *katha*. A decree was passed for rent at Rs. 3 per *katha*. Plaintiff appealed for assessment at Rs. 10 as originally prayed for:

Held, that Court-fee on the plaintiff's claim in second appeal was payable only on the reduced claim, that is, at Rs. 7 per *katha*. [*ibid.*]

Reference made by the Taxing Officer under s. 5 of the Court Fees Act.

Mr. *Sambhu Saran*, for the Appellant.

Mr. *Sultan Ahmed*, Government Advocate, for the Crown.

JUDGMENT.—This is a Reference by the Taxing Officer under s. 5 of the Court Fees Act, and it arises in connection with the second appeals filed by the plaintiffs in this Court.

The plaintiffs are proprietors of *Mauza* Amehta. The defendants hold a house in *khata* No. 196, *khasra* No. 47, on land measuring 2 acres in the said village. The land has been entered in the Survey Record of Rights as *gair majruha* of the *maliks*.

The plaintiffs' case is that the land was given to the defendants in lieu of services to be rendered by the defendants on condition that the plaintiffs would be entitled to take *khas* possession of the land either when the services were no longer required or when the defendants ceased to render those services; and that the defendants refused to render services from *Sawan* 1328 *Fasli* and are not inclined to do so and that they refused to quit the land or to pay rent. The plaintiffs, therefore, seek the following reliefs:

(1) That it may be adjudicated that the land or house is the *gair majruha* of the proprietors and was given as *jagir* to the ancestor of the defendants in lieu of rendering services on the condition that they would have no right to hold possession of the land in the event of not rendering services to the plaintiffs or of not paying ground rent; that the possession of the defendants is a trespass and the plaintiffs are entitled to recover possession;

(2) that on a declaration of the plaintiffs' title and want of title of the defendants, possession may be awarded to the plaintiffs by ousting the defendants, or in the alternative an order may be passed for recovery of ground rent at the rate of Rs. 10 per *katha* annually as per account given in the plaint, or any amount that may be considered proper by the Court from the defendants.

The plaintiffs valued the suit at Rs. 6-8-0 in the case of Mani Sonar and another, at Rs. 19-8-0 in the case of Dahin Sonar and others and at Rs. 16-4-0 in the case of Baijnath Sonar and another, and paid Court-fee thereon. The Munsif disallowed the prayer for *khas* possession, and allowed the prayer for assessment of rent fixing Rs. 10 per *katha* annually to be paid from *Sawan* 1328 *Fasli* up to the date of the suit.

On appeal the Subordinate Judge fixed the rate of rent at Rs. 3 per *katha* as a fair and equitable rent. The cross-appeal of the defendants was dismissed.

The plaintiffs have come to this Court in second appeal and seek to have the decrees of the Munsif restored, assessing the rent at Rs. 10 per *katha*, and have valued the memorandum of appeal at one year's rent under sub-s. (*ii*) of s. 7 of the Court Fees Act, deducting therefrom the amount of rent decreed by the lower Appellate Court.

The Stamp Reporter objected to the Court-fee paid by the plaintiffs on the plaint and the memoranda of appeal in this as well as in the lower Appellate Court. He contended that the suit of the plaintiffs being for recovery of *khas* possession, or in the alternative for assessment of rent, the Court-fee payable is on the higher of these alternative reliefs claimed by them. The alternative relief for assessment is assessable with a Court-fee of Rs. 15 under Art. 17 to Sch. II of the Court Fees Act. This fee being higher than the Court-fee payable for the relief for *khas* possession should be levied in view of the decisions in *Kashinath Narayan* v. *Govinda* (1), *Mukhlal Gir* v. *Ramdheyan Rai* (2) and *Dasarati Meshy* v. *Jay Chand Sutradhar* (3).

Accordingly, the plaint and the memorandum of appeal were not properly stamped and the plaintiffs must make the deficiency good with respect to the fee paid by them on the plaint in the trial Court and on the memorandum of appeal filed in this Court as well as in the lower Appellate Court. The defendants-respondents similarly should have paid Rs. 15 with respect to the cross-appeal filed by them in the lower Appellate Court and should be called upon to make up the deficiency in the Court-fee paid by them.

The Taxing Officer has accepted the report of the Stamp Reporter. The appellants dispute the view taken by the Taxing Officer, and the dispute thus raised between the Taxing Officer and the appellants has been referred to me for determination as a Taxing Judge, inasmuch as the dispute raised involves a question of principle.

The plaintiffs valued the relief upon one year's rent claimed by them on the principle of s. 7, cl. (*ii*) of the Court Fees Act. Under that clause Court-fee is to be paid according to the amount of rent of the immoveable property to which the suit refers payable for the year next before the date of presenting the plaint. The clause relates to suits of various kinds between landlord and tenant, such as, a suit for delivery by a tenant of a counter-part of the lease, to enhance the rent of a tenant having right of occupancy, for the delivery by a landlord of a lease, for the recovery of immoveable property from a tenant holding over after the termination of tenancy, to contest a notice of ejectment, to recover occupancy of immoveable property from which a tenant has been illegally ejected by the landlord and for abatement of rent. The clause does not provide for a suit for assessment of rent which implies that no rent was paid previously by the defendant. The Court-fee payable under this clause is upon the rent "payable for the year next before the date for presenting the plaint."

In a suit for assessment of rent there being no rent payable previously the clause does not apply. So far the Taxing Officer seems to be correct.

He, however, thinks that the prayer for assessment of rent amounts to a declaration, but this is not so. It is obvious from the reliefs quoted above that the plaintiffs, firstly, seek a declaration of their right to recover possession of the property and of the absence of any right in the defendants to hold possession thereof and then upon such declaration they want to eject the defendants or to have rent assessed in the alternative. The terms of the second relief make it quite clear. It is in two parts, namely, (1) to eject the defendants and (2) to have ground rent fixed in the alternative. Both these prayers in the alternative follow from the adjudication of the plaintiffs' title. Therefore, both these prayers are consequential reliefs sought by the plaintiffs upon a declaration of their title and of want of the defendants' title to the land in question. Therefore, it would be wrong to say that the prayer for ejectment is a consequential relief after adjudication of the plaintiffs' title, whereas the prayer for assessment of rent in the alternative is not a prayer for consequential relief but is only in the nature of a declaration. No rent was payable previous to the institution of the suit and the assessment of rent implies that the rent payable is uncertain and depends upon a determination by the

(1) 15 B. 82; 8 Ind. Dec. (N. S.) 56.
(2) 44 Ind. Cas. 143.
(3) 78 Ind. Cas. 530; A. I. R. 1925 Pat. 193.

Court. The rent of Rs. 10 per *katha* stated by the plaintiffs is only a suggestion of what they consider to be a fair and equitable rent.

Therefore, a suit for recovery of possession with mesne profits, and in the alternative for assessment of fair and equitable rent, is a suit for a declaration of the plaintiffs' title to the land and for consequential relief. In the case of *Kali Charan Roy* v. *Kesho Prasad Singh* (4) the landlord sued for assessment of rent and for recovery of specific sums as damages for use and occupation of the land. It was held that the suit was to obtain a declaratory decree where consequential relief was prayed and that it came within s. 7, cl. (*iv*) (*c*), and not under s. 7, cl. (*ii*) of the Court Fees Act. The latter clause applies to suits for "maintenance or annuities or other sums payable periodically" and the Court-fee payable is according to the value of the subject-matter of the suit which is deemed to be ten times the amount claimed to be payable for one year. It was held that "other sums payable periodically," in the section must be construed as implying sums payable of the nature of maintenance and annuities upon the rule of *ejusdem generis*. This ruling indicates that a suit for assessment of rent comes under s. 7, cl. (*iv*) (c).

The case of *Hemnalini Debi* v. *Maharaja Chandra Mouleshwar Prasad Singh Bahadur*, S. A. No. 283 of 1924, seems to be on all fours with the present one. In that case the suit was for *khas* possession and mesne profits and in the alternative for assessment of a fair and equitable rent. The question of Court-fee came before a Bench of this Court presided over by Das and Ross, JJ., the Stamp Reporter having taken the same view as in the present case. The order of the Bench was as follows:—

"We regret that in this case we are unable to agree with the Stamp Reporter. We have carefully read the plaint and, in our opinion, the suit is for *khas* possession and mesne profits, and in the alternative for assessment of fair and equitable rent. If the plaintiff succeeds in his appeal and if this Court refuses to give him *khas* possession, he would be entitled to a decree assessing fair and equitable rent payable by the defendant to him. We do not treat the alternative relief claimed by the plaintiff as a prayer for a declaration of title. It is clearly a prayer asking the Court to determine the fair and equitable rent payable by the defendant to the plaintiff."

In the present case the plaintiffs have been refused *khas* possession. Their claim is now confined to a decree assessing fair and equitable rent payable to them by the defendants. They also claim a decree at that rate from the date the cause of action arose up to the date of the suit. The prayer for determining a fair and equitable rent was treated in the aforesaid suit to be in the nature of a consequential relief in the same way as the prayer for obtaining *khas* possession. Both the prayers are consequential reliefs.

Therefore, following this decision the prayer for assessment of rent is not in the nature of a declaratory relief and it does not come under Art. 17, Sch. II of the Court Fees Act.

The plaintiffs' prayer is now for assessment of rent at Rs. 7, he having already received Rs. 3 out of his claim for Rs. 10 per *katha*. This reduces the value of the plaintiffs' claim in the second appeal and the Court-fee is payable upon the reduced claim: *vide*, *Lukhun Chunder Ash* v. *Khoda Buksh* (5).

The assessment of Court-fee should be in accordance with s. 7, cl (*iv*) (*c*), as observed above. The same result is arrived at by looking at the provisions of the Court Fees Act. There is no particular provision in the Court Fees Act applicable to a suit for assessment of fair and equitable rent and, therefore, *ad valorem* Court-fee is to be paid under Sch. I of the Act which, as the heading shows, provides for fee payable on a plaint or written statement, etc, in cases "not otherwise provided for in the Act."

I, therefore, hold that the fee payable upon the plaint and the memorandum of appeal in this Court as well as in the lower Appellate Court should be assessed in accordance with s. 7, cl. (*iv*) (*c*), treating the relief for assessment of fair and equitable rent as a consequential relief. Article 17 of Sch. II of the Court Fees Act, which applies to purely declaratory suits, does not apply to the present case.

A. N. A. *Answer accordingly.*

(4) 51 Ind. Cas. 15; 4 P. L. J. 561.

(5) 19 C. 272; 9 Ind. Dec. (N. S.) 627.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2303 OF 1926.
January 31, 1927.
Present:—Mr. Justice Addison.

SHAM SINGH—DEFENDANT—APPELLANT
versus
HARDIT SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 60—Transfer of tenancy—Suit by landlord to declare invalidity of transfer—Decree—Rights of tenant and his transferee, how far affected.

Where a landlord has obtained a declaration that a transfer is void under s. 60, Punjab Tenancy Act, such transfer must be held to be void completely even as between the vendor and the vendee. [p. 917, col. 1.]

Gohar Singh v. *Fattu* (1), distinguished.
Khuda Baksh v. *Fazl Din* (2), followed.

Second appeal from the decree of the District Judge, Jullundur, dated the 1st June, 1926, reversing that of the Sub Judge, Fourth Class, Nakodar, District Jullundur, dated the 4th July, 1925.

Mr. *Jagan Nath Bhandri*, for Lala *Badri Das*, R B, for the Appellant.

Mr. *Fakir Chand*, for the Respondents.

JUDGMENT.—Akku sold his occupancy rights in 1 *kanal* 8 *marlas* of land by a registered deed to Sham Singh and Sundar Singh on the 19th March, 1921.

Possession was given to the vendees. The occupancy tenancy was under s. 6 of the Punjab Tenancy Act and the landlords brought a suit under s. 60 of that Act for a declaration that the sale was void, having taken place without their consent. The suit was decreed and a declaration given that the sale was void. The vendees, however, continued in possession. Formerly, landlords used to sue for a declaration under s. 60 and also for possession but the tenant was always allowed re-entry if the landlords took possession. For this reason landlords usually now content themselves with a suit for a declaration without claiming possession.

One Hardit Singh then sued the vendees for possession of the occupancy tenancy on the ground that Akku had mortgaged it to him by two unregistered deeds, prior in date to the registered deed in favour of Sham Singh and Sundar Singh. The trial Court dismissed the suit holding that the sale-deed had priority. On appeal the learned District Judge held that though under normal circumstances the sale-deed would have had priority, yet in the present case as the sale had been declared void by a competent Court, the vendees were in possession merely as trespassers and without any right and for this reason the mortgagee could sue for possession as he still had a subsisting right seeing that the landlords had so far not sued for a declaration against him though they might do so if the mortgagee obtained possession. Accordingly, the plaintiff's suit was decreed by the learned District Judge and against his decision this second appeal has been preferred.

It was argued that the decree of the Revenue Court was in favour only of the landlords and that they only could dispossess the vendee. That is, it was claimed that the decision of the Revenue Court did not affect the position of the vendees *qua* the vendor and the mortgagee whose rights are derived from the vendor. *Gohar Singh* v. *Fattu* (1) was referred to. It was held in this ruling that the tenant vendor cannot dispute the validity of his own sale in a suit by his vendee for possession on the ground that he had no right to sell the occupancy tenancy, the proprietors not being parties to the suit. This decision undoubtedly lays down the correct law but the position is different in this appeal. The landlords have obtained a declaration that the sale to the present vendees is void.

It seems to me that I am bound by the Full Bench decision in *Khuda Baksh* v. *Fazl Din* (2). In that case an occupancy tenant made an unauthorised alienation of his holding and gave possession to the alienee. The landlords sued successfully to have the alienation declared void and to recover possession from the alienee. When the landlords obtained possession the tenant sued them for re-entry on his holding. The landlords pleaded that the plaintiff must be able to show that he was no longer bound by the contract either because the alienee had taken back his money or because the contract had been put an end to in some other way. It was held that plea was not a good answer to the suit and the tenant was entitled to re entry as against the landlord. In order to come to this decision the Full Bench had to hold as follows:

"Section 60 of the Punjab Tenancy Act declares a transfer not in accordance with

(1) 30 P. R. 1881.
(2) 17 P. R. 1892 (F. B.)

the provisions of the Act to be a transaction voidable at the option of the landlord. When, therefore, the landlord exercises his option successfully the transaction becomes altogether void, and we do not think it can be said that there is a valid contract existing anywhere. The voiding of the contract may.....entail certain obligations or confer certain rights on the original parties to it, but the contract itself has been declared void, and it appears to us immaterial at whose instance this was done. The plea in bar to the suit that the plaintiff cannot sue because he has transferred his rights to another person, necessarily implies that the transfer was a valid one, and it is sufficiently met by proof that the transfer had been declared void."

This clearly means that the Full Bench held that in a suit where the landlords have obtained a declaration that a transfer is void under s. 60 of the Act such transfer must be held to be void completely even as between the tenant vendor and his vendee. This being the case the vendees in the present appeal are mere trespassers while the mortgagee has still a subsisting right. His suit was, therefore, properly decreed and I dismiss the appeal with costs.

K. L. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2640 OF 1926.
February 3, 1927.
Present :—Mr. Justice Tek Chand.

DUNI CHAND—DEFENDANT—APPELLANT
versus
LEKHU—PLAINTIFF—RESPONDENT.

Custom (Punjab)—Succession—Got, sameness of, as ground for succession—Proprietary body's right of succession defined—Sister's rights.

It is now well-settled that a person is not entitled to succeed to the land of another merely by reason of his belonging to the same *got*. [p. 920, col. 1.]

Muhammad Rafi v. *Khazan Singh* (1), *Jhindu* v. *Gopala* (2) and *Kirpa* v. *Chinti* (3), followed.

Shah Nawaz v. *Sheikh Ahmad* (4), explained.

Budhi Singh v. *Mohan Singh* (5), distinguished.

In the event of a deceased proprietor dying without heirs, his estate would descend to the proprietary body only if the village is a homogeneous one and complete community of interest is maintained. Where no general community of interest between the several land-holders in the village has been preserved the estate of an heirless proprietor escheats to the Crown and does not devolve upon the proprietary body. [p. 919, col. 2; p. 920, col. 1.]

Both under custom as well as under Hindu Law sister is entitled to succeed in preference to the proprietary body. [p. 920, col. 2.]

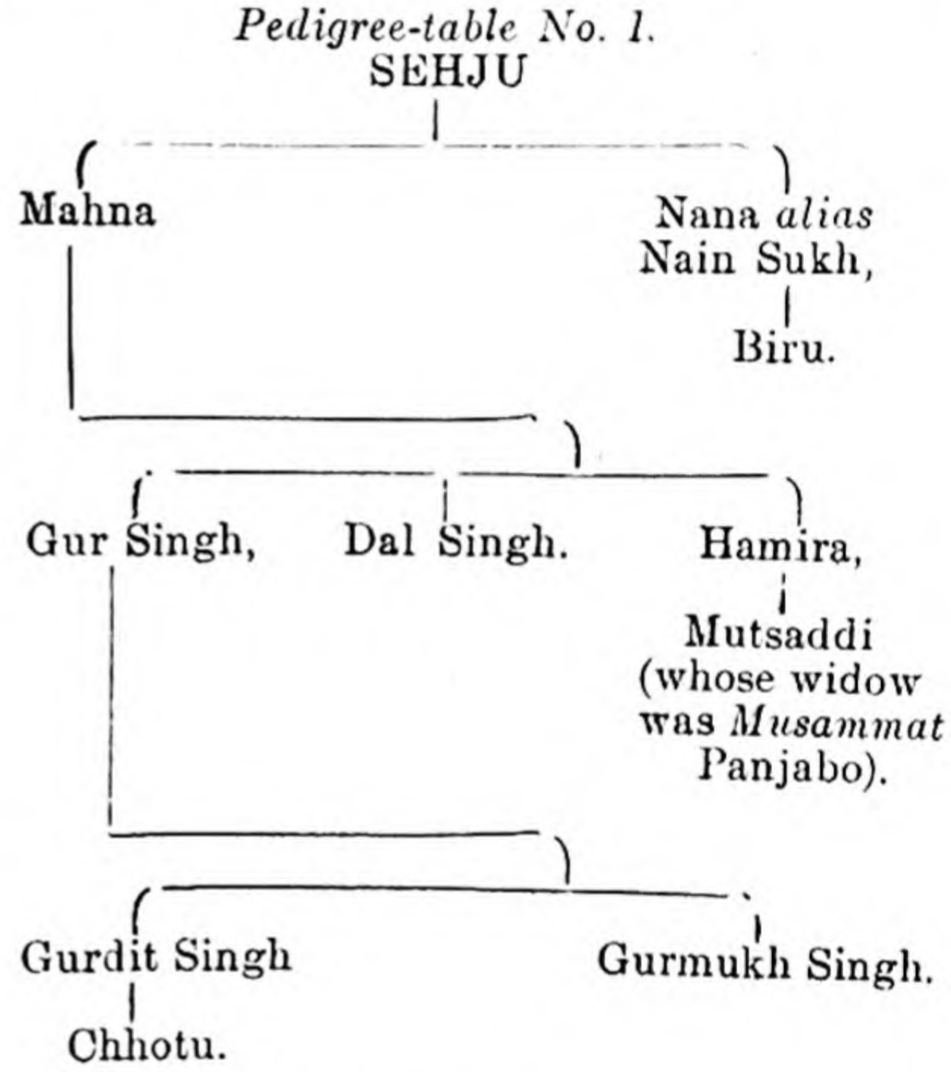
Second appeal from the decree of the Senior Subordinate Judge, Ambala, dated the 31st July, 1926, reversing that of the Subordinate Judge, Third Class, Ambala, dated the 20th May, 1926.

Lala *Badri Das*, R. B. and Mr. *Balwant Rai*, for the Appellant.

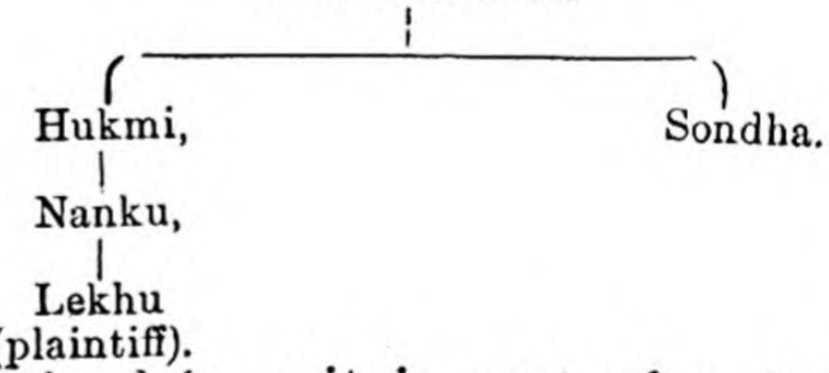
Mr. *B. R. Puri* for Mr. *S. C. Chatterjee*, for the Respondent.

JUDGMENT.—In order to understand the facts of this case it is necessary to give the following two pedigree-tables.

Pedigree-table No. 1.



Pedigree-table No. 2.

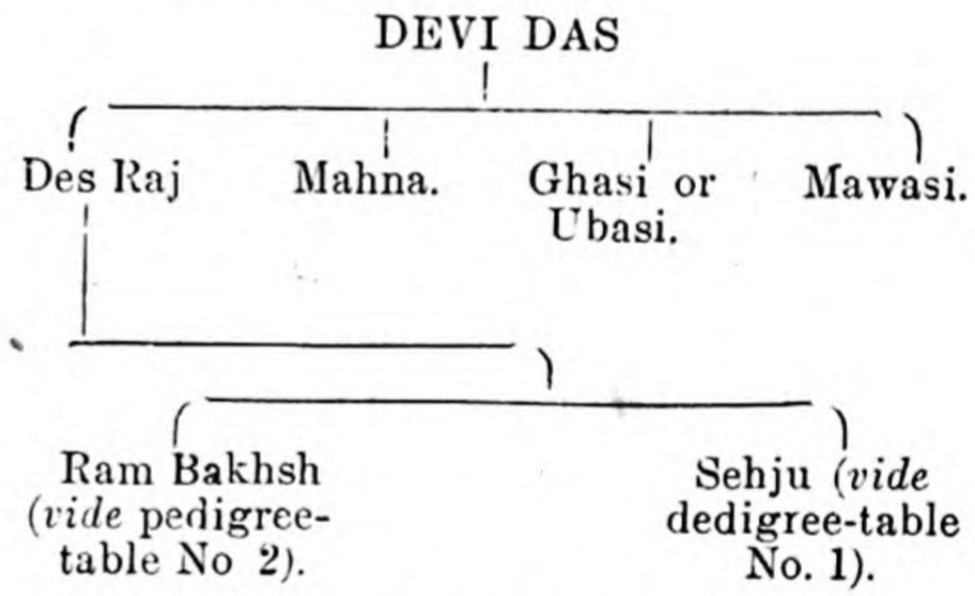


The land in suit is part of a holding which was entered in the revenue papers of 1883-84 as owned by *Musammat* Panjabo, widow of Mutsaddi, 2/3rds, and Biru son of Nana, 1/3rd (*vide* pedigree-table No. 1). Biru was shown as an absentee and *Musammat* Panjabo was entered as in possession of his share also. *Musammat* Panjabo mortgaged her own 2/3rds share in the holding to one Duni Chand *Bhabra*. Later on, on the 30th of August, 1883, she executed an unregistered mortgage-deed of Biru's 1/3rd share in the holding to Hari Singh and Mukha Singh as co-mortgagees for Rs. 98. It was stated in the mortgage-

deed that Hari Singh had 2/9ths share in the mortgage and Mukha Singh had 7/9ths share. On the 25th of November, 1884, *Musammat* Panjabo sold 7/9ths of Biru's 1/3rd share in the holding to Mukha Singh who was, as stated above, one of the co-mortgagees under the mortgage-deed of the 30th of August, 1883. This sale-deed was effected for Rs. 200 out of which Rs. 98 was left with the vendee on account of the mortgage-money. Out of this Rs. 98 the vendee Mukha Singh was to appropriate 7/9ths to himself as his share of the mortgage-money and to pay the remaining 2/9ths to Hari Singh, the co-mortgagee. Soon after the mortgage Mukha Singh vendee paid Hari Singh his share of the mortgage-money and having thus redeemed the mortgage took possession of the whole of Biru's share. Later on Mukha Singh purchased from *Musammat* Panjabo her own 2/3rds share in the holding and redeemed Duni Chand *Bhabra* who was a mortgagee from her of this share. Mukha Singh tried to have mutation effected of the whole land as a proprietor but as Biru was an absentee and the sale as to his share had been effected by *Musammat* Panjabo, the Revenue Authorities refused to enter him as proprietor of Biru's share. *Qua* this share Biru continued to be shown as mortgagor and Mukha Singh as mortgagee and in the cultivation column Mukha Singh was shown as the mortgagee in possession. As to *Musammat* Panjabo's own share 2/3rds share, Mukha Singh's name was substituted as owner in the proprietary column. Biru absentee seems to have died in some other village before 1907 and in the Revenue Records of that year Chhotu son of Gurdit Singh (*vide* pedigree-table No. 1) was entered in the proprietary column as mortgagor in place of Biru. In 1919 Mukha Singh's heirs transferred their rights in the whole holding to Duni Chand defendant-appellant, who entered into possession of the entire holding including the land in suit. Chhotu died in 1923 and Lekhu son of Nanku plaintiff (*vide* pedigree-table No. 2) alleging himself to be a collateral of Chhotu got the land mutated in his favour on 9th of June, 1925. On 17th November, 1925, Lekhu instituted the present suit for redemption of 1/3rd share in the holding representing Biru's share, on payment of Rs. 98 as his heir and stating that mutation had been effected in his favour as such.

The defendant Duni Chand resisted the plaintiff's suit on the ground that the plaintiff was not related to Chhotu, that in any case Chhotu had left a sister *Musammat* Mangali who was a nearer heir than the plaintiff, and that Mukha Singh had become owner of Biru's 1/3rd share in the holding by virtue of the sale, dated 25th November, 1884, *qua* 7/9ths share and by reason of adverse possession *qua* the remaining 2/9ths.

The plaintiff was examined before the issues were framed and stated that he was related to Chhotu in the fourth or fifth degree and for this reason he was his heir. He could not, however, definitely give the pedigree-table connecting his line with Chhotu's and stated that he belonged to the same *got*. He also denied the existence of the sister of Chhotu. Later on he put forward a pedigree-table which he had propounded during the mutation proceedings, by which he sought to connect his line (*vide* pedigree-table No. 2) with that of Biru and Chhotu (*vide* pedigree-table No. 1) in the following manner :—



On these pleadings the trial Court framed the following issues :—

(1) Whether the plaintiff is the collateral of Chhotu deceased, and, if so, of what degree?

(2) If issue No. 1 be found in the positive, can the plaintiff not sue in presence of Chhotu's sister ?

(3) Were $3\frac{1}{2}$ shares out of $4\frac{1}{2}$ shares sold to Mukha Singh and no suit lies in respect of that land?

(4) On payment of how much mortgage-money can the plaintiff obtain a decree ?

The plaintiff produced three witnesses who sought to prove the pedigree-table propounded by him and the defendant merely contended himself by going himself into the witness-box and producing certain revenue entries.

The trial Court held that the plaintiff had failed to prove the pedigree-table propounded by him and that as he was not a collate-

ral of the deceased he had no *locus standi* to maintain the present suit for redemption. In view of this finding the first Court found it unnecessary to decide the second issue as to the existence of Chhotu's sister, and on the third issue it found the sale to Mukha Singh proved. In accordance with these findings it dismissed the plaintiff's suit.

On appeal by the plaintiff to Rai Sahib Shibbu Mall, Senior Sub-Judge, the plaintiff sought to prove his alleged relationship with Chhotu, but the learned Senior Subordinate Judge agreed with the finding of the first Court and held that Lekhu plaintiff had failed to establish "a definite relationship with Chhotu or Biru. He also remarked that "Chhotu and Biru were descended from a common ancestor Sehju and Lekhu is descended from Ram Bakhsh." "But that there was no evidence to show that Sehju and Ram Bakhsh were own brothers, sons of Des Raj or that Des Raj, Mahna, Ubasi and Mawasi were the four sons of Devi Das who had come to this village 200 years prior to 1888 and who had acquired 1/4th share of the village land." Having thus found that the alleged relationship of the plaintiff with Chhotu was unproved and that he was not the collateral of the original mortgagor the learned Senior Sub-Judge, however, went on to hold that the plaintiff had a *locus standi* to maintain the present suit because he belongs to the same *got* and is a proprietor in the *patti* in which the land in suit is situate. He says: "There can be no manner of doubt that all the proprietors of this *patti* are descendants, of Devi Das and plaintiff Chhotu and Biru are all descendants of Devi Das though the full and correct genealogical tree is not available." The Senior Sub-Judge further held that the mortgage sued upon was still subsisting and that the plaintiff had a right to redeem on payment of Rs. 98. He accordingly decreed the plaintiff's suit for redemption on payment of this sum together with costs.

The defendant has come up in appeal to this Court and on his behalf Mr. Badri Das has assailed the judgment of the lower Appellate Court on both the points decided against his client. He contends that on the findings of the Senior Subordinate Judge that the plaintiff had failed to prove the pedigree-table propounded by him the suit of the plaintiff should have been dismissed and the Court should not have set up an entirely new case on behalf of the plaintiff and passed a decree on the ground that the plaintiff belonged to the some *got* and was a proprietor in the same *patti*. He also argues that there is absolutely no evidence on the record to support the remark of the Senior Sub-Judge that the proprietors of the *patti* are descended from Devi Das or that the plaintiff Chhotu and Biru are all descendants of Devi Das.

I have carefully examined the arguments addressed to me by the learned Counsel for both sides and am of opinion that the finding of the learned Senior Sub-Judge on this point cannot be maintained. Both in the mutation proceedings and during the trial the plaintiff Lekhu claimed the land in suit as a collateral of Chhotu in the fourth or fifth degree and he propounded a definite pedigree-table which showed that Sehju and Ram Bakhsh were real brothers, being sons of Des Raj. The oral evidence which he produced in support of this pedigree-table was obviously false and has not been accepted by either Court. The Senior Sub-Judge, has himself found that Lekhu has failed to establish a definite relationship with Chhotu or Biru and that a full and correct genealogical tree of the descendants of Devi Das is not available. In view of this definite finding of the Senior Sub-Judge I fail to see how he could hold that the plaintiff had a *locus standi* to maintain the suit. The plaintiff never claimed to redeem as a proprietor in the *patti* or as a person who belonged to the same *got* as Chhotu or Biru. There were not pleadings on this point nor was any issue framed with regard to this matter, nor yet was any evidence led relating thereto. Moreover, if the suit had been brought on the basis of escheat of Chhotu's land to the proprietors of the *patti* or the proprietors of the village, then all the *pattidars* or the entire proprietary body ought to have been impleaded as parties to the suit Further, it is clear that in the event of a deceased proprietor dying without heirs, his estate would descend to the proprietary body only if the village is a homogeneous one and complete community of interest is maintained. It is firmly established that where no general community of interest between the several land-holders in the village has been preserved the estate of an heirless proprietor

escheats to the Crown and does not devolve upon the proprietary body, *vide* exception to para. 28 of Rattigan's Digest and also Remark No. 1 appended to the paragraph.

In this case the plaintiff made no effort whatever to prove that the village was a homogeneous one or that a complete community of interest was preserved. Under these circumstances the Senior Sub-Judge was not justified in appeal in allowing the plaintiff to redeem the land on this basis.

As to the other ground, namely, that the plaintiff has a *locus standi* as he belongs to the same *got* it is now well-settled that one person is not entitled to succeed to the land of another merely by reason of belonging to the same *got*. It was held in *Muhammad Rafi* v. *Khazan Singh* (1), a case which is in several respects similar to the present one, that where a plaintiff fails to establish any definite relationship with the deceased, he should not be allowed to claim as an ultimate heir on the ground that he is a member of the same *got* and, therefore, presumably descended from a common ancestor. This ruling has been followed in various decisions of this Court and the learned Counsel for the respondent has not been able to cite any authority in which it has been disapproved or dissented from. The Senior Sub-Judge before whom this ruling was cited sought to distinguish it on the ground that there the plaintiff was challenging an alienation as a reversioner and here the suit is one for redemption of a mortgage in his capacity as the successor of the mortgagor. I confess I am unable to appreciate the distinction that the learned Senior Sub-Judge has sought to emphasize. In *Jhindu* v. *Gopala* (2) a Division Bench of the Punjab Chief Court held that there was no presumption that all *Jats* of one *got* living in a village were descended from one common ancestor. Similarly in *Kirpa* v. *Chinti* (3) Moti Sagar, J., held that the mere fact that the plaintiff is of the same caste and *got* as the alienor does not necessarily lead to the inference that he is descended from the same common ancestor and is his heir.

The lower Appellate Court has relied on two rulings neither of which seems to me to support its conclusions. *Shah Nawaz* v. *Sheikh Ahmad* (4) is, if anything, in favour of the defendant. It was held there that by merely having an entry made in his favour in the Revenue Records a plaintiff cannot and does not acquire ownership of the equity of redemption. This clearly goes against the plaintiff. The other ruling, *Budhi Singh* v. *Mohan Singh* (5), proceeded upon its peculiar facts. There the suit had been brought by the members of the village proprietary body as such to redeem the land which had been mortgaged by a co-proprietor in the village who had died leaving no direct heirs. The village in that case was found to be homogeneous and on the evidence led in that case it was found that the property of an heirless proprietor in such a village devolved on the proprietary body before it escheated to the Crown. As has been pointed out above, there was no such allegation in the present case nor was any evidence led.

Under the circumstances I am of opinion that the plaintiff having failed to establish any *locus standi* to maintain the present suit for redemption was not entitled to any decree. It is not necessary to decide the other issues that arise in this case, but I may mention in passing that even if there is a custom in the village whereby the village proprietary body succeeds to the estate of an heirless proprietor it would be necessary to determine whether Chhotu's sister was alive. Both under custom as as well as under Hindu Law the sister would come in before the proprietary body. The Senior Sub-Judge has given no finding on this point and without doing so he could not pass a decree in favour of plaintiff. The finding of the learned Judge on issue No. 3 also seems to be open to grave doubt but in view of my decision on the first point I do not think it necessary to go into that matter.

The appeal is accordingly accepted and the plaintiff's suit dismissed with costs throughout.

R. L. *Appeal accepted.*

(1) 68 P. R. 1892.
(2) 15 Ind. Cas. 266; 135 P. W. R. 1912; 235 P. L. R. 1912.
(3) 77 Ind. Cas. 518; A. I. R. 1923 Lah. 530.
(4) 59 Ind. Cas. 478; 1 Lah. 549; 2 Lah. L. J. 583.
(5) 32 Ind. Cas. 768; 40 P. W. R. 1916.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 110 OF 1926.

November 29, 1926.

Present:—Mr. Justice Henry Sheldon Pratt, Acting Chief Justice, and Mr. Justice Cunliffe.

K. K. S. A. R. A. CHETTIAR—APPELLANT

versus

MAUNG MYAT THA AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 27, 43—Application for discharge—Power of Court to extend time—Petitioning creditor, whether may apply for extension of time.

An insolvency Court has power to extend the time for making an application for discharge.

Abraham v. *Sookias* (1), followed.

There is nothing in law incompatible with the extension of the period within which a debtor should apply for his discharge at the instance of and on cause shown by the petitioning creditor.

Civil miscellaneous appeal from the District Court, Pyinmana, in Civil Miscellaneous Case No. 97 of 1925.

Messrs. *Sastri* and *Chari* for the Appellant.

Messrs. *Cowasjee Sen* and *Banerjee*, for the Respondents.

JUDGMENT.—In Civil Miscellaneous Case No. 97 of 1925, of the District Court, Pyinmana, Mg Myat Tha and Ma E Tin were adjudged insolvents on the application of K. K. S. A. R. Arunachalam Chettiar. The insolvents were ordered to apply for discharge on the 9th June, 1926.

On the date fixed there was no appearance and no application for discharge had been filed. The petitioning creditor had put in an application that the time for discharge might be extended under s. 27 (2) of the Provincial Insolvency Act.

The learned Judge considered this but was of opinion that under s. 43, the Court had no power to enlarge the period fixed for the application for discharge and that he was bound to annul the adjudication order. The order was accordingly annulled. Against this order the petitioning-creditor now appeals.

Section 27 (2) of the Act lays down that the Court may, if sufficient cause be shown, extend the period within which the debtor shall apply for his discharge.

Section 43 provides that if the debtor does not appear on the date fixed for hearing his application for discharge or on such subsequent date as the Court may direct, or does not apply for his discharge within the period specified by the Court, the order of adjudication shall be annulled.

The wording of the section appears clearly to contemplate an extension of the time within which the application for discharge may be made. In *Abraham* v. *Sookias* (1) a Bench of the Calcutta High Court held that under s. 27, cl. (2), the Court has power to extend the time even after the expiry of the period of the order for discharge.

In the present instance the application for extension was filed by the creditor before the expiry of the period fixed for the discharge application and the Court considered the question of extension on the actual date fixed for the application for discharge.

We are of opinion that the Court had, therefore, the power to extend the time for good cause shown and was not, as the Judge thought, bound to annul the adjudication order. Section 27 does not lay down at whose instance the period of application for discharge shall be extended or by whom cause must be shown.

Apparently it was contemplated that the application for extension would be made by the debtor but there is nothing in the actual wording of the section incompatible with the extension of the period within which the debtor is to apply for his discharge at the instance of and on cause shown by the petitioning creditor.

The application by the creditor for extension of the period for discharge was apparently filed on the 6th May.

On the following day the Judge endorsed on it "put up 9-5-26," but there is nothing to show that the applicant was warned that he would be heard in support of his application on the 9th May.

The diary is silent as to this application. The applicant asked for an opportunity to be heard in support of his petition.

We accordingly remit the proceedings to the District Court with the direction that the Judge do proceed to dispose of the application of the petitioning-creditor for an extension of the time on its merits.

If after hearing the parties and making any inquiries that may be necessary he is satisfied that sufficient cause has been

(1) 81 Ind. Cas. 584; 51 C. 337; A. I. R. 1924 Cal. 777.

shown for an extension under s. 27 (2) it will be open to him to review his order annulling the adjudication and to grant an extension. Costs of this appeal to be costs in the cause.

A. N. A. *Proceedings remitted.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 760 OF 1926.
February 7, 1927.
Present:—Mr. Justice Tek Chand.
DIL MUHAMMAD AND ANOTHER—DEFENDANTS—PETITIONERS
versus
SAIN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS

Contract Act (IX of 1872), ss. 134, 139—Omission to sue principal within limitation—Surety, whether discharged—Pursuing remedy against one of several debtors, effect of—Provincial Small Cause Courts Act (IX of 1887), s. 25—Limitation, wrong decision on point of—Revision, interference in—Accepting document, without formal proof, effect of.

A creditor's omission to sue the principal within limitation is not an act or omission of the kind contemplated by s. 134 or 139, Contract Act, whereby the surety is discharged. [p. 923, col. 2.]

Sankana Kalana v. *Virupakshapa Ganeshappa* (8), *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (9), *Subramania Aiyar* v. *Gopala Aiyar* (10) and *Carter* v. *White* (11), followed.

Ranjit Singh v. *Naubat* (12), dissented from.

It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others does not bring the case within ss. 134 and 139, Contract Act. [*ibid.*]

A wrong decision on a question of limitation is not a valid ground for interference in revision under s. 25, Provincial Small Cause Courts Act, when substantial justice has been done. [p. 923, col. 1.]

Ghasita v. *Sultan* (6) and *Sarab Dial-Ishar Dass* v. *Devi Ditta Mal-Gordhan Das* (7), followed.

Where party to a suit has accepted a certificate of an expert without formal proof thereof, he cannot be allowed later on to contend that it is inadmissible in evidence for want of proof. [p 922, col. 2; p. 923, col. 1.]

Petition for revision of a decree of the Judge, Small Cause Court, Lahore, dated the 30th August 1926.

Mr. *Dev Raj Sawhney*, for the Petitioners.

Mr. *Gopal Chand*, for the Respondents.

JUDGMENT.—On the 13th August, 1917, Dil Muhammad and Imam Din as principal debtors and Dulla as surety executed a bond in favour of plaintiff No. 1 and the predecessors-in-interest of plaintiffs Nos. 2 and 3, for Rs. 200 bearing interest at 2 per cent. per mensem. On the 15th June, 1925, the plaintiffs brought a suit in the Court of Small Causes at Lahore for recovery of Rs. 500 on foot of this bond against Dil Muhammad and Imam Din the principal debtors and Dulla the surety. It was discovered soon after that Imam Din had been dead for a long time. The plaintiffs accordingly made a statement giving up their claim against Imam Din and his name was removed from the record. In the plaint it was alleged that the suit was within limitation by virtue of certain payments of interest which were noted on the back of the bond and which bore the thumb impressions of one or other of the defendants. A decree has been passed against both Dil Muhammad and Dulla for Rs. 500 with costs and they have come up to this Court on revision.

The first point taken by Mr. Dev Raj Sawhney for the petitioners was that the suit had been instituted on the 24th June, 1925, and that even if the alleged payment of interest be held to be proved the suit would still be barred by time under the Repealing (Punjab Loans Limitation) Act, of 1923 as amended by the Act of 1925 according to which the last date for filing such suits was the 5th June, 1925. Mr. Dev Raj Sawhney seems to have been misled by a mistake in the copy of the judgment of the lower Court where the date of presentation of the plaint is given as 24th June, 1925 I have referred to the original plaint and find that it was presented on the 15th June, 1925. This contention is, therefore, incorrect and is overruled.

On the main point arising in the case Mr. Sawhney has contended that the finding of the learned Judge is based upon the report of the Finger Print Bureau at Phillaur where the thumb impressions of Dil Muhammad were examined by an expert but that this expert has not come into the witness-box and his report remains unproved and is inadmissible in evidence. From the record, however, it appears that the document was sent to Phillaur at the instance of the defendant Dil Muhammad himself and that the report was received on the 14th July, 1926. The case was put up for hearing on five occasions after this date but no request was made by the defendant Dil Muhammad to summon the expert. Under these circumstances, it must be held that the defendant accepted the certificate without formal proof and he cannot now be allowed to argue that this

evidence should be excluded for want of proof. In any case, even if the certificate and the conclusions that have been drawn therefrom by the learned Judge are excluded from consideration there is ample evidence on the record to prove that the payment of Rs. 25 was made by Dil Muhammad on account of interest on the 27th July 1919. There is the evidence on oath of the plaintiff himself and also that of P. W. No. 1 Nank Chand which has been accepted by the learned Judge as reliable. I must, therefore, hold that the requirements of s. 20 of the Indian Limitation Act have been fulfilled and the suit is within limitation so far as Dil Muhammad is concerned.

As regards Dulla surety Mr. Sawhney has, in the first place, contended that there being no acknowledgment of payment of interest by him, the suit is barred by limitation so far as he is concerned and the plaintiffs cannot under s. 21 of the Limitation Act rely on the payment of interest on 27th July, 1919, by Dil Muhammad one of the principal debtors, in order to bring the suit within time against Dulla. In support of this contention Mr. Sawhney has cited *Gopal Daji Sathe* v. *Gopal* (1), *Abde Ali* v. *Askaran* (2), *Lodd Govindass Krishnadass* v. *Rukmani Bhai* (3) and a number of other rulings. The view taken in these rulings, however, is opposed to that of Martineau, J., in *Harbans Lal* v. *Nathu* (4), which was cited without disapproval by Campbell and Zafar Ali, JJ., in *Nihal Chand* v. *Khuda Bakhsh* (5). I am not sure of the correctness of the ruling of Martineau, J., and if the decision of the case had turned upon this point only I would have been inclined to refer the matter to a larger Bench for an authoritative decision but here assuming that the lower Court has come to a wrong decision on the question of limitation so far as Dulla surety is concerned, I am not inclined to interfere on the revision side. It has been held over and over again by the Chief Court and this Court that a wrong decision on a question of limitation is not valid ground for interference on revision under s. 25 of the Small Cause Courts Act when substantial justice has been done, *vide*, *Ghasita* v. *Sultan* (6) and *Sarab Dial-Ishar Das* v. *Devi Ditta Mal-Gordhan Das* (7). I, therefore, decline to interfere with the judgment of the lower Court against Dulla on this point.

Mr. Sawhney has however, raised a further contention that in this case the surety is discharged, firstly, by reason of the failure of the plaintiff to sue Imam Din within the period of limitation and, secondly, by reason of the plaintiff having given up Imam Din or his legal representatives after the institution of the suit. Now with regard to this contention it has to be borne in mind that neither of these points was taken by the defendant in the Court below. Moreover, a creditor's omission to sue the principal within limitation is not an act or omission of the kind contemplated by s. 134 or 139 of the Indian Contract Act whereby the surety is discharged. The High Courts of Bombay, Calcutta and Madras have consistently taken this view. *Vide*, *Sankana Kalana* v. *Virupakshapa Ganeshapa* (8), *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (9) and *Subramania Aiyar* v. *Gopala Aiyar* (10), and it is in consonance with the dicta of the Court of Appeal in England *Per* Lindley, L J., in *Carter* v. *White* (11). The contrary view taken by the Allahabad High Court *Ranjit Singh* v. *Naubat* (12), and the rulings cited therein does not appeal to me as correct.

The other point that the claim against Imam Din was given up by the plaintiff during the pendency of the suit has no force whatever. It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others does not bring the case within ss. 134 and 139 of the Contract Act.

For the foregoing reasons I see no reason to interfere with the decision of the Court below and reject this petition but in view of all the circumstances I leave the parties to bear their own costs in this Court.

R. L. *Petition rejected.*

(1) 28 B. 248; 5 Bom. L. R. 1020.
(2) 84 Ind Cas. 199; 20 N. L. R. 140; A. I. R. 1924 Nag. 411.
(3) 21 Ind. Cas. 302; 38 M. 438; 14 M. L. T. 310; 1 L. W. 529.
(4) 53 Ind. Cas. 586; 105 P. R. 1919.
(5) 76 Ind. Cas. 150; A. I. R. 1924 Lah. 534.
(6) 11 Ind. Cas. 445; 93 P. R. 1911; 151 P. W. R. 1911; 228 P. L. R. 1911.
(7) 46 Ind. Cas. 541; 59 P. L. R. 1918; 139 P. W. R. 1918.
(8) 7 B. 146, 7 Ind. Jur. 317; 4 Ind. Dec. (N. S.) 99.
(9) 12 C. 330; 6 Ind. Dec. (N. S.) 225.
(10) 7 Ind. Cas. 898; 33 M. 308; 20 M. L J. 633; 8 M. L. T 321
(11) (1884) 25 Ch. D. 666 at p. 672; 54 L. J. Ch. 138; 50 L. T. 670; 32 W. R. 692.
(12) 24 A. 504; A. W. N. (1902) 166.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 738 OF 1922.
January 4, 1927.
Present:—Mr. Justice Fforde and Mr. Justice Campbell.

LABH SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat MANGO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom (Punjab)—Succession—Self-acquired property—Handal Jats *of Amritsar District—Daughters and collaterals*—Riwaj-i-am, *value of, as record of special custom*—Riwaj-i-am *of Amritsar District, reliability of—Evidence Act (I of 1872), s. 30.*

Among *Handal Jats* of the Amritsar District there is a special custom by which the collaterals of a deceased succeed to his self-acquired property to the exclusion of his daughters. [p. 932, col. 1.]

An entry in a *riwaj-i-am* recording a special custom as opposed to a general custom is *prima facie* proof of that custom even if it be unsupported by concrete instances and the onus is on the other side to rebut it. [p. 927, col. 1.]

[Case-law discussed.]

The principle upon which an entry in a *riwaj-i-am* is admitted as a piece of evidence conclusive of the facts stated unless rebutted, is that it is an official record kept by a person upon whom there is a public duty to make entries in it only after satisfying himself of the truth of those entries, and accordingly the document itself is evidence of the truth of its contents unless and until its falsity can be demonstrated by any of the various methods by which any public book, register or document may be attacked. [p. 926, col. 2.]

The *Riwaj-i-am* of Amritsar District as compiled in 1865 and revised in 1914 is an accurate and reliable record of custom. [p. 928, col. 1.]

[Case-law referred.]

First appeal from a decree of the Senior Subordinate Judge, Lyallpur, dated the 26th January, 1922.

Mr. *Dev Raj Sawhney*, for the Appellants.

Mr. *Hargopal*, for Mr. *Kharak Singh*, for the Respondents.

JUDGMENT.

Fforde, J.—The appeal arises out of a suit brought by collaterals of Gurpal Singh for a declaration that an alienation of certain self-acquired property of the latter made by his widow *Musammat* Santi after his death in favour of her daughter *Musammat* Mango does not affect their reversionary interests in that property.

It is admitted that under the general custom governing agricultural tribes in the Puujab a daughter is entitled to succeed to the acquired property of her father to the exclusion of his agnatic relations, but the plaintiffs contend that there is a special custom in the Amritsar District governing the tribe of *Handal Jats*, to which the parties belong, whereby agnates have the right to succeed to property, whether ancestral or acquired, to the exclusion of the daughters of the deceased owner.

The only question for determination of this appeal is whether or not such a special custom has been established. If it has been proved to have been established the plaintiffs must succeed; if not, their suit fails. The learned trial Judge has held that the plaintiffs have not succeeded in establishing the custom upon which they rely and has dismissed their suit with costs. Seventeen witnesses for the plaintiffs have given general evidence to the effect that amongst *Handal Jats* daughters never succeeded to self-acquired property as against collaterals, but only four of these witnesses have given instances in support of their views. These instances have been discussed and criticised by the learned Senior Subordinate Judge who has refused to attach any value to them on the ground that they have not been supported by any documentary evidence. The remaining witnesses who have given their views as to the custom prevailing amongst this tribe but have not supported their opinions by proof of any actual cases, have been disregarded by the learned trial Judge without discussion. The only evidence given for the other side is that of *Musammat* Santi, one of the defendants who was put into the witness-box by the plaintiffs. She has referred to two somewhat vague instances of succession by daughters, one of which she says took place hundred years ago and the other she does not even approximately date. Both these instances she admits are based on hearsay and she has not attempted to produce any of the persons who are alleged to have supplied her with the information. At the conclusion of her examination-in-chief she stated that she knew of no instances of daughters succeeding in Amritsar.

If there had been no further evidence produced by either side I think it is clear that the plaintiffs must fail, but there is one important piece of documentary evidence upon which the plaintiffs' case is mainly based, and that is the *Riwaj-i-am* of the Amritsar District of 1865 and the revised edition of that record drawn up by Mr. Craik in 1914. In Mr Craik's volume under

the answer to question 60 appear the following remarks :—

"According to the *Riwaj-i-am* of 1865 sons exclude daughters. But nothing is said as to agnates. Nearly all tribes state that daughters are excluded by male lineal descendants through males and by the widow or widows of the deceased. Similarly nearly all of them say that agnates, however remote, exclude daughters," and then four exceptions are given to this rule, the exceptions referring to:

(1) *Pathans* of Tarn Taran and Muhammadan *Kambohs* of Amritsar Tahsil,

(2) *Mughals* of Amritsar Tahsil,

(3) *Pathans* of *Kakkar* and Talla in Ajnala Tahsil, and

(4) *Khatris* and *Brahmins* of Ajnala Tahsil.

Under question 61, which asks whether there is any distinction as to the rights of daughters to inherit (1) the immoveable or ancestral property, and (2) the moveable or acquired property of their father, the answer is that all tribes state that no distinction is made and the answers to question 60 are applicable. The author then adds "But in reality daughters have a right to exclude agnates with respect to non-ancestral property, though the right is seldom asserted for the reasons given under answer 60." This qualification by the author of the 1914 Edition is not, however, supported by anything contained in the Original Vernacular Record. The author of the English Edition of 1914 has remarked in his preface that "The present English volume is a condensed abstract of the present *riwaj-i-am* . . . . For relevant mutation cases and judicial decisions the Vernacular copy must be consulted." On consulting this Vernacular copy we find that question 61 is as stated by Mr. Craik in his English version, but the answer is as follows:—

"Answer by all the tribes:—"In either case daughters get no share. There is no distinction as regards moveable or immoveable property. The answer conforms to that of question 60."

There are no instances either under question 60 or question 61 of collaterals succeeding to the exclusion of daughters or daughters succeeding to the exclusion of collaterals, but 15 instances are given of proprietors leaving only daughters and the daughters holding the land until marriage, and in regard to a number of tribes of this district daughters are not entitled to hold the land even to this extent.

It seems to me that on a careful consideration of the *Riwaj-i-am* of 1865, read in the light of the original revised edition of 1914, a special custom prohibiting daughters succeeding to the inheritance of their father whether that inheritance consisted of moveable or immoveable property or property acquired or ancestral, has been definitely and emphatically recorded.

Mr. Hargopal for the defendants-respondents, however, contends that a *riwaj-i-am* unsupported by instances is not a sufficiently strong piece of evidence in support of custom to shift the onus of rebuttal to the other side. He says that this is more especially so when the special custom recorded is opposed to the general custom of agricultural tribes in this Province. In support of this proposition he has cited a number of decisions of this Court which I shall presently discuss. These authorities undoubtedly support his view, but it appears to me that the matter is concluded by the decision of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) in which this very point was the subject of an express decision. The Chief Court of the Punjab from whose judgment the appeal to the Privy Council had been brought, had held that an entry in a *riwaj-i-am* recording a special custom but without giving instances in support of it was insufficient as evidence to cast the onus of rebuttal upon the side contesting such custom. Reid, J., who delivered the judgment of the Court, referring to certain decisions of the Chief Court, observed "four Judges of this Court held that an entry in the *riwaj-i-am* unsupported by instances, does not justify modification of the ordinary custom" and again, "answers must be supported by instances to be of any value." In dealing with this matter their Lordships expressed the opinion that the Chief Court was "in error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged" and their Lordships concluded by saying that in their opinion "the statements contained in the *riwaj-i-am* form a strong piece of evidence in support of the

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.)

custom, which it lay upon the plaintiffs to rebut." Mr. Hargopal's argument that that case is distinguishable from the present one inasmuch as the special custom recorded by the *riwaj-i-am* in that case was not opposed to general custom whereas in the present case it is, does not seem to me to be of any substance. In point of fact their Lordships of the Privy Council, in the case referred to, assumed that there was a general custom among the agricultural tribes of the Punjab which was opposed to the special custom recorded in the *riwaj-i-am* but it was in accordance with an express exception to the general rule. I do not, however, see that it makes any difference to the principle laid down by their Lordships as to the value to be attached to an entry contained in a public record of this nature, that the recorded entry is opposed to general custom. The very term "special custom" implies a departure from the ordinary custom of the Province. Mr. Hargopal's reasoning, therefore, comes back to this: that wherever you have an entry in a *riwaj-i am* recording a special custom that entry must always be valueless as a piece of evidence, and it is only where it records a general custom of agricultural tribes that it can be of any value unless it happens to be supported by instances.

The first case which Mr. Hargopal relies upon in support of his proposition is *Wazira* v. *Maryan* (2) the head-note to which declares that "statement in a *riwaj-i-am* when opposed to general custom can carry very little weight unless supported by instances and that consequently the entries in the *Riwaj-i am* of the Gujranwala District in favour of the special custom relied on by the plaintiff-collaterals unsupported by instances were insufficient to establish that custom, such *riwaj-i-am* having, moreover, been imperfectly compiled." The key-note to that decision, however, is contained in the last sentence of the paragraph referred to which is based upon the penultimate paragraph of the judgment of Leslie-Jones, J., where, after discussing the judgment of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) the learned Judge concludes by saying "But the matter is different when without citing any instances, a *riwaj-i am* which has been imperfectly compiled describes a special custom opposed to the general custom of the Province and the great mass of authorities." The learned Judge discussed at length the reasons why the entries in the *riwaj-i am* in that particular case should not be accepted. He came to conclusion on the face of the document itself that it was not a reliable record and that fact read with the rest of the evidence in the case led him to hold that the *riwaj-i-am* as a peice of documentary evidence was in itself of insufficient evidential value to establish the custom in question. The principle upon which an entry in a *riwaj-i-am* is admitted as a peice of evidence conclusive of the facts stated unless rebutted, is that it is an official record kept by a person upon whom there is a public duty to make entries in it only after satisfying himself of the truth of those entries, and accordingly the document itself is evidence of the truth of its contents unless and until its falsity can be demonstrated by any of the various methods by which any public book, register, or document may be attacked. The principle upon which their Lordships of the Privy Council relied upon the entry in the *riwaj-i am* in the case already referred to, is based upon well-established rules of the law of evidence in England which have been given statutory expressions in s. 30 of the Indian Evidence Act.

The second series of cases in which this Court has departed from the principle laid down by the Privy Council in *Beg* v. *Allah Ditta* (1) is *Khuda Baksh* v. *Fatteh Khatun* (3) where relying upon the observations of Leslie-Jones, J., in *Wazira* v. *Maryan* (2), it was held that the *riwaj-i-am* of the Multan District "being a peculiar one and quite opposed to Customay Law," was not sufficient to shift the onus of rebuttal on to the other side. In *Manohar* v. *Nanhi* (4) the Court went a little further, in holding that "the mere entry in the *riwaj-i-am*, unsupported by instances, that daughters can under no circumstances inherit their father's property, is of very little weight, and it is quite insufficient to shift the onus on to the daughters." In *Budha* v. *Fatima Bibi* (5) a Division Bench of this Court laid down

(2) 42 Ind. Cas. 358; 84 P. R. 1917; 151 P. W. R. 1917; 3 P. L. R. 1918.

(3) 46 Ind. Cas. 679; 13 P. R. 1919; 140 P. W. R. 1918.

(4) 66 Ind. Cas. 399; 2 Lah. 366; A. I. R. 1922 Lah. 320.

(5) 76 Ind. Cas. 921; 4 Lah. 99; A. I. R. 1923 Lah. 401.

the definite proposition that: "It is now a well-established rule.....that a statement in a *riwaj-i-am* opposed to general custom and unsupported by instances possesses very little evidential value." And finally in *Gurdit Singh* v. *Malan* (6) the Court held that a *riwaj-i-am* opposed to the general custom and unsupported by instances was not sufficient to shift the onus to the party attacking the custom recorded in that document which is a return to the proposition of Reid, J, quoted above, of which their Lordships of the Privy Council disapproved.

It seems to me that in these five decisions of this Court the Judges have by progressive stages returned to a proposition of law which has been expressly dissented from by the Privy Council. It may be observed that in the last four out of these five cases, Scott-Smith, J, was a member of the Division Bench which decided this point, and in three out of the four cases it was he who wrote the considered judgment of the Court. I find myself unable to accept the view on this matter expressed by the learned Judges in the above-mentioned cases for the simple reason that a contrary view has been laid down in the clearest possible terms by any authority from which these Courts are not permitted to dissent. I must, therefore, hold that an entry in a *riwaj-i-am* recording a special custom is *prima-facie* proof of that custom and the onus is shifted to the other side to rebut it.

Mr. Hargopal finally contends that the *riwaj-i-am* relied upon by the plaintiffs in the present case is not an accurate or reliable record of the custom in question. He says that this document has been condemned as unsatisfactory by a recent decision of this Court in *Gurdit Singh* v. *Ishar Kuar* (7) where the following observations appear:—

"Dr. Narang contended that an entry in the *riwaj-i-am* was *prima facie* evidence of a custom and referred to *Beg* v. *Allah Ditta* (1). The value of the *Riwaj-i-am* of 1865 as a piece of evidence, however, is considerably minimised by the fact that in *Dial Singh* v. *Dewa Singh* (8) in referring to this very *riwaj-i-am* it was said that it did not lay down what the custom was but that the compilers thought it ought to be. Again, we find that in the Settlement of 1914 when a new *riwaj-i-am* was compiled, it is stated that a gift to a daughter can be made of ancestral or self-acquired property to a certain extent *vide* answer to question 117." It appears that the view of the learned Judges as to the unsatisfactory nature of the document in question was based upon a case reported as *Dial Singh* v. *Dewa Singh* (8) The attention of the learned Judges does not appear to have been directed to a series of subsequent authorities in which this *riwaj i-am* was cited with approval and relied upon. These cases are *Jiwan* v. *Hakam Khan* (9), *Khan* v. *Hira* (10), *Sardar Wasawa Singh* v. *Sardar Arur Singh* (11), *Sohana* v. *Sundar Singh* (12), *Buta Singh* v. *Ram Singh* (13).

Finally in two recent cases in both of which the judgment of the Court was delivered by Scott Smith, J., this *riwaj-i am* has been carefully considered and accepted as evidence of the very custom relied upon by the plaintiffs in the present case. One of these cases *Naraini* v. *Jowahir Singh* (14) deals with *Kambohs* of the Amritsar District and the head-note to it is as follows:—

"Among *Kambohs* of the Amritsar District a daughter is not entitled to succeed to the non-ancestral property of her father in preference to his collaterals in the 4th degree."

"The *riwaj-i-am* is a public record prepared by a public officer in the discharge of his duties and is admissible in evidence to prove the facts therein entered. A statement in a *riwaj-i-am* with regard to a custom is a strong piece of evidence in support of the custom." In reference to the 1914 Edition of this *Riwaj i-am* the following remarks appear in the judgment: "We are not prepared to hold that the entries relied upon by the respondent in Mr. Craik's *riwaj-i am* of the Amritsar District can carry very little weight. There is no suggestion that that *riwaj i am* was carelessly or imperfectly compiled and Mr. Craik's

(6) 84 Ind. Cas. 171; 5 Lah. 364; A. I. R. 1925 Lah. 35; 1 Lah. Cas. 279.
(7) 68 Ind. Cas. 551; 3 Lah. 257; A. I. R. 1922 Lah. 392.
(8) 5 P. R. 1885.
(9) 140 P. R. 1894.
(10) 98 P. R. 1895.
(11) 33 P. R. 1900; P. L. R. 1900; p. 368.
(12) 85 P. R. 1907; 132 P. L. R. 1908; 114 P. W. R. 1907.
(13) 86 P. R. 1907; 131 P. L. R. 1908; 113 P. W. R. 1907.
(14) 89 Ind. Cas. 724; 1 Lah. Cas. 253; A. I. R. 1926 Lah. 142.

own note shows that the exclusion of a daughter is very strict in the Amritsar District." The other case, *viz.*, *Nadhan Singh* v. *Rajo* (15), a decision of the same Division Bench, deals with the very tribe we are concerned with here. The head-note reads:—"By the custom prevailing among *Sandhu Jats* of the Amritsar District, daughters are ousted by collaterals of the last male owner in the matter of succession to self-acquired property." In the course of the judgment after referring to the case of *Naraini* v. *Jowahir Singh* (14) the judgment proceeds:—"In that case, no doubt, there was some slight evidence in addition in favour of the view that collaterals were preferred to a daughter even in the case of non-ancestral property. In the present case there is no instance produced by either party. We have found that in the case of the parties in the other case, who were *Kambohs*, the entry in the *riwaj-i-am* should be relied upon and we see no reason to come to a different decision in the case of *Sandhu Jats*." The finding in this case in favour of the special custom was based almost entirely upon the entry in the *riwaj-i-am* and the other side having failed to discharge the onus of rebutting that entry it was held to be conclusive.

In the case now before us no attempt has been made to show, otherwise than by a reference to the reported decisions I have mentioned, that either the *riwaj-i-am* of 1865 or the new edition of 1914 is in any way imperfectly compiled or inaccurate. I am, therefore, of opinion that on the strength of the unrebutted evidence furnished by these public records the special custom relied upon by the plaintiffs has been established. I would accordingly accept the appeal, set aside the decree of the learned trial Judge and enter judgment for the plaintiffs with costs.

Campbell, J.—The parties to this suit are *Handal Jats* of the Amritsar District settled in the Lyallpur District. The plaintiffs sued for a declaration that a gift by the widow of their collateral Gurpal Singh to Gurpal Singh's daughter should not affect their reversionary rights. The property gifted was a square, self-acquired by Gurpal Singh. The daughter pleaded that she was the next heir, and whether she was so or not became the main point in issue. The trial Court dismissed the suit, holding that the general rule of custom was against the plaintiffs and that they had failed to prove a special custom by which collaterals were preferred to daughters in succession to non-ancestral property. The plaintiffs have appealed.

The plaintiffs produced 17 witnesses all *Handal Jats* of the Amritsar District, who declared that daughters had no right of succession to non-ancestral property, but none of the instances quoted by them substantiated by documentary evidence, although the trial Judge directed that this should be done and gave an opportunity for the production of the necessary documents. The witnesses were nearly all elderly men, and seven of them were *Lambardars*. The plaintiffs also put the defendant donor into the box. She said that she knew of no instance of succession by daughters in the Amritsar District, and she mentioned two of which she had heard, one occurring 100 years ago.

The plaintiffs also produced extracts from the *Riwaj-i-am* of 1865 and 1914 and referred to page 28 of Craik's Customary Law of the Amritsar District, where the rule of 1914 *Riwaj-i-am* applicable to the matter in issue is described, not altogether accurately as will appear presently. The defendants produced no rebuttal evidence of any kind.

The learned Subordinate Judge held that the oral evidence and the *riwaj-i-am* entries to be of no avail to the plaintiffs in the absence of authenticated instances, relying upon what he conceived to be the rule laid down in *Wazira* v. *Maryan* (2) that statements in a *riwaj-i-am*, when not based on general custom can carry little weight unless supported by instances. He decided that the general rule stated in para. 23 of Rattigan's Digest of Customary Law must be followed that daughters have a right to succeed in preference to collaterals to their fathers' self-acquired property.

The plaintiffs in appeal rely partly upon the finding by their Lordships of the Privy Council in *Ahmad Khan* v. *Channi Bibi* (16) that evidence by a large body of witnesses in a position to know the rule of custom is entitled to weight even though

(15) 85 Ind. Cas. 783; 1 Lah. Cas. 15; A. I. R. 1925 Lah. 556.

(16) 91 Ind. Cas. 455; 6 Lah. 502; A. I. R. 1925 P. C. 267; L. R. 6 A. (P. C.) 190; 3 O. W. N. 93; 52 I. A. 379; 30 C. W. N. 506; 50 M. L. J. 637 (P. C.).

no specific instances are quoted but mainly upon their Lordships' previous and well-known decision in *Beg* v. *Allah Ditta* (1) regarding the value to be attached to entries in the *riwaj-i-am* unsupported by instances. The plaintiffs' learned Counsel claims that on these authorities in the total absence of any rebuttal of the defendants the suit should have been decreed.

The defendants reply that a series of decisions by this Court and by the Chief Court subsequent to *Beg* v. *Allah Ditta* (1) plainly lay down the rule stated by the trial Judge that *riwaj-i-am* entries without instances are of small evidentiary value. The cases cited in addition to *Wazira* v. *Maryan* (2) are *Khuda Baksh* v. *Fatteh Khatun* (3), *Manohar* v. *Nanhi* (4), *Budha* v. *Fatima Bibi* (5) and *Gurdit Singh* v. *Malan* (6). I propose to examine these cases first setting forth what their Lordships of the Judicial Committee held in *Beg* v. *Allah Ditta* (1).

In *Beg* v. *Allah Ditta* (1) there was a contest for the inheritance to one Shahamad between (*a*) certain collaterals of Shahamad and (*b*) a son of his daughter by a husband who was proved to have the status of *khana-damad* or resident son-in-law, the *riwaj-i-am* supported this son's claim, but it was put aside by the Chief Court on the ground that the particular entry relevant was not supported by instances. Their Lordships of the Privy Council in reversing the Chief Court's decision laid it down that the *riwaj-i-am* was a public document admissible in evidence to prove the facts entered in it subject to rebuttal and the statements recorded in it formed a strong piece of evidence which it lay upon the plaintiffs (the collaterals) to rebut.

Wazira v. *Maryan* (2) was a judgment by a Division Bench of the Chief Court disposing of a claim by collaterals in the 4th degree (*Virk Jats* of Gujranwala District) to succeed to non-ancestral land in preference to the daughter of the deceased proprietor. The plaintiffs relied upon entries in the *riwaj-i-am*. The learned Judges examined the *riwaj-i-am* of the Gujranwala District with great care citing several portions of it and came to the conclusion that the same value does not attach to every *riwaj-i-am* even though all such documents are public records prepared by a public officer in discharge of his duies and under Government rules. They then referred to *Beg* v. *Allah Ditta* (1) in the following words :—

"That judgment must be read as a whole. The Privy Council were dealing with a case in which the *riwaj-i-am*, even though it cited no instances was nevertheless in full accord with a well-known custom, which is nevertheless well established because it forms an exception to the general rule that male collaterals exclude daughters. In such a case it was doubtless for those who controverted the *riwaj-i-am* and the weight of authority to rebut the case arrayed against them. But the matter is different when without citing any instances, a *riwaj-i-am* which has been imperfectly compiled describes a special custom opposed to the general custom of the Province and the great mass of authorities."

On this finding they refused to hold that the plaintiffs merely by producing the *riwaj-i-am* on which they relied had succeeded in proving a custom by which they were preferential heirs to the daughter.

Khuda Baksh v. *Fatteh Khatun* (3) is also a decision by a Division Bench of the Chief Court. The plaintiffs Muhammadan Jats of the Multan District sought to succeed as collaterals in preference to a sister of the last male holder and relied upon an entry in the *riwaj-i-am* unsupported by instances. The judgment delivered by Scott-Smith, J., quoted in full the passage cited above from *Wazira* v. *Maryan* (2) and then held that *for the reasons stated in that decision* the ruling of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1) did not apply to such cases as the one before them. That is to say, the Judges found (if words have any meaning) that the *riwaj-i-am* before them had been "imperfectly compiled" although there is no express mention of its defects elsewhere in the judgment.

In *Manohar* v. *Nanhi* (4) the judgment also delivered by Scott-Smith, J., went a step further and declared without any finding as to the manner in which the *riwaj-i-am* had been prepared that a mere entry in it unsupported by instances that daughters can under no circumstances inherit their father's property was of very little weight and was quite insufficient to shift the onus on to the daughters because in the opinion of the learned Judges that entry was contrary to all the principles

of Customary Law. *Beg* v. *Allah Ditta* (1) was referred to in unusual terms [also employed by the same learned Judge in *Khuda Baksh* v. *Fatteh Khatun* (3)] as having "been considered in a subsequent decision of the Chief Court *Wazira* v. *Maryan* (2). *Khuda Baksh* v. *Fatteh Khatun* (3) was also cited, and its decision and that in *Wazira* v. *Maryan* (2) were apparently taken to be authorities for the proposition laid down which with all deference I suggest is the precise negative of what their Lordships of the Privy Council stated to be the law in *Beg* v. *Allah Ditta* (1).

The fourth case is *Budha* v. *Fatima Bibi* (5) (Scott-Smith and Zafar Ali, JJ.) The question for determination was whether among agricultural tribes of the Sialkot District collaterals exclude daughters from succession to self-acquired property. Counsel for the appellants argued that in the presence of *riwaj-i-am* which afforded presumptive evidence of the existence of the special custom it lay on the defendants to rebut the same. This argument was disposed of in the judgment as follows :—

"No. 2 does not carry any weight in the face of the authorities cited above and relied upon by the learned District Judge. It is now a well-established rule that a statement in the *riwaj-i-am* opposed to general custom and unsupported by instances possesses very little evidential value."

The authorities in question were *Chhuttan* v. *Hazari Lal* (17), *Wazira* v. *Maryan* (2) and *Khuda Baksh* v. *Fatteh Khatun* (3). The first named was a decision anterior to that of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1). The other two, as shown above, do not lay down any such general rule (which with due respect I do not regard as well-established) but relate only to *riwaj-i-am* which are found to be imperfectly compiled.

The last case is *Gurdit Singh* v. *Malan* (6) where I venture to think, Scott-Smith, J., who delivered the judgment once more failed to give due recognition as a binding authority to *Beg* v. *Allah Ditta* (1). His words are:—

"Mr. Morton, however, contends that the entry in the *riwaj-i-am* is a strong piece of evidence in support of the custom put forward by the plaintiffs having regard to the decision of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (1). This decision was considered by a Division Bench of this Court in *Wazira* v. *Maryan* (2) in which it was held that 'statements in a *riwaj-i-am* when opposed to general custom can carry very little weight unless supported by instances'."

It does not appear, however, that the decision of the case proceeded entirely upon this observation for the fact was also taken into consideration that the *riwaj-i-am* itself recorded in an appendix numerous exceptions to what was stated in the body of the work to be a general rule.

If *Manohar* v. *Nanhi* (4) and *Budha* v. *Fatima Bibi* (5) were correctly decided, the argument of the defendants' learned Counsel would prevail, but with all respect I consider that they cannot be followed so long as *Beg* v. *Allah Ditta* (1) stands as the Judicial Committee's exposition of the law. If there was no intention in *Khuda Baksh* v. *Fatteh Khatun* (3) to hold that *riwaj-i-am* was, as a whole, a defective public record, I would say the same about that decision.

The rule is put in *Beg* v. *Allah Ditta* (1) perfectly plainly. Statements in a *riwaj-i-am* which is a public record, prepared by a public officer in discharge of his duties and under Government rules, are a strong piece of evidence that their contents are true, and that strong evidence must be believed unless rebutted by the party against whom it tells. Of the numerous methods of rebuttal one is that which succeeded in *Wazira* v. *Maryan* (2), namely, to convince the Court from an examination of other portions of the *riwaj-i-am* that it had not been compiled in a properly careful manner, or that for other reasons it is not a reliable record. But the fact that a statement of custom in a *riwaj-i-am* is not supported by instances does not in itself provide the necessary rebuttal and if on an issue regarding the existence of an exception to a general rule of custom the sole evidence offered is a *riwaj-i-am* entry without instances, the issue must be decided in accordance with that entry.

The relevant entries in the current Amritsar *riwaj-i-am* are to be found on pages 28 and 29 of Craik's Customary Law of the Amritsar District which as stated in the preface is a condensed abstract of the original *riwaj-i-am* omitting instances except a few Chief Court rulings. We

(17) 30 Ind. Cas. 22; 7 P. R. 1916; 129 P. W. R. 1915; 46 P. L. R. 1916.

have concluded the original *riwaj-i-am* and we find that it does not contain the "note" on page 29 of Craik's Customary Law or the passage of the answer to question 61 commencing "But in reality daughters have a right to exclude agnates". Questions 61 and 60 and their answers in the original are as follows:—

"*Question 61*—Rights of daughters and their descendants.

Under what circumstances are daughters entitled to inheritance? Are they excluded by sons, widows or near male collaterals heirs of the deceased person? If so, is any limit fixed for collateral heirs to show that heirs upto such and such limit or degree can exclude daughters? If so, how is that limit ascertained? If the limit is to be taken from the common ancestor, in what degree should the deceased meet him?

Answer—For mutations see pages 175 to 178.

All the tribes state:—

In the presence of sons near male collaterals, heirs or widow of the deceased, his daughter is excluded from inheritance. Collaterals, however remote they are, exclude daughters from inheritance but the following are exceptions:—

Pathans and *Afghans* of Tahsil Tarn Taran and Musalman *Kambohs* of Tahsil Amritsar state that if a deceased person leaves no widow or male descendants, the whole of his heritage goes to his daughters.

The *Mughals* of Tahsil Tarn Taran state that if a deceased leaves no male descendants or widow, one-third of this heirtage goes to his daughters and the rest to his collaterals.

The *Pathans* of *Mouza* Kakru Tala, Tahsil Ajnala state that in the absence of collaterals up to the fourth degree the heritage goes to the daughters. *Khatris* and *Brahmins* of Tahsil Ajnala state they follow custom according to the Hindu Law.

All the tribes except those referred to below state that if a deceased person leaves a minor daughter or daugters and no male descendants his heritage should be entered in the names of the daughters till their marriage.

But *Sidhu Jats* of Atari, *Bal Jats* of Tahsil Amritsar, *Khatris* and *Brahmans* of Neshta Tahsil Tarn Taran, and *Manj Rajputs* of Manj, Tahsil Ajnala, state that land should devolve upon collaterals however, remote they are. It should not be entered in the names of daughters in any case not even until their marriages."

(Here follow 15 instances of sonless proprietors being succeeded by daughters until their marriage. The mutations referred to at the commencement of the answer are illustrative of the exceptions detailed and not of the general rule stated).

Question 61—Is there any distinction as regards the daughters' right of inheritance (*a*) in the matter of immoveable or ancestral property (*b*) in the matter of moveable or self-acquired property of father?

Answer by all the tribes: "In either case daughters get no share. There is no distinction as regards moveable or immoveable property. The answer conforms to that of question No. 60."

An attempt has been made to impugn the reliability of this *riwaj-i-am* by referring us to *Gurdit Singh* v. *Ishar Kuar* (7) where the following passage occurs:

"There remains the question of custom. On this point Art. 23 of Rattigan's Digest lays down that, according to the general custom of the Province, a daughter excludes collaterals in succession to self-acquired property. It would, therefore, be incumbent on the collaterals to prove a custom opposed to this general custom. In order to do this they have referred to the *riwaj-i-am* of the Settlement of 1865 in which it was stated that a proprietor could not make a gift of even his self acquired property to his daughter. Our attention was also drawn to the evidence of a certain number of witnesses who have stated that in this village daughters do not succeed to self-acquired property. Dr. Narang contended that an entry in the *riwaj-i-am* was *prima facie* evidence of a custom and referred to *Beg* v. *Allah Ditta* (1). The value of the *Riwaj i-am* of 1865 as a piece of evidence, however, is considerably minimised by the fact that in *Dial Singh* v. *Dewa Singh* (8) in referring to this very *riwaj i-am* it was said that it did not lay down what the custom was but what the compilers thought it ought to be. Again, we find that in the Settlement of 1914, when a new *riwaj-i am* was compiled, it is stated that a gift to a daughter can be made of ancestral or self-acquired property to a certain extent—*vide* answer to question 117. In these circumstances, we are of opinion that the collaterals have failed to prove a custom by

which they exclude daughters from suceeding to the self-acquired property of a sonless proprietor."

Here it does not appear that the attention of the learned Judges was drawn to the above quoted passages in the 1914 *Riwaj-i-am* which repeat what was stated in 1865. Furthermore, it was not brought to their notice that the derogatory remarks in *Dial Singh* v. *Dewa Singh* (8) which were made about a statement of custom regarding adoption in the 1865 *Riwaj-i am* were subsequently dissented from in several later rulings, *e. g*, *Rall* v. *Budha* (18), *Ram Mal* v. *Miram* (19) and *Sardar Wasawa Singh* v. *Sardar Arur Singh* (11) and that there are numerous other later decisions which speak of the Amritsar 1865 *Riwaj-i-am* as a particularly reliable record.

In *Naraini* v. *Jowahir Singh* (14) it was held that among Amritsar *Kumbohs* a daughter was excluded from self-acquired property by collaterals, and the decision was based very largely upon the answers to questions 60 and 61 in the 1914 *Riwaj-i-am* which was held to have been carefully compiled. In *Nadhan Singh* v. *Rajo* (15) the same decision was come to in regard to *Sandhu Jat's* of the Amritsar District, and was based entirely upon those answers there being no instance either way proved by either party. In both these cases one of the Judges on the Bench was Mr. Justice Scott-Smith, whose connection with the earlier rulings has been emphasised above. Whatever may have been his views about the *riwaj i-ams* of other Districts with which those rulings dealt, it is clear from these two later cases that he was satisfied with the authoritativeness of the Amritsar *Riwaj-i-am* when it stated, without quoting instances, an exception to the general rule regarding the rights of daughters to succeed to self-acquired property.

I would accept this appeal holding that the defendants, who produced no evidence, have failed to rebut the evidence supplied by the answer to question 61 of the 1914 *Riwaj i-am* that among *Jats* of the Amritsar District collaterals succeed to the self-acquired estate of a deceased proprietor in preference to his daughter, and I would decree the plaintiffs' suit with costs throughout.

R. L. *Appeal accepted.*

(18) 50 P. R. 1893.
(19) 30 P. R. 1896.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 108 OF 1925.
July 27, 1926.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Patkar.

SHRAVAN GOBA MAHAJAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

KASHIRAM DEVJI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 19, 19A, 37, 42, 45—Contract induced by undue influence—Death of party—Right of legal representatives to set aside document—Specific Relief Act (I of 1877), s 35—Trusts Act (II of 1882), s. 88.

A suit to set aside a document for fraud or undue influence can be brought by the legal representatives of the party injured. [p. 936, col. 1.]

Where a person of weak mind has been induced to make a nominal transfer of his properties in favour of a near relation on the statement or representation that the latter would manage it for him and keep it out of harm's way, the transferee puts himself in a fiduciary position, and the legal representatives of the transferor are consequently entitled under s. 88 of the Trusts Act to sue for recovery of the property from the transferee. [p. 935, col, 1.]

First appeal from a decision of the First Class Subordinate Judge at Jalgoan, in Suit No. 3 of 1923.

Mr. *G. S. Rao*, D. B., for the Appellants.
Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.

Marten, C. J.—This suit was brought by the representatives of one Dashrath Shivaji to set aside a sale-deed, Ex. 51, purporting to have been effected on December 3, 1919, in favour of defendant No. 1 for a sum of Rs. 8,000. The trial Judge decided in favour of the plaintiffs. Defendant No. 1 appeals.

The gist of the plaintiffs' case is set out in their plaint as follows:—

"The property as described above was originally of the ownership of Dashrath Shivaji. He was rather silly and had just recently attained majority; besides he was not capable of understanding dealings and transactions. He had also fallen into the company of vicious people. Taking advantage of these circumstances Shravan Goba, defendant No. 1, being a relative of the deceased Dashrath said to him as follows: "I undertake to manage all your property. In order that your property might be preserved, that you might have means of livelihood, you should pass a fresh sale-deed in my favour in respect of all the property. I shall not take posses-

sion of your property. The defend No. 1 made such false representation the deceased Dashrath and deceitfully got him to pass a registered sale-deed for Rs. 8,000 in his own favour in respect of the property in suit."

The pleading then says that the consideration money was agreed to be paid in the presence of the Sub-Registrar to make a show of truth, but that the property continued to remain in possession of Dashrath. They accordingly asked for a declaration that the sale-deed taken by defendant No. 1 was null and void, as it was hollow and without consideration, and for a decree for possession of the land which they say was obtained by defendant No. 1 after the death of Dashrath.

[His Lordship found on the question of fact that the sale-deed was induced by misrepresentation and proceeded:]

Now here it has been strongly urged upon us by Counsel for the appellants that this is in effect a suit to set aside a document on the ground of fraud or undue influence within the meaning of the Contract Act, ss. 16, 17 or 18, and that as Dashrath is dead, the right to sue does not devolve on his personal representatives, in as much as the relief given by ss. 19 and 19A must be confined to the actual party, who has been defrauded, or on whom the undue influence has been exercised. In support of that proposition, certain cases were cited which, I think, are all or nearly all distinguishable on this simple ground, *viz.*, that the party alleged to have been defrauded had, by his own conduct in his own lifetime, put it out of his power to bring a suit to set aside the document in question, and that, accordingly, his legal representatives could be in no better position.

Thus, the first case cited by Diwan Bahadur Rao was an unreported case before Sir Basil Scott and Mr. Justice Batchelor in *Mahmed Allibai* v. *Udesingji* First Appeal No. 254 of 1915, decided on August 29, 1917. That was a case where the defence to an agreement of March 7, 1873, was that it had been obtained by undue influence practised on one Ganpatsingji. But the judgment points out that Ganpatsingji, for at least twenty-five years after this particular document, was paying money under it, and took no steps whatever to endeavour to set it aside. It is consequently not surprising that the Court in that case refused to allow his sons after his death to set up any case of that description. Speaking for myself, I cannot accept a stray sentence or two in that judgment as meaning that if Ganpatsingji had died, say, within a week after this agreement, his representatives could not have brought a suit to have it set aside on the ground of undue influence.

Rangnath Sakharam v. *Govind Narasinv*, (1) was a case before Sir Lawrence Jenkins and Mr. Justice Aston. There the Court pointed out that, under the Indian Contract Act, a fraud rendered a contract voidable but not void. That, of course, is a proposition which we accept. But with reference to the case of *Jugaldas* v. *Ambashankar* (2) which was there cited (a decision of Sir Charles Sargent and Mr. Justice Nanabhai), that was a case where a tenant tried to set up a defence to a suit which his landlord by his own conduct was barred from raising. The landlord had sold the land in question to the plaintiffs but afterwards complained that the sale was fraudulent. Consequently at that date he knew the facts entitling him to bring a suit for rescission of the conveyance. He did nothing. Years passed by, and the landlord's claim was barred by limitation. Naturally, therefore, the Appellate Court held that as the landlord himself was barred, the tenant, a mere third party and at most claiming through the landlord, could be in no better position than the landlord. That case also is no authority for the proposition that a contract can only be set aside by the actual party to it.

Then, an argument was put forward to us founded on Halsbury's Laws of England, Vol. VII, page 357, *viz.*, that under English Law only the party affected could bring an action to set aside a contract or conveyance on the ground of undue influence or fraud. As regards English Law, one may say at once that it is perfectly plain that that argument is unfounded. By English Law it is clearly settled that not only in equity may a party to a contract himself bring a suit to set it aside, but also that his legal representatives may do so after his death. This principle also applies to moneys obtained by undue influence.

(1) 28 B. 639; 6 Bom. L. R. 592.
(2) 12 B. 501; 6 Ind. Dec. (N. S. 818.

In the well-known case of *Allcard* v. *Skinner* (3) Lord Lindley says (page 187*):—

"A right to have a gift set aside for fraud or undue influence does not cease on the death of the donor but passes to his representatives; and if in *Mitchell* v. *Homfray* (4) the donor had been entitled when he died to have his gift set aside, his executors would have succeeded to his rights, and would have obtained the relief they sought."

So, too, in *Morley* v. *Loughnan* (5) the executors of the man defrauded or over whom undue influence had been practised, succeeded there in obtaining a decree against the defendant in respect of gifts of a large amount of £1,40,000 obtained by the defendant by divers discreditable means from the deceased Morely.

There are also two cases cited by Mr. Shingne for the respondent, *viz.*, *Greslay* v. *Mousley* (6) and *Holman* v. *Loynes*, (7) both of which were cases in which sales by clients to their solicitors were set aside after the death of the clients.

There is yet one other useful case, so far as the English Law is concerned, of *Twycross* v. *Grant* (8), where Brett, L. J. says (page 46)†:—

"Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shown upon the face of the proceedings that an injury has accrued to the personal estate."

Lord Justice Cotton said (page 47†):—

"It has been argued that this is an action to recover damages: in one sense that is true; but it is an action for a wrong done, not to the intestate himself, but to his property; therefore, the right to sue upon his death was transmitted to his personal representatives."

Now that was a case brought by the plaintiff to recover from the promoters of a company the price paid by the plaintiff for shares which had proved valueless, on the ground that the prospectus issued by them in breach of the Companies Act omitted to disclose certain contracts which ought to have been specified therein. There, after judgment and pending an appeal to the House of Lords, the plaintiff died. It was held that the plaintiff's interest in the action survived and could be continued by the personal representatives.

In saying this we are well aware of the maxim in English Law *actio personalis moritur cum persona*. Lord Bramwell in that very case deals with the maxim in its origin, and explains how by various Statutes down from the reign of Edward III that maxim has been gradually modified in English Law. But we think it clear that as regards modern English Law, an action for damages for fraud or a suit in equity to set aside documents on the ground of undue influence and so on can undoubtedly be brought by the representatives of the party injured, where you find that there is a direct injury to the estate of the deceased.

Then the case of *Govind Ramaji Ganjale* v. *Savitri Rama Thosar* (9), before Sir Basil Scott and Mr. Justice Hayward, was relied on by the appellants. But there the actual decision of the Court was that a suit could be maintained by the representatives of a deceased person on the ground that the case fell within s. 88 of the Indian Trusts Act. No doubt the Court there did deal with an argument very similar to that which Diwan Bahadur Rao has presented to us, and at page 175* Sir Basil Scott said :—

"This argument might be pertinent and requires serious consideration if we were dealing with a case of a contract effected by undue influence in which the parties were not in a fiduciary relation to each other and in which the influencing party had not acquired possession of property of the party influenced. When property has been acquired by a party by using for his own advantage his fiduciary position the case falls under s. 88 of the Indian Trusts Act, which runs as follows."

Then the learned Chief Justice sets it

(3) (1887) 36 Ch. D. 145; 56 L. J. Ch. 1052; 57 L. T. 61; 36 W. R. 251.

(4) (1882) 8 Q. B. 587; 50 L. J. Q. B. 460; 45 L. T. 694; 29 W. R. 558.

(5) (1893) 1 Ch. 736; 62 L. J. Ch. 515; 3 R. 592; 68 L. T. 619.

(6) (1859) 4 De G. & J. 78; 28 L. J. Ch. 620; 5 Jur. (N. S.) 583; 7 W. R. 427; 45 E. R. 30; 124 R. R. 164.

(7) (1854) 4 De G. M. & G. 270; 23 L. J. Ch. 529; 18 Jur. 839; 2 W. R. 205; 43 E. R. 510; 22 L. T. (o. s.) 296; 102 R. R. 127.

(8) (1879) 4 C. P. D. 40; 48 L. J. C. P. 1; 39 L. T. 616; 27 W. R. 87.

*Page of (1887) 36 Ch. D 40—[*Ed.*]

†Pages of (1878) 4 C. P. D.—[*Ed.*]

(9) 47 Ind. Cas. 883; 43 B. 173; 20 Bom. L. R. 911.

*Page of 43 B—[*Ed.*]

out and the judgment proceeds (page 181*):—

"Since the facts of this case as found by the lower Courts clearly bring it within the scope of s. 88 of the Indian Trusts Act, we affirm the decree declaring the sale-deed to be null and void."

In the present case when once one accepts in substance the story told by Mharu, then we have here an elderly man and a relation obtaining the property on the statement or representation that he would manage it for the young man, and keep it out of harm's way, surely in a case such as that the elderly relative put himself in a fiduciary position towards the young man. I wish to make it quite clear that I am not basing my judgment on this that he stood in any fiduciary position before the date of this deed. But I do say that once it was agreed that the elderly man was to manage the property and for that purpose to have the nominal sale-deed executed in his favour, then he became in law a trustee for the young man—if not express at least implied—having regard to the relative positions of the parties, the one to the other. Moreover, in this case defendant No. 1 did not obtain possession of the property until after the death of Dashrath.

So, on this view of the case it closely resembles the one before the Appellate Court in *Govind Ramaji Ganjale* v. *Savitri Rama Thosar* (9). And one may go further and state that the argument presented to the Court in that case does not really apply here because Dashrath had indicated his election to avoid the contract by reason of the notice Ex. 84 which he had given. It may be said that he afterwards repudiated that notice by the subsequent action which he took. But nevertheless we find that at one time he gave a notice to that effect.

Accordingly, in the view we take it is not strictly necessary to give a decision as to whether, if the case did not fall within the above section of the Indian Trusts Act, the suit would be maintainable under the sections of the Contract Act. But as the point has been argued, I have no hesitation in expressing my individual opinion that, having regard to the subsequent sections in the Contract Act which clearly contemplate that in certain cases the benefit and burden of promises shall devolve on legal representatives, that would also be the case as regards the right given by s. 19 or 19-A. I refer in particular to ss. 37, 42 and 45. In this connection it may be pointed out that the appellant is forced in argument to go to this length that the legal representatives cannot take advantage of either branch of s. 19. The result, therefore, would be that if a man was defrauded or induced to enter into a contract by fraud and died the next day, his representatives could not avoid the contract under the first part of s. 19. Nor could they even under the second branch insist that the contract should be performed on the basis that the representations made were true. On what principle of justice or equity that construction should be put on s. 19 or on the corresponding s. 19A I entirely fail to see. No authority going to this length has been cited to us, and speaking for myself, I decline to be the first Judge to adopt what seems to me a forced, unnatural, and unjust construction of this Act.

Accordingly, in our view this suit is maintainable by the representatives of the deceased. It is suggested to us that the terms of the order were in any way wrong having regard to the view which the learned Judge took of the facts and the law. Accordingly, the appeal from that decision which, we think, was the right decision, will be dismissed with costs.

Rule discharged with costs.

Patkar, J.—[On the question of law his Lordship stated as follows:—]

The next point argued by Diwan Bahadur Rao is that even though this document was voidable on account of misrepresentation or fraud by defendant No. 1, the plaintiffs as the heirs of Dashrath cannot impugn it. He relied on the decisions in *Mahmad Allibhai* v. *Udesingji*, First Appeal No 254 of 1915, decided by Scott, C. J., and Batchelor, J., on August 29, 1917, *Rangnath Sakharam* v. *Govind Narasinv* (1) and *Govind Ramaji Ganjale* v. *Savitri Rama Thosar* (9). The case in *Mahmad Allibhai* v. *Udesingji* can be easily distinguished on the ground that the heirs who sued were disabled on account of laches and acquiescence from disputing the transaction because the persons who were parties to the document had acted upon it for a long time. The case of *Rangnath Sakharam* v. *Govind Narasinv* (1) does not directly deal with the point

*Page of 43 B.—[*Ed*].

uuder consideration. The case of *Govind Ramaji Ganjale* v. *Savitri Rama Thosar* (9) is more in favour of the respondents, if defendant No. 1 be considered to have acquired the property by using his fiduciary position for his own advantage.

The law is clearly laid down in Halsbury's Law of England, Vol. XV, page 106, para. 209, and the cases therein cited bear out the contention that a suit can be brought by a legal representative to set aside a document which has been induced by fraud or undue influence. I may refer to the cases of *Gresley* v. *Mousley* (6), *Holman* v. *Loynes* (7), *Morley* v. *Loughnan* (5) and *Allcard* v. *Skinner* (3). To the same effect is the case of *Twycross* v. *Grant* (8). I think that s. 35 of the Specific Relief Act also supports this contention. Section 35 says: "Any person interested in a contract in writing may sue to have it rescinded, and such rescission may be adjudged by the Court." The wording of the section is not that a party to a contract may sue to have it rescinded, but any person who is interested in a contract in writing may do so. I think the heir is a person interested in a contract in writing which is sought to be set aside.

I think, therefore, that the suit lies in this case at the instance of the plaintiffs who are the heirs of Dashrath. On the merits of the case we have reached the conclusion that Mharu is a reliable witness and that the sale-deed was passed by Dashrath on the false representation of defendant No. 1. We, therefore, think that the view of the lower Court is correct, and that this appeal should be dismissed with costs.

Marten, C. J.—I wish to add that I agree in particular with what Mr. Justice Patkar has said with reference to the Specific Relief Act. I had intended to refer to that Act.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 528 OF 1926.

January 13, 1927.

Present :—Mr. Justice Addison.

PAL SINGH—PLAINTIFF—PETITIONER

versus

HARNAM SINGH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5, Sch. I, Art. 164—Application for setting aside ex parte *decree—Limitation—Court, whether can enlarge time—Illegal exercise of jurisdiction—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

Section 5 of the Limitation Act does not apply to applications for setting aside *ex parte* decrees. A Court has, therefore, no discretion to enlarge the thirty days allowed by Art. 164 of the Limitation Act within which a defendant should apply to set aside an *ex parte* decree. Where a Court entertains an application for setting aside an *ex parte* decree after the expiry of the period of limitation it illegally assumes a jurisdiction not vested in it. [p. 937, col. 1.]

Petition for revision of the order of the Sub-Judge, Fourth Class, with powers of a Judge Small Causes, Nawanshahr, District Jullundur, dated the 27th April, 1926.

Mr. *Fakir Chand*, for the Petitioner.

Mr *A. R. Khosla*, for the Respondent.

JUDGMENT.—On the 20th January, 1926, the plaintiff Pal Singh obtained an *ex parte* decree for Rs. 75 against his brother Harnam Singh. The suit was one for recovery of Harnam Singh's share of the expenses incurred by the plaintiff in connection with their father's death. Two other brothers were joined as *pro forma* defendants and when they appeared they stated that they had paid their share to the plaintiff.

On the 8th March, 1926, the defendant applied to have the *ex parte* decree against him set aside on the ground that he was under the impression that the suit in question had been fixed for the 8th June, 1926. He, however, had come to know that it had been decreed as an attachment was issued against him. The Judge thought that the defendant might have laboured under a misapprehension as regards the date and set aside the decree on payment of a small amount as compensation. Against this order this revision has been admitted.

Harnam Singh had been present at certain hearing of the suit after it was first instituted. He was also served in the suit. The last hearing which he attended was that of the 26th of November, 1925. On that date the suit was fixed for the 11th December, 1915, when he was absent. The suit was then adjourned to the 20th Janu-

ary, 1926, because the *pro forma* defendants, that is, the other two brothers of the plaintiff, had not been served. They were present on the 20th January, 1926, and Harnam Singh was again absent just as he had been absent on the 11th December, 1925. It was then that the suit was decreed *ex parte* against him.

It is obvious that s. 5 of the Limitation Act does not apply. The Court has no discretion to enlarge the thirty days allowed by Art. 164 of the Limitation Act within which the defendant could apply to set aside the *ex parte* decree. He had only one month from the date of the decree and in entertaining the application I must hold the Court assumed illegally a jurisdiction which it did not possess. This follows from *Piroj Shah* v. *Qarib Shah* (1). The application was clearly time-barred and, therefore, did not lie.

I accept the petition and setting aside the order of the Judge Small Cause Court dismiss the application to set aside the *ex parte* decree which must stand. The petitioner will have his costs here.

R. L. *Petition accepted.*

(1) 95 Ind. Cas. 124; 7 Lah. 161; 8 Lah. L. J. 267; A. I. R. 1926 Lah. 379; 27 P. L. R. 321.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 736 OF 1925.

July 29, 1926.

Present :—Sir Amberson Marten, KT., Chief Justice and Mr. Justice Patkar.

DAJI RAMJI PATIL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAXMAN RAOJI TAGE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property standing in the name of a member—Presumption—Nucleus, burden of proof.

There is no presumption that a Hindu family has any joint property and it is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property. [p .937, col. 2.]

Ram Kishen Das v. *Tanda Mal* (1) and *Bhagubai* v *Tukaram* (2), followed.

Second appeal from the decision of the Assistant Judge at Poona, in Appeal No. 279 of 1924, reversing the decree passed by the Subordinate Judge at Khed, in Civil Suit No. 39 of 1923.

Mr. *G. N. Thakor* (with him Mr. *A. G. Sathaye*), for the Appellants.

Mr. *Mehendale* (with him Mr. *S. R. Bakhale*), for the Respondents.

JUDGMENT.—We hold that the lower Appellate Court has here erred in law in throwing the burden of proof upon the plaintiffs. The learned Assistant Judge quotes from Mulla's Hindu Law: "Every Hindu family is presumed to be joint in food, worship and estate unless the contary is proved. The burden of proof, therefore, lies upon him who alleges separation" Accepting that proposition, the Judge in para. 7 of his judgment has held that "the plaintiffs have not succeeded in showing that in 1894 Vaman was separate from his brothers Hari and Anant, and that consequently the land, Survey No. 17, belonged exclusively to him and after his death to his son, *viz.*, their vendor Chintaman."

We think that the above proposition of law is stated far too widely or at any rate cannot be accepted without qualifications. In *Ram Kishen Das* v. *Tanda Mal* (1) it was held that there is no presumption that a Hindu family has any joint property, and that it is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property.

Then, in Mayne's Hindu Law, 9th Edition at pages 375, 377, 378 and 380, the law is discussed and clearly enunciated. At page 377 it is stated:—

"It may now be considered as settled law that it is necessary to establish the existence of a nucleus of a joint family property before the property in the possession of any one member can be presumed to be joint family property. This is really a logical corollary to the rule...that there is no presumption that a family, because it is joint, possesses joint property or any property."

Then, in the next paragraph, he explains that to say generally of any particular property in the possession of any member of the family, that it is presumably joint estate, is to assert one or other of a great many different propositions:—

"Either that in its present condition it was ancestral property, or that it was acquired by means or with the assistance of ancestral property, or by means of joint labour, or joint funds, or both, or that it was acquired by a single member without aid from other funds or from other members, and then thrown into the common stock. Now, these propositions are each

(1) 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723.

different in their probability, and different in the facts which would establish them."

Then, at page 380 it is said:—

"If a member of the family admitted a partition among some of the members, but asserted that the others had remained undivided, the *onus* would lie upon him to make out such a case."

In the present case, Shridhar, the father of Vaman, Hari and Anant, died before 1888, and consequently prior to the purchase of the suit property by Vaman in 1894. It does not appear that Shridhar left any property. On the facts as found, Anant, one of the brothers, had already separated.

In our opinion, the learned Assistant Judge wrongly applied the presumption that Vaman and Hari must have been joint in 1894. Then, after holding that the plaintiff had failed to rebut that presumption, he next finds that by 1918 Chintaman (the adopted son of Vaman) and Keshav (the son of Hari and the natural brother of Chintaman) had become separate. How and when they so became separate the learned Judge does not state. *Prima facie* the fact of their separation would be quite inconsistent with the fact which the Court had relied on as establishing a course of conduct over a series of years as between Vaman and Hari and Chintaman and Keshav which would make the property joint property.

Consequently we think the proper course to adopt is that taken in *Bhagubai* v. *Tukaram* (2) where very much, as here, the proper issues had not been framed in the Courts below. In the present case, there was no appropriate issue at all in the trial Court, and in the lower Appellate Court the learned Judge framed no issues whatever. The case of *Bhagubai* v. *Tukaram* (2) resembles the present. There Sir Lawrence Jenkins stated the law in very much the same terms as those I have just stated from *Ram Kishen Das* v. *Tanda Mal* (1) and from Mayne, and then sent down the issues for determination by the lower Court. Those issues are appropriate in the present case, as we do not see our way to decide the case on the present materials on our finding that the presumption of law was wrongly raised and applied by the lower Appellate Court. Accordingly, we will send down the following issues for determination by the lower Appellate Court:

1. Was there a nucleus of joint ancestral family property and if so, what was the same?

2. Was the property claimed by the plaintiffs in this suit or any part thereof the self-acquired property of Vaman, or was it acquired under such circumstances as it became the joint property of Vaman and Hari?

3. If it was the self-acquired property of Vaman, then did it subsequently become the joint property of Vaman and Hari by being voluntarily thrown by Vaman into the joint stock with the intention of abandoning his separate claims upon it?

4. If it was or became the joint property of the brothers, was it subsequently partitioned?

5. Whether Vaman and Hari ever constituted a joint Hindu family? If so, when if at all did they separate?

As Vaman died in 1899 and Hari died in 1908, for the purpose of answering these issues Chintaman will be regarded as joint with Vaman, and Keshav with Hari, and the acts of either Vaman or Chintaman on the one hand, and Hari or Keshav on the other will be considered by the lower Appellate Court down to the date of suit.

Then both sides wish to adduce further evidence. The appellants desire to put in evidence the document referred to towards the end of the judgment of the trial Judge which was excluded on certain grounds. The respondents also wish to adduce evidence because they say that the issues in the Court below may have misled them into not calling certain evidence which they otherwise would have called. We, accordingly, give liberty to both sides to adduce further evidence. In that event the lower Appellate Court will have power to send the issues to the trial Court to have the necessary further evidence taken, and then returned to the lower Appellate Court which will record its findings in the usual way. Those findings should be returned to us within three months.

There was yet one further point raised in the case, *viz.*, that even on the Appellate Court's judgment the plaintiffs in any event should have been awarded joint possession of the property along with the

(2) 7 Bom. L. R. 169.

defendants. But that point has not been fully argued here. I only mention it to show that it has been taken before us and has not been overlooked. The draft order to be shown to us.

My brother Patkar reminds me that although it is conceded in the judgment that Shridhar left no property, yet Counsel for the respondents wants to have an opportunity of proving, if he can, that Shridhar did leave property, and that there was consequently a nucleus of joint ancestral family property.

Stay application continued.

A. N. A. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1807 OF 1926.

January 24, 1927.

Present:—Mr. Justice Dalip Singh.

PALA PARSHAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Easement—Dominant and servient tenements, partition between—Easement to discharge water, creation of—Apparent and continuous easements.

Where there is no drain either in the dominant tenement or in the servient tenement but the level of the dominant tenement is higher than that of the servient tenement so that the natural drainage would be from the dominant tenement to the servient tenement, then if there is a partition of the dominant from the servient tenement, there will be an easement to discharge rain water but not water of daily use. [p. 840, col. 2.]

Second appeal from the decree of the District Judge, Delhi, dated 16th March, 1926, reversing that of the Sub-Judge, Third Class, Delhi, dated the 10th August, 1925.

Mr. *J. N. Aggarwal*, for the Appellants.

Mr. *Kishan Dyal*, for the Respondents.

JUDGMENT.—The plaintiffs claimed a right of easement to discharge the water of their house, *i. e.*, both rain water and water of daily use (*barsati* and *istimali*) through the courtyard of defendants and door X into the Municipal lane at C as shown in the plan Ex. P-1. They alleged that defendants had stopped the passage of the water by building a wall and they prayed for an injunction preventing the defendants from interfering with their right to discharge water.

The facts are that the houses of the plaintiffs and the defendants were originally joint. Subsequently Rupa got his share partitioned and sold it to Thakar Das. It is alleged by the plaintiffs that the water of the house used to flow through the courtyard of the defendants, and the door on to the Municipal lane. The plaintiffs got the dominant tenement by pre-emption. The defendants pleaded that Rupa himself had constructed the wall to separate his own portion from the joint property and since then the water of his house passed into the Municipal lane by a new way marked Z in the plan Ex. P-1. This defence has been rejected in both Courts.

The trial Court decreed the suit following *Buta Singh* v. *Lall* (1) holding that the water of the plaintiffs' house used to flow through the courtyard of the defendants in a natural stream one or two feet wide, and that the plaintiffs had a right of easement to discharge their water. He, accordingly, gave the plaintiffs a decree for a perpetual injunction directing the defendants to construct a drain one foot wide in the obstructing wall E, D and onwards through their courtyard into the Municipal lane at point C in the plan Ex. P-1, and restraining them from obstructing the flow of water in any way.

The defendants appealed and the learned District Judge held that there was nothing to show that Rupa possessed a right of easement prior to partition. He held that it was not improbable that following the natural drainage the water might have passed down through the common courtyard, but there was no evidence of any defined channel through the courtyard. He then held that according to Halsbury's Laws of England, Volume XI, para. 610, page 313 there must be some ascertained channel for drainage before a right of easement in regard to drainage can be permitted. He also held that there was no question of easement of necessity under s. 13, because the plaintiffs could arrange to pass their drainage water into the Municipal drain at the point Z. He held that the level of the floor of the plaintiffs' house might be lower than the Municipal drain, but that was not a reason for giving an

(1) 53 Ind. Cas. 581; 101 P. R. 1919.

injunction. He distinguished *Buta Singh* v. *Lall* (1) on the ground that no drainage in the ordinary sense of the term existed in the common courtyard prior to partition. He, therefore, dismissed the suit with costs throughout.

In second appeal it is urged that the reference to Halsbury's Laws has no application whatsoever and the Counsel for the respondent has not contested this point. Counsel for the appellants relies on Peacock's Law of Easement, pages 22 and 23, on s. 13 (*f*) of the Easements Act, *Sultani* v. *Ram Saran Dass* (2), *Munshi Misser* v. *Bhimrajmam* (3) and *Khanchand* v. *Gulrajmal* (4). He contends that the finding shows that previous to partition the water was allowed to pass through the common courtyard. On the authority of *Munshi Misser* v. *Bhimrajmam* (3) he contends that there is no necessity for a drain in the servient tenement. On the authority of *Sultani* v. *Ram Saran Dass* (2) he contends that the right to discharge water is apparent and continuous. On the authority of s. 13 (*f*) of the Easements Act which states the common law on the point he contends that an easement arose on partition. In reply Counsel for the respondents contends that an easement under s. 13 (*f*) must be apparent and continuous. He contends that water for daily use is non-continuous and that neither rain water nor water for daily use can be apparent when there is no drain either in the dominant or in the servient tenement. In *Buta Singh* v. *Lall* (1) he contends that there was a drain. The judgment talks of drainage, but on referring to the record of the case it appears that there were actually two drains forming a drainage system in that particular case. In *Munshi Misser* v. *Bhimrajmam* (3) there was a drain in a dominant tenement, though there was no drain in the servient tenement. In *Sultani* v. *Ram Saran Dass* (2) it is not clear whether there was or not drainage. The ruling merely speaks of a drainage. But the facts as far as I can gather from the judgment would tend to show that there was some sort of drain. He also referred to Gale on Easement, pages 113 and 114. He further contends that as there was no mention of any easement of drainage, in the partition suit it must be considered that the decree finally decided the rights of the parties, and he cited *Sibnath Saha* v *Mohesh Chandra Saha* (5). This last point can be disposed of at once. In *Sibnath Saha* v. *Mohesh Chandra Saha* (5) it seems that the right of way was actually contested in the partition suit and was only allowed to a limited extent. There is nothing on this record to show that there was any question as to the right of drainage in the partition suit and decided in that suit. The case is, therefore, distinguishable. The point then that arises for decision is that where there is no drain either in the dominant tenement or in the servient tenement but the level of the dominant tenement is higher than the servient tenement so that the natural drainage would be from the dominant tenement to the servient tenement, then in such a case if there is a partition of the dominant from the servient tenement, does a right of easement arise and to what extent?

Now it seems to me that the question of the easement *qua* water of daily use and rain water stands on a different footing.

It may be contended that the easement to discharge rain water is both apparent and continuous, because by looking at the levels of the two properties it ought to be possible to see that the water from one will naturally flow into the other. It is also clear that the right to discharge rain water is a continuous one, and, therefore, the easement would be both apparent and continuous *qua* rain water. It must also be borne in mind that it is found that there was a hole at the point X at the other end of the courtyard and that, therefore, there was some trace of an easement to drain in the servient tenement. That being so, I hold that *qua* the right to discharge rain water there was an apparent and continuous easement and on partition this easement arose and continued.

I am, however, doubtful as to the right to discharge water for daily use. I find it difficult to see how such an easement can be either continuous or apparent without any drain in the dominant tenement to indicate it. Counsel for the respondents relies on *Sultani* v. *Ram Saran Dass* (2) where the right to water from certain bath-rooms,

(2) 49 P. R. 1900; P. L. R. 100, p. 173.
(3) 18 Ind. Cas. 824; 40 C. 458; 17 C. W. N. 306; 17 C. L. J. 368 (F. B.)
(4) 8 Ind. Cas. 939; 4 S. L. R. 180.
(5) 59 Ind. Cas. 89.

was held to be apparent and continuous. He contends that the argument of the learned District Judge that this would mean all sorts of sullage and filthy water is not correct, but the plaintiffs would only have the right to discharge water and not sullage. As stated above the facts of *Sultani* v. *Ram Saran Dass* (2) are not very clear and I am of opinion that the right to discharge water of daily use is not made out

I, therefore, accept the appeal only to this extent that I grant the plaintiffs a decree for an injunction restraining the defendants from preventing the rain water of the plaintiffs' property passing into the courtyard of the defendants and discharging itself at point X in the plan Ex. P- 1, into the Municipal drain at C. I do not accept the appeal as regards the right of water of daily use. As the parties have partially succeeded in this Court, I direct that the parties should bear their own costs throughout.

R. L. *Appeal accepted in part.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 74 OF 1926.

August 24, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice and Mr. Justice Kemp.

MATHERAN STEAM LIGHT TRAMWAY—APPELLANTS

versus

B. N. LANG—RESPONDENT.

Bombay High Court, Original Side Rules, Nos. 242, 243—Judgment of Chamber Judge, whether should state reasons—Letter to Prothonotary containing order and directing communication to parties, whether valid judgment—Adjournment, effect of—Civil Procedure Code (Act V of 1908), O. XXII, r. 2—Judgment of Original Side, requisites of.

It is not necessary on the Original Side of the High Court for a Judge in Chambers to give his reasons for making any particular order on a summons or petition, and although the fact that a Judge may adjourn a petition or summons into Court would generally mean that the matter is of greater complexity or importance, and that, accordingly, as a matter of convenience, the learned Judge should give his reasons for his final decision, yet a mere adjournment into Court does not necessarily involve that. [p. 942, col. 2.]

The provision in the Civil Procedure Code that a judgment is to state the reasons and is to be signed by the Judge does not apply to the High Court on its Original Side. [*ibid.*]

Rules 242 and 243 of the Bombay High Court Rules do not necessarily imply that a judgment of a Judge of the Original Side should contain the reasons fo his decision. [*ibid.*]

A letter addressed by a Judge of the Original Side of a High Court to the Prothonotary of the High Court specifying what his order on a particular petition is and containing directions to treat the contents as his order to be communicated to the parties is a valid judgment. [p. 943, col. 1.]

Mr. *Mulla*, for the Appellants.

Mr. *B. J. Desai*, for the Respondent.

JUDGMENT.

Marten, C. J.—In our judgment given on August 16, we directed to be determined as a preliminary issue the question whether there was any judgment validly delivered by Mr. Justice Taraporewala.

This was a petition to rectify the Company's register. The petition was adjourned into Court, and judgment was reserved by Mr. Justice Taraporewala on April 10, 1926. On April 23, the learned Judge dictated notes of his judgment to a shorthandwriter Mr. Daji. The next day Mr. Justice Taraporewala left Bombay by the mail boat *Ranpura* for England. The shorthandwriter did not transcribe the notes, but himself went on leave from April 26 to June 2.

On April 28, the learned Judge wrote a letter from the *SS. Ranpura* to the Prothonotary of this Court, which, in the ordinary course of post, would have reached him on or about May 7. The learned Judge there said that he had dictated to Daji his judgment which was to be delivered on June 7. He there states:—

"Will you kindly request Mirza, J., to deliver it for me? If the draft requires to be approved and signed by me, there will be no time for me to do so by June 7. I desire that in any event my order on the petition should be communicated to the parties in Court on June 7. I have granted all the prayers of the petition and ordered that the registers of the Company be rectified by placing the names of F. E. Dinshaw, D. K. Daji, Wadia and Balsekar (2nd to 5th petitioners), on the Company's register of share-holders, and that the Company should pay the petitioners' costs. Will you kindly treat this letter as an authority for communicating the said order to the parties in Court on June 7? You can send the draft judgment to me for approval and signature" to an address in Europe.

Then, after referring to certain other cases in which he had passed decrees and

dictated judgments, he stated that the latter did not require to be revised. He concludes:

"If necessary, will you kindly ask Mirza, J., to go through the drafts and make necessary corrections if the clerk has made any mistakes? Daji is a good clerk and takes down my judgments well, and I believe there will be no necessity to correct mistakes. You must have got the judgments now."

On June 3, the shorthandwriter transcribed his notes, and showed them to the Prothonotary. The Court re-opened after the April vacation on June 7, 1926. But as from the forenoon of that day Mr. Justice Taraporewala ceased to be a Judge of this Court as his resignation had been accepted by Government with effect from that date, Mr. Justice Mirza, who was shown the above letter of April 28, read out in Court these shorthand notes as being the judgment of Mr. Justice Taraporewala. A question then arose as to the date from which the rectification of the Company's register should take effect. That point had not been dealt with by Mr. Justice Taraporewala, and, accordingly, Mr. Justice Mirza on July 2, gave his decision on that point, *viz.*, that the rectification should take effect from November 25, 1925.

It is contended here by the appellants that there has been no judgment by Mr. Justice Taraporewala; that the unapproved and uncorrected notes dictated to the shorthandwriter did not constitute a final decision of the Judge, and, therefore, not a judgment; and that the letter of April 28 is not a judgment which the learned Judge intended to give, for it contains no grounds whatever for his decision, as is contemplated by the definition of "judgment" under s. 2 (9) of the Civil Procedure Code, and that at most it merely states his order on the petition which is not a sufficient compliance with the requirements of this Code.

On the other hand, it is contended for the respondents that at any rate the letter of April 28 amounts to a judgment in this sense, *viz.*, that it is an expression of the learned Judge's final decision as to the order he should make on this present petition; and that it contains all the materials necessary for a final order on that petition. It is further contended that we may also, under the circumstances, treat the notes dictated to the shorthandwriter as being a part of the judgment.

Now, it must be remembered in the first place that this was a petition, and that although it was adjourned into Court, it might have been heard in Chambers. This is the first time I have heard it suggested that it is necessary on the Original Side of this Court for a Judge in Chambers to give his reasons why he should make any particular order on a summons or petition. Though the fact that a Judge may adjourn a petition or summons into Court would generally mean that the matter is of greater complexity or importance, and that, accordingly, as a matter of convenience, the learned Judge should give his reasons for his final decision, yet surely a mere adjournment into Court does not necessarily involve that. For instance, supposing a summons for discovery was adjourned into Court I see no essential reason why the Judge should not merely say "summons dismissed with costs" if that was his decision. And even on questions of construction the Chancery Judges used frequently to answer merely yes or no to the various questions submitted to them on originating summonses adjourned into Court, and many other examples may be given.

Further, although the Code, no doubt, as regards Courts in the *mofussil*, requires that a judgment is to state the reasons and is to be signed by the Judge, those rules admittedly do not apply to the High Court on its Original Side. Similarly, O. XX, r. 2, which provides that "A Judge may pronounce a judgment written but not pronounced by his predecessor" does not apply to the Original Side. Again, although the Bombay High Court Rules contemplate by r. 242 that "the judgment shall be pronounced in open Court", that does not necessarily involve that the pronouncement is also to include the reasons for its decision. As regards r. 243 that rule does not say that necessarily a Judge has to give reasons for his decision. What is to be prepared for the use of the Appellate Court is a note of his judgment and of his findings on the several issues raised. Further, it is pointed out to us that the technical definition of a judgment in s. 2 (9) of the Civil Procedure Code, (*viz.*, "'judgment' means the statement given by the Judge of the grounds of a decree or order") can hardly apply without qualification to the Original Side, because in cl. 15 of the Letters Patent which deals with appeals

Bakhshi *Tek Chand*, for the Appellants.

Lala *Moti Sagar*, R. B., for the Respondents.

JUDGMENT.—One Bahadur Singh, a *Kalal* of the Sialkot District, sold 24 *kanals* 18 *marlas* of land to Sohan Singh for Rs. 4,000 by a registered deed dated the 14th June, 1924. The plaintiffs who are some of his nephews, brought a suit for the usual declaration that the sale should not affect their reversionary rights as it was without consideration and necessity. The two Courts below have concurred in dismissing the suit and the plaintiffs have preferred this second appeal.

Bahadur Singh's wife has two brothers, namely, Manohar Singh and Sukh Dev Singh, the latter of whom has a son Danishmand Singh. Danishmand Singh has been living with the vendor since his childhood as his own mother died when he was very young. Bahadur Singh in March, 1923, executed a Will in favour of this boy and the plaintiffs then sued to have the Will set aside. Bahadur Singh during the pendency of this suit revoked the Will and the suit was thereupon dropped. It was after this that the sale in question took place.

The trial Court held that though the parties were *Kalals* they were governed by agricultural custom and that the land was ancestral. It, however, dismissed the suit as it held the sale to be for consideration and necessity.

The only point argued on behalf of the plaintiffs-appellants before the District Judge was the question of necessity and that is the only point before me. The consideration for the sale in question was made up of three items:—

(1) Rs. 500 for payment to the Punjab National Bank,

(2) Rs. 1,000 to pay off a pro-note dated the 28th June, 1923, executed by the vendor in favour of Manohar Singh his wife's brother and uncle of Danishmand Singh the boy who has lived with the vendor for most of his life. It was stated in the deed that this money had been advanced to the vendor to defray the expenses of an illness he had suffered from, namely, paralysis.

(3) Rs 2,500 for personal necessity and *karobar*.

As regards the first item of Rs. 500 both Courts have held that this money was borrowed from the Punjab National Bank by the vendor some 17 days before the sale and it was re-paid shortly after the sale. Both Courts have also held that the land held by the vendor is of very poor quality and that the income therefrom is not more than Rs. 8 per mensem. They have further held that the vendor was a man of good character and that it was not even alleged that he was of an immoral character or recklessly extravagant. This being the case they have come to the conclusion that it was enough for the vendee to enquire as to the existence of this debt and to advance the money when he discovered that it was due especially as there was nothing to put him upon his guard or to make him think that there was any thing wrong with this debt.

A preliminary objection has been taken that this is a finding of fact which cannot be challenged in second appeal. I agree. In *Devi Ditta* v. *Saudagar Singh* (1) it was held that an outsider who pays antecedent debts in consideration of the transfer of property if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived and is entitled to have the alienation declared binding. This ruling covers the case of the item of Rs. 500 while *Jhandu* v. *Niamat Khan* (2) is also in point. And other authority of this Court is *Jagat Singh* v. *Ganda Singh* (3).

The next item is the one of Rs. 1,000 due on the pro-note dated the 28th June, 1923, in favour of Manohar Singh. It may be the case as remarked by the District Judge, that this item may be suspicious, but the District Judge, after considering all the circumstances, held that so far as the vendee was concerned it was a just antecedent debt within the meaning of the rulings already quoted. This again is a finding of fact, which cannot be atacked in second appeal. Besides, on the evidence this appears to have been the only possible conclusion that could be arrived at. The vendee found a pro-note which was due, the vendor was of good character and not extravagant, and it was impossible for him to come to the conclusion that it was merely a nominal debt, a document which was written in order to injure the reversioners. The appeal must also fail as regards this item.

(1) 65 P. R. 1900; P. L. R. 1900, p. 322.
(2) 54 Ind. Cas. 842; 1 Lah. 472.
(3) 69 Ind. Cas. 47; A. I. R. 1922 Lah. 301.

The last item of Rs. 2,500 was advanced for personal necessities and for trade, or rather money-lending. Both Courts have come to the conclusion that there was *bona fide* necessity for the advance of this item, Rs. 1,500 of which were after the date of the sale in dispute lent out at interest by the vendor. The findings in this question are that Bahadur Singh, the vendor, owned only about 15 *bighas* of poor land, 4 *bighas* of which were already under mortgage, this mortgage having been effected for 5 or 6 years previously and acquiesced in by the reversioners as they have brought no suit to set it aside. This in itself helps to show that the vendor was not well off and could not live upon the income from his land which was not more than Rs. 8 a month. The vendor used to be in the army, but had to retire some 25 years ago without a pension. Since then his only source of income has been his land, *i. e.*, Rs. 8 a month, together with certain sums, which had been lent out by his father, and which he had been able to collect. The sums collected, however, it has been held, must have been exhausted before the sale took place. That means that at the time of the sale he had only Rs. 8 a month as income from his land while he had six years before to mortgage his land. It was for these reasons that the Courts below held that part of this money had been advanced for personal necessities while the portion of it advanced to lend out at interest was also considered to be a prudent and proper transaction and, therefore, necessary as that was the only way to get a sufficient income to live upon. The Courts below distinguished the case of *Jats* who had been agriculturists from time immemorial who had no connection with trade, and for whom it might not be a necessary purpose to sell an ancestral land to put the money in business. But they considered that the case was different with *Kalals*, whose usual occupation was trade and service.

The finding of the District Judge was attacked before me on the ground that it was against the principle laid down in *Santa Singh* v. *Waryam Singh* (4) which was followed in *Mohammad Usman Khan* v. *Ata Mohy-ud-din* (5). The first ruling undoubtedly laid down that a *Jat* agriculturist could not alienate his ancestral land in order to start trading. Since that time, however, there have been other rulings of this Court the principal of which is *Muhammad Hassan-ud-din* v. *Saif Ali Shah* (6). That was a case where the consideration for a mortgage was said to be a small amount due on a prior mortgage together with money taken for purposes of trade. The parties were *Sayad* agriculturists. The property mortgaged was an ancestral *sarai*. In that case the mortgagor had only 10 or 11 *kanals* of land which did not supply him with sufficient income upon which he could live. For that reason the Judges who decided the case thought he was justified in alienating the *sarai* for the purposes of trade. They did not think that the Division Bench of the 1915 case intended to lay down that under no circumstances could a member of an agricultural tribe alienate ancestral property for purposes of engaging in trade.

In the case before me the facts are very similar. The vendor is a *Kalal*. *Kalals* are usually engaged in trade or money-lending and take up service. The income of his land was totally insufficient for his wants. It seems to me, therefore, that his alienating part of that land to invest it in trade in order that he should be able to live was a necessary purpose.

It was also held in *Ram Kishen* v. *Khiali* (7) that the rules prevailing among *Jats* who have been agriculturists from time immemorial that an alienation of ancestral land for the purpose of raising money to be invested in trade is not permissible cannot be properly applied to the community of *Brahmans*. In that case also it was held that the parties were governed by agricultural custom. It was held in the case that the finding of the lower Appellate Court that the share of the price of one of the vendors was required for his personal necessities was a finding of fact which could not be contested in second appeal. This case, therefore, also covers the case before me as regards the item of Rs. 2,500 as to which it has been found by the lower Appellate Court that this sum was advanced for personal necessities and for investing in trade.

(4) 24 Ind Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

(5) 73 Ind. Cas. 871; 5 Lah. L. J. 304; A. I. R. 1923 Lah. 142.

(6) 74 Ind. Cas. 451; 4 Lah. 122; 5 Lah. L. J. 246; A. I. R. 1924 Lah. 41.

(7) 78 Ind. Cas. 148; A. I. R. 1924 Lah. 685; 6 Lah. L. J. 313.

In my opinion the Courts below came to the correct conclusion and I dismiss this appeal with costs.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 25 OF 1926.

August 26, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Kemp.

PHILLIP A. WATKINS AND OTHERS —DEFENDANTS—APPELLANTS

versus

LAXMINARAYEN BASDEODAS— PLAINTIFF—RESPONDENT.

Letters Patent (Bombay), cl. 12—Cause of action arising partly within Bombay—Leave to sue—Discretion of High Court to refuse leave—Agent purchasing bullion in London—Failure to insure according to custom of London market—Loss of bullion—Suit against agent—Cause of action—Interpretation of Statutes—Practice.

The plaintiff, a bullion dealer in Bombay, sent a cable to the defendants in London to purchase gold bullion. The order was accepted by the defendants at London. The defendants insured the bullion and shipped the same. The ship was lost at sea. The plaintiff sued the defendants for the difference between the amount for which the defendants had insured and that for they ought to have insured according to the custom of the bullion market in London:

Held, (1) that no material part of the cause of action arose in Bombay; [p. 948, col. 1.]

(2) that even if any part of the cause of action arose in Bombay, leave to sue in Bombay should be refused in exercise of the discretion vested in the High Court under cl. 12 of the Letters Patent. [p. 947, col. 2.]

Per *Marten, C. J.*—Where the words of a Statute or a Charter are clear, the interpretation or application of them in any individual case should not be cut down by any arbitrary so-called rules of construction or practice which may have been adopted in essentially different cases. [*ibid.*]

Appeal against the judgment of Mr. Justice Mirza.

Mr. *Bahadurji*, for the Appellants.

Mr. *Munshi*, for the Respondent.

JUDGMENT.

Marten, C. J.—This is an exceptional case. The plaintiff an Indian merchant bought gold bullion through the defendants in London in May 1922. The bullion was shipped on *SS. Egypt* and was lost on the sinking of that ship. But the defendants had insured the gold for its value and upwards, with the result that the plaintiff was re-paid his entire cost of the purchase of the gold plus a certain additional sum. But he is not content with that. He says that the defendants ought to have insured not for say 5 or 6 per cent. above the value of the gold, as they in fact did, but for 10 per cent. above that value. Accordingly, he claims the difference between this 5 per cent. and 10 per cent.

This claim is based solely on an alleged custom of the bullion market in London: and it is thus pleaded in the plaint which, I am glad to notice, is concisely and clearly drawn, differing in that respect from most of the plaints I see in this Court. Paragraph 3 runs as follows:—

"In accord with the custom prevailing in such business, which custom is and was at all material times well known to the defendants, the defendants ought to have insured the said bullion for £ 27,400, that is to say, for an amount 10 per cent over the value of the said order and charges.

"The defendants, in fact, contrary to the said custom and in breach of their duty to the plaintiff, insured the said bullion for £ 25,600 only."

Accordingly, the plaintiff prays for a decree for Rs. 26,247-8 9 with interest from July 4, 1922, which sum represents from the particulars Ex. D the equivalent of £ 2,000 at the current rate of exchange on July 4, 1922.

The plaintiff waited nearly three years to bring his suit. He has now brought it and has obtained the leave of the Chamber Judge under cl. 12 of the Letters Patent. The defendants took out a summons to have that leave discharged. Mr. Justice Mirza has refused that leave and discharged the summons. The defendants appeal.

It will readily be seen why this case is exceptional. It depends, in our opinion, solely upon the question as to what is the custom of the London Bullion market. All the evidence must necessarily be in London. It will be for those skilled in the practice of London Bullion market to give evidence, with if necessary their books to prove instances of the practice which they say exists. The learned Judge says that there are two Indian merchants who can testify to the practice of the London market. Surely in a case such as the present, the people they deal with in London can give far better evidence of the practice of the London market than those two alleged Indian merchants in Bombay.

Moreover, if this case was brought in London, the Court hearing the case would

have the advantage of seeing the witnesses. I disagree with the opinion of the learned Judge to the effect that in a case of this sort it is immaterial to judge of the personal character of individual witnesses. If there is to be any real contest of fact in this case, I think the demeanour and standing of the witnesses has its importance. I also attach importance to this that there is a special Commercial Court in London, and that either the Commercial Judge or a London Special Jury will be in a far better position to judge of the position and standing of the witnesses from the different firms that may be called before them at the trial in London than would be the case if the suit was heard in Bombay merely on commission evidence.

I also, with great respect to the learned Judge, dissent from his view that justice can equally well be done if first of all there is to be a trial in Bombay on commission evidence, and that then if the plaintiff is successful there can be another law suit in London to enforce the judgment obtained in Bombay. This seems to me to be a roundabout way of obtaining a fair and proper decision as to what is the custom of the bullion market in London. There is also a smaller point that if these London witnesses have to produce their books, that can be easily done in London without the necessity of making and checking copy entries from the business books as would be necessary if the case had to be decided here on commission evidence taken in London. But it is not solely a question of mere convenience. It is only right and proper to look at the whole of the facts of the case. And what do we find here? The contract made in London by reason of a cable sent to London and accepted there: the bullion bought in London: the bullion paid for by the plaintiff in London through his agents the Mercantile Bank of India: the bullion shipped in London: and the assurance monies also paid in London to the plaintiff's agents the Mercantile Bank. Accordingly, all the essential facts of the case have taken place in London. As far as plaintiff's own personal evidence is concerned, I fail to see how he could help the Court as to what the custom of the bullion market in London is. In any event his evidence can be of comparatively little weight compared with those who have spent their lives in that market.

These, then, being the general considerations, what are our powers under cl. 12 of the Letters Patent? As I read that clause, I find that in cases where the cause of action has arisen only in part within the local limits of the Ordinary Original Civil Jurisdiction, then the leave of the Court is to be obtained. What does this mean? It means surely that the Court in the exercise of its discretion may either grant the leave or refuse it. Otherwise, it would be useless to insert in cl. 12 the words "with the leave of the Court" for it would be sufficient to say "if the cause of action arises wholly or in part within the local limits of the jurisdiction."

If, then, a discretion is vested in the Court as to whether leave should be granted or not, why should the exercise of that discretion be cut down by any alleged hard and fast rule as to practice. It will be remembered that we are dealing here with an exceptional case. It may well be that in an ordinary cause it is a useful general guide in the exercise of one's discretion to see whether a material part of the cause of action has arisen within the jurisdiction. But I entirely repudiate the notion that where the words of a Statute or a Charter are clear, then one's interpretation or application of them in any individual case is to be cut down by any arbitrary so-called rules of construction or practice which may have been adopted in essentially different cases. With great respect I adopt and concur in the view which Sir Norman Macleod and Mr. Justice Shah expressed in *Govindlal* v. *Bansilal* (1). There in dealing with a case of land Sir Norman says (page 1056*):—

"The question of granting leave is purely a question for the discretion of the Court and it will be considered according to the facts of each case whether it is advisable that leave should be granted. In ordinary cases leave is granted practically, as a matter of course, unless either the portion of the land or the part of the cause of action inside the local limits is so trifling that it is not desirable that the suit should be tried in the High Court...But if it is merely a question of discretion, whether or not leave should be granted, it is open to the defendant to ask the Court to exercise its discretion against the

(1) 77 Ind. Cas. 934; 23 Bom. L. R. 1049; 46 B. 249.

*Page of 23 Bom L. R.—[*Ed.*

plaintiff according to the circumstances of the case; and undoubtedly where part of the property in a partition suit is outside British India, the Courts would certainly be very slow to grant leave, so that the Court could exercise jurisdiction over such property, as undoubtedly difficulties would arise in the execution of any decree that might be passed in the suit."

What Sir Norman Macleod said there applies, I think, equally to a case not dealing with land, but with a cause of action such as we have here. After all, we are dealing with defendants who live over 6,000 miles away from this Court, and whom it is sought to bring into this Court on facts which mainly arise in their own country and to decide the question of the custom of their own market, and not that of Bombay. Looking at the case as a whole, I have no doubt that this is one of those exceptional cases where leave under cl. 12 of the Letters Patent ought not to be given. On that ground alone the decision of the learned Judge ought, in my judgment, to be reversed, and the leave revoked.

In saying this I recognise that the learned Judge has given certain grounds for the exercise of his discretion. But, again, I regard this as an exceptional case where we are justified in reversing the decision of the Judge notwithstanding that he has purported to exercise his discretion. I have already indicated that I disagree with several of the grounds on which he has based the exercise of his discretion.

Apart from that there is another branch of the cese, *viz.*, whether any part of the cause of action has arisen in Bombay. Speaking for myself, I see great difficulty in holding that any part of the cause of action has arisen here. But I recognise that there are so many authorities on this particular branch of the law in the Court that I do not wish to say anything which would necessarily conflict with the decisions either on one side of the line or on the other that have been given. I would only say that as at present advised my present view is that at any rate no material part of the cause of action arose in Bombay, and that all the material parts arose in England. Accordingly, if it was necessary so to do, I should be prepared to base my judgment on that alternative ground alone.

Accordingly, in our opinion, the leave given should be revoked, and the plaint must be returned to the plaintiff. The plaintiff will pay defendants' costs of this summons.

I should add that the plaintiff has indicated to us that he proposes at some unspecified date to present an application for amendment of the plaint. It is sufficient to say that no such application is before this Court or was before the lower Court notwithstanding that his plaint was filed over a year ago, and that the cause of action arose nearly three years before that date. We propose, therefore, to say nothing further about this proposed amendment except that it is not now before the Court, and that we do not in the least wish to encourage it. On the contrary, after this lapse of time it might be quite improper for any Court to allow any such amendment.

Kemp, J.—The plaintiff is a bullion dealer in Bombay. The defendants are described in the plaint as a partnership carrying on business in England. On May 11, 1922, the plaintiff sent a cable to the defendants requesting them to purchase £25,000 worth of gold bullion. The order was accepted by the defendants' cable of the same date. On May 16, 1922, the defendants cabled to the plaintiff "Bought £15,000 gold shipment this mail. Please cable remittance and advise through which Bank....." On May 17, 1922, the defendants cabled a further purchase of £10,000 gold and asked for a similar cable remittance and advice as to the Bank. The invoice value or the goods purchased by the defendants for the plaintiff was £24,490-12-10 and the defendants insured it for a sum of £25,600 and intimated that fact to the plaintiff on May 23, 1922.

It appears that the amount for which the defendants insured this bullion was approximately six per cent. above the value. On May 20, 1922, the steamship *Egypt* on board which the bullion had been shipped by the defendants was lost at sea. The plaintiff says that the defendants should have insured the bullion for an amount 10 per cent. over its value which, as calculated in para. 3 of his plaint, would have amounted to Rs. 27,600. On July 4, 1922, the defendants received the insurance moneys and remitted to the plaintiff through the Bank a sum of £980. The plaintiff filed this suit on June 15, 1925, claiming the difference between the percentage for which the defendants had in-

sured this bullion and the percentage at which, according to him, they should have insured it.

The defendants took out a summons before the learned Chamber Judge to revoke the leave granted under cl. 12 of the Letters Patent. The learned Judge discharged that summons, and against that order the present appeal is preferred.

Now the plaintiff's claim against the defendants is in respect of a breach of duty as agent. The plaintiff says that according to the custom of the bullion market in London the proper percentage for which the bullion should have been insured was 10 per cent. above its value. The first point for consideration in this case is what was the contract between the parties? I think it is clear that it was a contract of agency. The plaintiff employed the defendants to purchase this bullion for him in London, to ship it and generally to perform all the duties ordinarily incumbent on an agent entrusted with such business. The cause of action is obviously the alleged breach of duty by the defendants as agents in the performance of their agency.

Did any part of the cause of action accrue in Bombay? In the first place, the contract was clearly made in London because it was there that the offer of agency was accepted by the defendants. Then the performance of the contract was to be in London because it was there that the gold was to be purchased and the shipment was to be made and the duties of the agent to be performed. Incidentally, the defendants reside in London. The alleged breach of the defendants' duty arose in London, because it is there that the defendants are alleged to have insured for a percentage below the customary percentage in the London market. The damage accrued to the plaintiff in London because it was there that the insurance monies were to be paid to his agents.

As a matter of fact the defendants paid the insurance monies to the plaintiff's Bank in London (see their cables of May 16 and 17, and the plaintiff's letter of May 19, 1922); so that the payment was to be made by the defendants to the plaintiff's agent in London. This was one of the ways in which the principal in Bombay would according to the usual course of business be paid. It could not be expected that the defendants should send their representative with the money all the way to Bombay to pay to plaintiff.

It seems to me, therefore, that the whole cause of action accrued in London. That being so, there is no part of the cause of action accruing in Bombay under which leave under cl. 12 of the Letters Patent could be granted.

In coming to this conclusion I wish also to point out that the cases which have been cited with reference to suits between a commission agent and his principal in which the principal asks for the balance due at the foot of a commission agency account have no application in this case. Here the present suit is not a suit for an account. Nor is it a suit for the balance due at the foot of an account. Further, I am of opinion that even if any part of the cause of action in this case did accrue in Bombay, it is desirable that the suit should be heard in London. All the evidence relating to the custom of the bullion market in London is in London and there does not appear to me to be any necessity for the plaintiff himself to give any evidence on the point. I, therefore, think that even under cl. 12 of the Letters Patent if leave to sue were necessary this is a case in which it should not be granted.

I agree with the order proposed by the Chief Justice.

Marten, C. J.—Our order will, accordingly, be to the following effect:—Appeal allowed. Order discharged. Leave revoked. Plaintiff to pay defendants' costs of the appeal and in the Court below.

Plaint to be returned.

A. N. A. *Order accordingly.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2437 OF 1926.

January 27, 1927.

Present :—Mr. Justice Addison.

DEVI DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NIZAM DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Will—Bequest to two or more—Tenancy-in-common—Extinction of legatee's line—Reversion—Heir disinherited under Will, whether entitled to benefit of reversion—Custom (Punjab)—**Kashmiris** *of Jhelum City, whether governed by custom.*

Where property is bequeathed to two or more persons jointly, the legatees acquire the property as tenants-in-common and not as joint tenants. [p. 951, col. 1.]

Rampiari v. *Krishna Piari* (2), followed.

Where property bequeathed under a Will reverts to the testator's line on the extinction of the legatee's line, an heir of the testator cannot be deprived of the benefit of reversion on the ground that he had been originally deprived of any share by the Will. [*ibid.*]

The *Kashmiris* of Jhelum City are governed by custom. [p. 950, col. 2.]

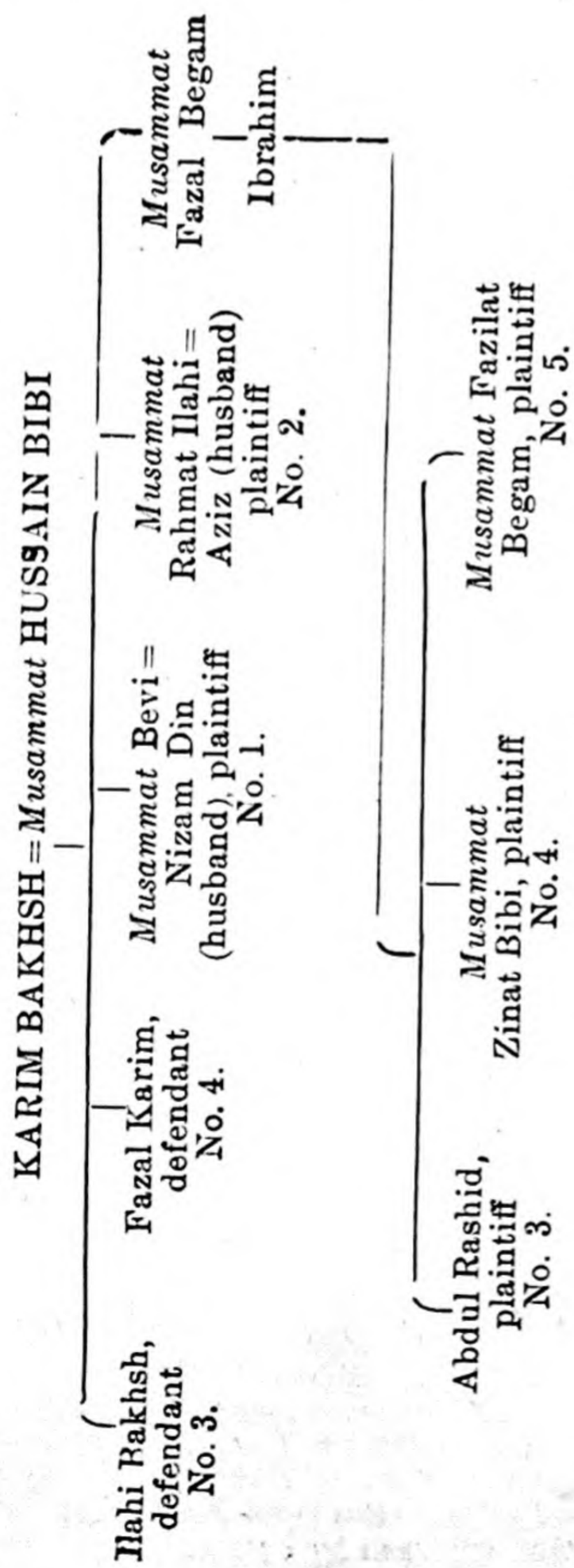
Mehtab Bibi v. *Hussain Bibi* (1), followed.

Second appeal from the decree of the District Judge, Jhelum, dated the 31st May, 1926, reversing that of the Subordinate Judge, Fourth Class, Jhelum, dated the 31st August, 1925.

Malak *Ram Lal Anand*, for the Appellants.

Sheikh *Azimullah*, for the Respondents.

JUDGMENT.—The following pedigree-table is necessary :—



The family is a *Kashmiri* one, residing in the City of Jhelum, and its members are governed by custom as laid down in *Mehtab Bibi* v. *Hussain Bibi* (1). Ilahi Bakhsh on the 3rd May, 1910, mortgaged half of a property to Devi Das and Kundan Lal. On the 19th Aril, 1922, these two persons sued on their mortgage and obtained a decree for sale of the mortgaged property. Before the sale took place the two husbands of two deceased sisters of Ilahi Bakhsh, and the children of a third sister of Ilahi Bakhsh instituted the present suit for a declaration that the half of the property which had been mortgaged by Ilahi Bakhsh, belonged to them. The whole property had belonged first of all to Karim Bakhsh who had given it to his wife *Masammat* Hussain Bibi in lieu of dower and she had bequeathed one-half to Fazal Karim and one-half to her three daughters excluding Ilahi Bakhsh. Devi Das and Kundan Lal challenged both the gift to *Musammat* Hussain Bibi in lieu of dower and the Will made by her. The trial Court dismissed the suit on the ground that the gift in favour of *Musammat* Hussain Bibi in lieu of dower had not been established. The lower Appellate Court found that this gift in her favour had been established and that the Will made by her giving the property half to Fazal Karim and half to her three daughters, had also been established and that both the gift to *Musammat* Hussain Bibi and the Will by her were valid by custom. It further held that the two husbands of two of the deceased daughters had no right in the half share gifted to the three daughters as they had failed to establish under custom their right to succeed to their wives. The lower Appellate Court, however, did not go on to determine what was the effect of these two husbands having no right in the half share of the property but was content to say that Ilahi Bakhsh in any case had no right in it as he had been originally specifically deprived of his share in the property. The lower Appellate Court accordingly granted a decree to the plaintiffs to the effect that their half share in the property that is the half share mortgaged by Ilahi Bakhsh was not liable to sale under the mortgage decree in question. Against this decision the contesting

(1) 15 Ind. Cas. 556; 17 P. R. 1913; 124 P. W. R. 1912; 249 P. L. R. 1913.

defendants have preferred this second appeal.

This appeal is for the most part concluded by the findings of fact and custom to the effect that both the gift to *Musammat* Hussain Bibi and the Will by her were proved and were valid by custom and also by the finding that Ilahi Bakhsh only lived in the property in question with the permission of his brother Fazl Karim who was a co-sharer in the property. On the District Judge's own finding, however, two-thirds of one-half, namely, the shares of the two deceased wives did not belong to their husbands. He has not decided what would happen under custom to those shares. It is certainly wrong in holding that Ilahi Bakhsh had no right to succeed to these shares as he was originally deprived of any share in the property. Ordinarily speaking, as the half share of the property was willed to the three daughters jointly they would be tenants-in-common: see *Rampiari* v. *Krishna Pairi* (2). Further, ordinarily speaking, under custom the two shares of the deceased daughters, namely, two-thirds of one-half would revert to the original donor's line. It is not clear whether the other plaintiffs who are the descendants of the third daughter would get any share of their two deceased aunts' shares. So far as the decision of the District Judge goes, plaintiffs Nos. 3, 4 and 5, *i. e.*, the children of *Musammat* Fazal Bagam, are certainly entitled to a declaration that they are owners of one-sixth of the whole property that is one-third of the mortgaged half share. This second appeal must be accepted and the matter remanded to the District Judge to decide whether these particular three plaintiffs are entitled to any portions of the shares of *Musammat* Bevi and *Musammat* Rahmat Ilahi deceased. If they are, then the share to which they are entitled from these two deceased persons should be added to the one-sixth share of the whole property to which they are certainly entitled and a decree given to the extent to which these three plaintiffs are found entitled. It is impossible for me to decide this point here and it must be remanded for this purpose. The remand is under O. XLI, r. 23, Civil Procedure Code. The parties will bear their own costs here Court-fee on this appeal will be refunded.

R. L. *Case remanded.*

(2) 63 Ind. Cas. 301; 43 A. 600; 19 A. L. J. 608.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 50 OF 1926.

September 17, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Kemp.

V. R. NAIK—DEFENDANT—APPELLANT

versus

BALVANT SITARAM MAHINDRE—PLAINTIFF—RESPONDENT.

International law—Suits in foreign country and in British India between same parties on same subject-matter—Stay of foreign action—Submission to jurisdiction of British Court—Oppressive and vexatious actions—Jurisdiction sparingly exercised—Civil Procedure Code (Act V of 1908), s. 10.

A non resident foreigner who enters appearance without protest in a suit filed against him in a British Court and files a counter-claim, submits to the jurisdiction of the British Court, and can be restrained by that Court by injunction from proceeding with a suit in a Foreign Court between the same parties and relating to the same subject-matter. [p. 953, cols. 1 & 2.]

Mulchand Raichand v. *Gill & Co.* (1) and *Narayan Vithal Samant* v. *Jankibai Sitaram* (4), followed.

But this jurisdiction is of a delicate character and requires to be exercised with caution. [p. 953, col. 2.]

A Court will not interfere to restrain an action in a Foreign Court unless it is vexatious or oppressive. [*ibid.*]

Appeal from an order of Sir Norman Macleod, KT., Chief Justice, dated the 23rd April, 1926.

Mr. *G. N. Thakor*, for the Appellant.

Mr. *Kamdar*, for the Respondent.

JUDGMENT.

Marten, C. J.—This is an appeal from an order of Sir Norman Macleod restraining the defendant from proceeding with the Suit No. 45 of 1335 *Fasli* year filed by him against the plaintiff in the Court at Nandod in the Dominions of His Exalted Highness the Nizam of Hyderabad pending the hearing and final disposal of the Bombay suit.

The appeal raises question of some importance and difficulty, first, as to the jurisdiction of the learned Judge to make an order of that nature and, secondly, whether the jurisdiction was properly exercised on the materials before him. Unfortunately we have no judgment of the learned Judge and no personal notes of his. We are informed by Counsel that the case was heard in the learned Judge's private room, and that, accordingly, it was impracticable for Counsel to take notes of the judgment. However that may be, we regret that we are without the assistance which we should normally get and which we should particularly value in the present case.

Shortly stated the facts are that by a contract made in Bombay on August 16, 1923, the plaintiff agreed to sell certain machinery to the defendant for the use of the latter's factory at Nandod in the Hyderabad State. The specification, Ex. A, to the plaint, and the letter from the plaintiff of even date, Ex. 1 to the written statement, show that delivery was to be F O. R. Bombay and that payment was to be made in Bombay, and that Rs. 12,500 were paid forthwith in part-payment. Some disputes appear to have arisen between the parties as to the nature of the goods delivered, and, accordingly, we find by a letter of September 25, 1924, Ex. B to the plaint, that the plaintiff was prepared to make good a shortage in certain articles, and to allow a sum of Rs. 1,820 off the contract price. That letter stated that the shortage was to be supplied by the plaintiff to the Naik Factory at Nandod in fifteen days. But it seems to us that it was not intended that the terms of delivery of the main contract, *viz.*, F. O. R. Bombay, were thereby to be altered.

Then follows certain other correspondence in October 1924, which is set out in Ex. 2 to the written statement and there is certain other correspondence in September and November 1925 which is Ex. 5 to the written statement. I may here state that the correspondence has been set out in our paper-book in an inconvenient way, for some of it is in one place and some in another. Then going to Ex. D to the plaint, one finds that by a letter of December 12, 1925, the plaintiff called on the defendant to pay Rs. 9,304 within seven days or otherwise the plaintiff would take proceedings to enforce payment. This resulted in the defendant instituting on January 6, 1926, proceedings in the Nandod Court the plaint in which is set out as Ex. A to the affidavit sworn on behalf of the plaintiff on April 19, 1926. This pleading claims a decree against the Bombay party for the recovery of the amount due to the Hyderabad party after going through the accounts of the Bombay party. It describes the Bombay party as being "a resident of Latur in His Exalted Highness the Nizam's Dominions at present residing in No. 93 Fort Street, Bombay." It pleads an agreement by the Bombay party to deliver the machinery at Nandod, and also an agreement to re place certain articles and deliver them at Nandod, and that as it was agreed to supply the articles at Nandod and the oral promise was also made at Nandod the Court had jurisdiction to try the case. The pleading further says that unless the whole account is shown by the defendant the actual amount under dispute cannot be ascertained. The pleading alleges specifically that the cause of the complaint arose by the Bombay party not supplying machinery of the make and type as specified in the contract; that some parts were of Indian manufacture whereas they should have been of British make, and they were not delivered during the specified period, and some were booked to places other than Nandod. The pleading also states that the Hyderabad party will file another suit against the Bombay party for the loss suffered by the firm because the machinery and other articles were not delivered during the specified period.

It appears that the Bombay party was not served with notice of this Nandod suit until April 12, 1926. Meanwhile he had instituted his present suit in this High Court on January 28, 1926, claiming the sum mentioned in his notice of December 12, 1925. The suit came on as a Short Cause on March 12, 1926, when a written statement was put in by the defendant and also a counter-claim. The suit was, accordingly, transferred to the Long Cause List and the hearing fixed for July 5. In that written statement the Hyderabad party sets out his case in great detail, and includes in it a portion which he had omitted from the Hyderabad suit, *viz.*, a claim for damages for delay in delivery. And whereas his claim in other respects in the Hyderabad suit was for Rs. 2,000 his corresponding claim in the Bombay suit is for Rs. 18,021. This, we are explained, is due to the operation of the Court-fees in the Hyderabad State. He, accordingly, counter claimed for Rs. 6,960 for damages for delay, and another Rs. 18,021 for damages for divers breaches of covenant which are set out in the particulars, Ex. 3, to the written statement. In those particulars he includes the deduction of Rs. 1,820 arrived at on September 25, 1924.

Consequently, so far as the evidence before us goes, the present plaintiff was unaware of the proceedings in the Nandod Court until he saw the statement in para. 8 of the written statement. We are told by Counsel that it was not till March 11, 1926, that a copy of the written state-

ment was supplied to the plaintiff. It will be seen that the pleading there does not protest against the present suit except to this degree that the defendant pleads that the present suit has been filed in the Bombay High Court as a counter-blast to the Nandod suit.

It appears that the hearing was fixed for the Nandod suit on April 24, 1926. Accordingly, on April 19 the plaintiff took out a notice of motion for an injunction. That came on for hearing on April 23, and although an affidavit was put in asking for an adjournment, that was refused, no doubt, having regard to the close proximity of the date of hearing in the Nandod suit. The motion was, therefore, heard without having a detailed answer put in by the defendant, and the only affidavit, the one asking for an adjournment, was put in by his manager in Bombay. It is perhaps unfortunate that the course was not adopted of adjourning the motion for say a fortnight or three weeks, and granting an injunction merely over that period. However, that was not the course actually taken, and an injunction was granted till the trial of the action.

Now, in considering this question I wish to make it clear in the first instance that this is not an application to stay the Bombay suit. There is no question but that the Bombay suit will go on.

Turning next to the question of jurisdiction, we think that there is jurisdiction in this case to grant an injunction, seeing that the defendant has submitted to the jurisdiction by entering an appearance without protest, and, moreover, has filed a counter-claim in this very suit. We recognize, of course, that he is a resident in the Nizam's Dominions, but seeing that by his counter-claim he has in effect become a plaintiff suing in this Court, we think that gives us jurisdiction over him as a litigant before us with regard to the subject-matter of the suit. It is clear that the subject-matters of both suits are the same, *viz.*, the rights of the parties under the contract of August 16, 1923, with reference to the sale and delivery of the suit machinery.

The matter came up before this High Court in *Mulchand Raichand* v. *Gill & Co.* (1) which was also an appeal from Sir Norman Macleod's decision, and there the Court held that it had jurisdiction in a case of that nature. I recognize, speaking for my own judgment, that the views there expressed on the points of law which I am now on may be said to be *obiter*. But nevertheless I would like to take pages 970* and 971* as part of my judgment in the present case, containing as it does, references to Halsbury's Laws of England, Vol. XVII, page 263; *Dawkins* v. *Simonetti* (2), a decision of the English Court of Appeal; and Dicey's Conflict of Laws (1908 Edition), pages 44, 45 and 48, and also *Carron Iron Co.* v. *Maclaren* (3). Mr. Justice Heaton in giving his judgment in *Mulchand Raichand* v. *Gill & Co.* (1) held that the Judge has complete jurisdiction to make all orders appropriate to the trial and progress of the suit, and that he must have that power over the parties which is essential to a prompt and complete disposal of the suit before him.

There had previously been a decision of Sir Norman Macleod to the same effect in a Full Bench case of *Narayan Vithal Samant* v. *Jankibai Sitaram* (4). But as the judgment of the remaining Judges was not based on that ground, it cannot be regarded as a decision of the Full Bench itself.

Holding then as we do that we have jurisdiction in this case, the next question is whether this is a proper case in which it should be exercised. Now I think it reasonably clear that the jurisdiction is one of a delicate character, and that it requires to be exercised with caution. The English cases of *Cohen* v. *Rothfield* (5), *McHenry* v. *Lewis* (6) and *Hyman* v. *Helm* (7) which are all decisions of the English Court of Appeal, fully establish that proposition. So far as the jurisdiction in England is concerned, they go to show that there must be something vexatious or oppressive before the Court will interfere to restrain an action in a Foreign Court So, too, in *Vanichand Rajpal* v. *Lakhmichand Maneckchand* (8) Mr. Justice Pratt refused in that case to stay proceedings in the Court of Morvi,

(1) 53 Ind Cas. 518; 21 Bom. L. R. 963.

(2) (1881) 29 W. R. 228 at p. 229; 50 L. J. P. 30; 44 L. T. 266.

(3) (1855) 5 H. L. C. 416 at p. 441; 24 L. J. Ch. 620; 3 W. R. 597; 10 E. R. 961; 101 R. R. 229.

(4) 30 Ind. Cas. 560; 39 B. 604; 17 Bom. L. R. 655.

(5) (1919) 1 K. B. 410; 88 L. J. K. B. 468; 120 L. T. 134; 63 S. J. 192.

(6) (1883) 22 Ch. D. 397; 52 L. J. Ch. 325; 47 L. T. 549; 31 W. R. 305.

(7) (1883) 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258.

(8) 53 Ind. Cas. 395; 21 Bom. L. R. 955.

*Page of 21 Bom. L. R. [Ed.]

but it would appear there at page 960* that the Morvi suit provided a more complete remedy than the British suit. That case went to the Court of Appeal, but was decided on the point that the order of Mr. Justice Pratt was not a judgment and, therefore, no appeal lay.

I do not wish to be led into a precise and accurate definition of the circumstances under which a Court in British India will or will not exercise that jurisdiction. I do not think that such a definition could easily, if at all, be framed. But I do think that we have to consider whether it would be a real hardship on the plaintiff if his suit which was instituted first was allowed to proceed in the Hyderabad suit. I have to the best of my ability weighed carefully all that has been said by Counsel for the plaintiff in this respect. I recognize that the Bombay suit is the more complete suit of the two. I recognize that the plaintiff was the first person to give his notice, and that defendant by his written statement and counter-claim in the Bombay suit would appear at that time to have been content to have the whole dispute decided here.

But I am unable to say on the present materials that necessarily no part of the cause of action arose at Nandod, and that the Nandod Court has no jurisdiction to hear the suit. There are allegations made in the Hyderabad suit, which presumably the Hyderabad Court will test on that point. If the Hyderabad Court has no jurisdiction then no doubt on an application by the Bombay party it will proceed to determine whether under the laws of the Hyderabad State it has jurisdiction to hear the suit that has been filed there.

But, on the whole, without going into further details in this case, I do not think in the present case the plaintiff has established a sufficiently satisfactory case for us to exercise this particular jurisdiction in his favour. As I have said in the beginning of my judgment we are without the reasons which actuated the learned Judge in granting the order, and, accordingly, we must decide according to our own opinion on the evidence before us.

In the result, therefore, I would allow the appeal, and discharge the order made and dismiss the motion.

Costs of the motion and of the appeal to be costs in the cause.

Kemp, J.—The plaintiff-respondent sent his notice of demand in this case on December 12, 1925, demanding payment within seven days and threatening legal proceedings in default. The appellant-defendant filed his suit on January 6, 1926, at Nandod in His Exaltered Highness the Nizam of Hyderabad's territories. The plaintiff-respondent filed his suit in Bombay in this Court on January 28, 1926. He took out a notice of motion on April 19, 1926, and on April 23, 1926, Macleod, C. J., passed an order staying the Nandod suit. From that order this appeal is preferred.

It remains to be stated that on March 6, 1926, the defendant filed his written statement and a counter-claim to the plaintiff's suit here. The defendant's appearance was not under protest.

Under the circumstances I am of opinion that this Court had jurisdiction to act against the defendant *in personam* as the defendant had submitted to the jurisdiction without doing so under protest. Where a person appears unconditionally or without protest he submits to the jurisdiction on the whole case. See *Manitoba and North-West Land Corporation* v. *Allan* (9). I think, therefore, the learned Chief Justice had jurisdiction to pass an order of stay in the Nandod suit.

The next point for consideration is whether he should have passed such an order. Unfortunately he has given no reasons for his judgment and we are, therefore, not in a position to say what facts he took into consideration and what facts he did not. *Prima facie*, there is nothing oppressive in a defendant filing a suit in his country when a similar suit is filed against him by his defendant in this Court. The decided cases in England show that a foreigner has a right to prefer—if he thinks he can derive any advantage therefrom—the procedure of the Court of his own country. The Courts in England have been slow to exercise their jurisdiction *in personam* in such a case. They have laid down that it should be shown that the plaintiff in the English suit should show that there is no advantage which his foreign defendant could obtain from the procedure in the foreign country which he cannot equally obtain in the English suit. [*Cohen* v. *Rothfield* (5), per Scrutton, L. J., at page 414*.] Moreover, there is do presumption that the multiplicity of actions is vexatious

*Page of 21 Bom. L. R.—[*Ed.*]

(9) (1893) 3 Ch. 432; 63 L. J. Ch. 156; 69 L. T. 558.

Page of (1919) 1 K. B.—[*Ed.*]

and a special case must be made out to induce a British Court to interfere. [*McHenry* v. *Lewis* (6).] It lies on the English plaintiff to show that the foreign action brought by his defendant is vexatious or oppressive. In *Vanichand Rajpal* v. *Lakhmichand Maneckchaud* (1) Mr. Justice Pratt refused the stay of a suit in Morvi State and that decision was upheld in appeal. Nevertheless, I think it is necessary to proceed with caution in India in applying the principle laid down in the English cases, which proceed on the assumption that the foreign Courts are Courts with an established system of jurisprudence tested by time and to which litigants can safely have recourse without the fear of not obtaining substantial justice.

Is then the present suit at Nandod vexatious or oppressive? It certainly seems to have been filed by the defendant in the desire to be first in the field with his litigation, after the plaintiff had threatened him with a suit in this Court. The plaintiff's demand was made on December 12, 1925, and the defendant's suit at Nandod was filed on January 6, 1926. Moreover, the defendant does not appear to have been anxious to give the plaintiff intimation of his Nandod suit, and the first intimation that the plaintiff had of it was when the defendant filed his written statement on March 6, 1926. The defendant did not serve his summons on the plaintiff till April 12, 1926. He says he was unable to do so before but this is questionable. Moreover, in the Nandod suit the defendant reserved his right to sue for damages on the alleged failure of the plaintiff to supply the goods in time. He has, however, in the suit in this Court claimed such damages in his counter-claim. So, really, all the disputes between the parties will be disposed of in the suit here whereas there might have to be another suit for damages if the defendant proceeds with his suit at Nandod. It further appears that the cause of action really arose entirely in Bombay. Unfortunately, the difficulty in this case is that the order made on the notice of motion by the Chief Justice was made practically on the facts stated by the plaintiff. The defendant's agent here filed an affidavit in which he asked for time in order that his principal might have an opportunity of replying to the plaintiff's affidavit. That application was refused and the order of stay was passed.

The result is we do not know really what answers the defendant would have made to the facts alleged by plaintiff. He claims that the written agreement was varied by an oral promise to deliver some of the goods, at any rate, in the Hyderabad State. He also claims that there was short delivery and that in some cases country-made goods were supplied instead of English goods under the contract, and the correspondence shows that he appears to have been trying to obtain from the plaintiff an account of the various deliveries. That really is what I think he means in his letter of November 10, 1925, when he says that he will pay whatever is due. Moreover, there was a dispute about a credit for Rs. 5,000. On the whole I am satisfied that there seems to be a real dispute in this case between the parties However dilatory the defendant may have been in proceeding with the Nandod suit, I cannot say in the particular circumstances of this case that that suit was either oppressive or vexatious. I wish here to point out that this does not appear to be the situation in which, *e.g.*, a commission agent whose claim has been practically admitted by his constituent, files a suit in Bombay and is countered by a suit filed by the constituent in a foreign or up-country Court. Assuming always that the circumstances under which the Court has jurisdiction to act *in personam* are satisfied, the Court would doubtless pass a proper order for stay in such a case. I agree the appeal should be allowed.

A. N. A. *Appeal allowed.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 686 OF 1926.
January 18, 1927.
Present :—Mr. Justice Addison.
DEVI DITTA—PLAINTIFF—PETITIONER
versus
BABU RAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5, Sch. I, Art. 158 —Objections to award—Limitation—Court's power to extend time.

Objections to an award must be filed within ten days from date on which it is submitted to the Court under Art. 158, Limitation Act, and the Court has no power to enlarge this period.

The provisions of s. 5 of the Limitation Act do not apply to applications falling within Art. 158 of Sch. I of the Act.

Petition for revision of the decree of the Additional Subordinate Judge, Fourth Class, Una, District Hoshiarpur, dated the 12th May, 1926.

Mr. *Duni Chand*, for the Petitioner.

Mr. *I. C. Chopra*, for the Respondent.

JUDGMENT.—During the pendency of a suit the parties referred the subject-matter of the suit to the arbitration of Pandit Narain Chand who on the 12th of April, 1926, in the presence of the parties filed his award in Court. The Court fixed the 26th of April, 1926, as the date up to which parties could file objections to the award. On the 26th of April, 1926, objections were filed but the Court has held that these objections were time-barred under Art. 158 of the First Schedule to the Indian Limitation Act as they were not filed within ten days after the award presented to the Court by the arbitrator in the presence of the plaintiff. As the Court held that the objections were barred it proceeded to pass a decree in accordance with the award. Against the order of the Court refusing to entertain the objections the plaintiff has applied here on the revision side.

Article 158 of the First Schedule of the Indian Limitation Act is quite clear. Ten days is the time within which the plaintiff should have presented his objections to the award after it was filed in Court in his presence. The objection should, therefore, have been presented by the 23rd of April and not on the 26th of April. The words of s. 5 of the Indian Limitation Act show that this section does not apply to such applications. There is a direct authority in the case of *Surya Narain Jha* v. *Banwari Jha* (1) a decision of the Calcutta High Court in a case very similar to the present in which it was held that no application having been made within the time prescribed by Art. 158 it was not competent to the Court to extend the time prescribed by that Article.

It was argued, however, that the petitioner was deceived by the order of the Court, this appears to me to be of no consequence. The law is quite clear. Ten days was the proper period. That time could not be extended by the Court and it was for the plaintiff if he desired to present objection to do so within the period prescribed by law.

The result is that this revision must fail and I dismiss the petition but leave the parties to bear their own costs here as the point raised is a novel one.

R. L. *Petition rejected.*

(1) 17 Ind. Cas. 7; 18 C. L. J. 35; 18 C. W. N. 626.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 320 OF 1925.

July 23, 1926.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

CHHAGANLAL SAKARLAL VANI —DEFENDANT—APPELLANT

versus

JAYARAM DEORAJ THAKAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 99, O. XXXIV, r. 5—Omission to draw up final decree, effect of—Preliminary decree, whether can be executed —Suit against wrong legal representative—No objection by true legal representative—Decree, binding nature of.

Where a Court has omitted to draw up formally a final decree in a mortgage suit, if the preliminary decree has been made absolute, this decree coupled with the order making it absolute may be taken to be the final decree. [p. 958, col. 2.]

An omission to draw up a formal final decree may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable. Section 99 of the Civil Procedure Code will cover such an error where it does not affect the merits of the case or the jurisdiction of the Court. [p. 959, col. 1.]

A suit upon a mortgage executed on behalf of a minor was instituted after the minor's death against his step-mother as his heir. The minor's grandfather who was made a party to the suit contended that he was not a necessary party and his name was struck off. In execution of the decree passed against the step-mother, the person who claimed under a transfer from the step-mother and the grandfather contended that the decree was invalid inasmuch as the grandfather and not the step-mother was the legal heir:

Held, (1) that it must be taken to have been decided for the purposes of the suit that the step-mother was the proper heir and that the decision was binding on the transferee; [p. 960, col. 1.]

(2) that it was not open to the transferee to object to the execution of the decree on the ground that he had obtained some interest from the grandfather independent of the minor's interests. [*ibid.*]

[The necessity of following the rules of the Civil Procedure Code and the forms, relating to preliminary and final decrees pointed out.]

Second appeal from the decision of the Assistant Judge at Thana, in Appeal No. 102 of 1924, confirming the decree passed by the First Class Subordinate Judge, at Thana, in *Darkhast* No. 69 of 1921.

Mr *G. N. Thakor* (with him Messrs. *D. C. Virkar* and *G. M. Joshi*), for the Appellant.

Mr. *P. B. Shingne*, for the Respondents.

JUDGMENT.

Shah, J.—This appeal arises out of execution proceedings. It has given rise to somewhat prolonged arguments. Having regard to the points which have been raised in support of the appeal, it is desirable that I should state the facts which have given rise to this appeal. It appears

that one Dagdu died, leaving a minor son Rangnath, two widows Santubai and Kashibai, his grandfather Govind, and an uncle, Yeshvant. It appears that in 1896, Santubai passed a simple mortgage on behalf of her minor step son Rangnath in favour of Jayaram, plaintiff No. 1. Apparently Rangnath's natural mother, Kashibai, was not alive then ; and we do not know exactly when Dagdu died. Anyhow when the mortgagees filed a suit on this mortgage in 1911, they joined Santubai, Govind Balaji, the paternal grandfather of Rangnath, and Yeshvant, the uncle of Rangnath, as defendants. Rangnath had died before the suit. It was stated in the plaint as follows :—

"The debtor Rangnath, a minor, is dead, and defendant No. 1 has passed the mortgage-deed for her minor son and after his death she is his heir, and defendant No. 2 is the grandfather (father's father) of the minor Rangnath and defendant No. 3 is the paternal uncle of the minor Rangnath. Defendants Nos. 2 and 3 are reversionary heirs of the deceased Rangnath."

In this suit Govind, the grandfather, filed his written statement in which he pleaded that really the property mortgaged belonged to him. He did not contest the recital in the plaint that Santubai was the heir of the deceased minor Rangnath, and he pleaded that he had been unnecessarily joined in the suit. It seems that a few days before the decision of the suit, the Court directed the names of Govind and Yeshvant to be struck off, and ultimately on September 18, 1911, the following decree was passed :—

"Rs. 5,000 became due to the plaintiffs under a mortgage-deed Ex. 18 on the date on which the suit is filed. It is hereby further ordered as follows :—If defendant No. 1 pays in Court on March 18, 1912, or before that day Rs. 5,000 and interest thereon at the rate of nine per cent. per annum from the date of the filing of the suit till payment and costs of this suit as mentioned below, the plaintiff do hand over all the documents they may have got in their possession or power in respect of the mortgaged property to defendant No. 1 or to that person whom she will appoint, and if it is found necessary to do so, that property free from mortgage and free from all the encumbrances created on the same, by the plaintiffs or any persons claiming under the plaintiffs or created by the persons under whom they may be putting forward their claim, should be re-conveyed to the defendant No. 1. It is further ordered as follows :—If defendant No. 1 does not pay the aforesaid amount as mentioned above the entire mortgaged property, or a sufficient portion thereof should be sold and the amount of sale-proceeds should be paid into Court and should be utilized towards payment of the amount directed to be paid to the plaintiffs, of the subsequent interest and of subsequent costs, and if there remains any balance it should be returned to defendant No. 1. The suit against defendants Nos. 2 and 3 is dismissed."

Thereafter, in December, 1913, the plaintiffs filed *Darkhast* No. 264 of 1913 in which they prayed as follows:—

"The decree should be made absolute and interest hereafter should be caused to be paid at nine per cent. per annum. If the amount be not paid by defendant No. 1 the immoveable property mortgaged and shown in the accompanying statement of claim should be sold and the amount be paid to plaintiffs."

On February 3, 1914, the Court made the following order :—"The defendant does not appear. Decree for sale made absolute." Nothing further was done on this *darkhast*. Two *darkhasts* were filed—one in April, 1915, and another within three years in April, 1918. In February, 1920, another *darkhast* was filed, but all these *darkhasts* really were not proceeded with and apparently nothing was done. Then, on April 19, 1921, the present *darkhast* was filed. Santubai had died in 1920. Before she died, Santubai and Govind had joined in executing a conveyance of the mortgaged property to one Chhaganlal Sakarlal Vani. In the present *darkhast* the description of the parties was given in this way:—Santubai deceased by his legal representatives original defendants Nos. 2 and 3, and Govind Balaji (defendant No. 2) having died he was further described as represented by his legal representative Yeshvant Govind, original defendant No. 3. It may be mentioned that the transferee Chhaganlal Sakarlal Vani was brought on the record in October, 1923. Thereafter the description of the parties was amended by mentioning the original defendants Nos. 2 and 3, *i. e.*, Govind and Yeshvant, as the legal representatives of the deceased Rangnath. This was done on March 15, 1924.

After the transferee from Govind and Santubai was brought on the record, several contentions were raised. Some of them were based on the allegation that Santubai being the step-mother of Rangnath was really not the heir of Rangnath according to Hindu Law, but Govind, the paternal grandfather, was the nearer heir. Evidence was adduced to show that Santubai was the step-mother of Rangnath and not his natural mother. It was held that the decree, of which execution was sought, was legally made final and was capable of execution; that the application for execution was maintainable; and that Santubai was not the legal representative of Rangnath. The Court ordered execution to proceed. It was held, that a separate suit was necessary for the purpose of determining whether the mortgage-decree under execution was valid or not, and that it was not open to the added parties to contest the validity of the mortgage-decree in execution proceedings. It was also held that the added parties were the representatives of the judgment-debtor.

The transferee Chhaganlal appealed to the District Court, and the learned Assistant Judge who heard the appeal, found that it was not open to the appellant to raise the contention that Santubai was not the heir of Rangnath, and to contend that the decree obtained against her was not binding upon him. He held that the *darkkast* was not premature on the ground that the decree was not made final. The learned Assistant Judge also held that the *darkhast* was not time-barred, and accordingly, dismissed the appeal.

The transferee has now appealed to this Court, and four points have been raised in support of his appeal. First, it is urged that there is no executable decree because the final decree, which would be the only executable decree, has not been passed, and the decree which is sought to be executed is only a preliminary decree. Secondly, it is urged that as the heirs of Rangnath were brought on the record on March 15, 1924, *i. e*, more than three years after the preceding *darkhast* which was in February 1920, the execution was barred. Thirdly, it is urged that the decree is invalid because Santubai was never the heir of Rangnath according to Hindu Law, so long as Govind, the paternal grandfather, was alive. And, lastly, it is urged that in any case nothing more is liable to be sold in execution than the right, title and interest of Rangnath.

As regards the first point, it is perfectly true to say that there was a preliminary decree passed, and there was the order making the decree for sale absolute; but there was no formal final decree drawn up. Technically, therefore, it is right to say that there is no final decree which could be executed. This contention has become possible because of the laxity which prevails in the lower Courts in drawing up decrees in mortgage suits. In the present case the preliminary decree was drawn up in the proper form provided by the Code of Civil Procedure. Under r. 5 of O. XXXIV, when such payment as is directed by the preliminary decree is not made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold. And when an order making the decree absolute is made, the final decree has to be drawn up. The question that now arises is whether, at this distance of time, nearly fifteen years after the decree, and twelve years after the order making the decree absolute was made, the execution can go on or not.

Having regard to the terms of the preliminary decree which has been made absolute, we could only attribute the omission to have a final decree drawn up to a misapprehension on the part of the Court, as well as the parties concerned as to the necessity of having a final decree formally drawn up. The parties seem to have gone on all these years on the footing that the preliminary decree, which was made absolute, was the formal expression of the final decree under r. 5 of O. XXXIV, as from the date when it was made absolute. I am of opinion that, though the final decree has not been formally drawn up, on the terms of the preliminary decree, which has been made absolute, that decree coupled with the order may be taken under the circumstances to be the final decree. In its ultimate analysis, it is only a formal defect. It is conceivable that a formal defect of this nature may lead to a real difficulty in the way of execution; and it is necessary to see that even such a formal defect does not creep in, and that a formal decree is drawn up when the decree is made final. But, under the circumstances of this case, we are not prepared to hold that there is no executable

decree. The result of allowing a contention of this nature at this distance of time will be that a decree will have to be drawn up formally now and a fresh beginning will have to be made in the way of execution after the lapse of so many years. That is a result which should be avoided so far as it is legally possible to do so. On this point there is no express decision which can help the Court one way or the other. But having regard to the observations in *Jawahir Mal* v. *Kistur Chand* (1) it seems to us that an omission of this kind may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable, as they are in this case. Section 99 of the Code of Civil Procedure would cover such an error or irregularity, as under circumstances such as we have in this case, it does not affect the merits of the case or the jurisdiction of the Court.

The second point is that when the heirs of Rangnath were properly described on the record of the present application on March 15, 1924, the execution was time-barred. It seems to me that the point is untenable. In the first place, when the *darkhast* was filed, the persons were properly described as the heirs of Santubai, who was the judgment-debtor under the decree. The subsequent amendment seems to have been made on the contention raised by the transferee after he was brought on the record. I am not at all sure that that amendment was necessary or correct. But to treat that amendment as a ground for holding that the application is time-barred is wholly unsound. There is no doubt that the application as presented in April, 1921, was properly presented, and Govind, and after his death, his legal representative Yeshvant, were brought in as legal representatives of Santubai who was originally sued as the heir of the deceased mortgagor Rangnath.

As regards the third point, it is urged that the decree is a nullity, as it was passed, not against the true heir of Rangnath, but against one who was not his legal heir according to Hindu Law. In other words, it is urged that according to Hindu Law under the Vyavahara Mayukha, by which the parties are governed, the grandfather being the preferential heir over the step-mother, the decree was a nullity as it was passed against the step-mother. It appears that in both the lower Courts, the point was conceded that the grandfather was the preferential heir, and even here when the appeal was first argued it was so assumed. In view, however, of the difficulty of this question, we have heard further arguments to-day on the point. It does not appear to me to be free from doubt and difficulty, as it appeared to the lower Courts. I do not desire, however, under the circumstances of the case, to examine the question whether under the Vyavahara Mayukha the step-mother is to be preferred as an heir to the grandfather or not. It may be said that, having regard to the position which she would occupy as the widow of the nearest *gotraja sapinda*, she would come in next after the named heirs in the compact series of heirs, and from that point of view perhaps it may be said that she is to be preferred to the grandfather. There has been no decision on this point. In support of the view that the grandfather is to be preferred, Mr. Thakor has urged arguments on the interpretation of texts which require consideration. In the view I take of the case, it is not necessary to examine this question further. I prefer to leave it undecided and rest content only by pointing out that the assumption which has been so readily made in the lower Courts may require to be considered.

Assuming, for the sake of argument, that Santubai was not the proper heir according to Hindu Law, the fact remains that she was described as an heir at the time the suit was filed. The grandfather, who is now put forward as the preferential heir, was a party to that suit. He filed his written statement, and he did not contest in any sense the correctness of the recital in the plaint to which I have already alluded. Thus the suit proceeded on the basis that Santubai was the legal representative and the heir of Rangnath. Govind had filed a written statement and his name was ordered to be struck off the record. He did not then contest this allegation which was made by the mortgagee in the suit; but, on the contrary, he pleaded that he was unnecessarily joined in the suit. It seems to me, therefore, that in all subsequent proceedings in the suit, it must be taken, at least so far as Govind and the person claiming under him are concerned, that Santubai was properly

(1) 13 A. 343; A. W. N. (1891) 119; 7 Ind. Dec. (N. S.) 217.

joined as the legal representative of Rangnath, and that the decree was properly passed on that basis, that is, it must be taken to have been decided for the purposes of the suit that Santubai was the proper legal heir of Rangnath.

That principle has been recognised by the Privy Council in *Genry Henry Hook* v. *Administrator-General of Bengal* (2) and also *Ramachandra Rao* v. *Ramachandra Rao* (3). It would lead to very anomalous results if any other view were taken of the position of Santubai with reference to this litigation. Apart from that it is hardly open to the transferee, who comes in as the representative of Govind and Santubai, as he has got his conveyance from them, to question the validity of the decree in execution. It seems to me that it would not be open to him to do so in execution proceedings. But in the view which I take of the finding as to Santubai being the heir of Rangnath for the purpose of this litigation, I hold the decree to be valid and binding upon the parties, and as the present appellant claims under her, he is equally bound by that decree.

The last point, namely, that it is only the right, title and interest of Rangnath that is liable to be sold, is a point which does not affect the execution of the decree. The original mortgagor was Rangnath as represented by his step-mother Santubai. When the property is put up for sale, in effect, it will be the right, title and interest of the mortgagor as now represented by the parties on the record that will be put up for sale. If any person has any interest independent of the interest of the mortgagor, that cannot be affected by the execution of this decree. But the transferee cannot object to the execution of the decree on the ground that he is claiming under Govind some interest which is independent of Rangnath's interest in this property. If he has any such interest at all it is an interest which has to be established in a separate suit. But the existence of any such interest would be no ground for not allowing execution of the decree to proceed.

(2) 60 Ind. Cas. 631; 48 I. A. 187; 23 Bom. L. R. 648; 19 A. L. J. 366; 40 M. L. J. 423; 29 M. L. T. 336; (1921) M. W. N. 313; 33 C. L. J. 405; 3 U. P. L. R. (P. C.) 17; 25 C. W. N. 915; 14 L. W. 221; 48 C. 499 (P. C.).

(3) 67 Ind. Cas. 408; 49 I. A. 129; 24 Bom. L. R. 963; 30 M. L. T. 154; 26 C. W. N. 713; 45 M. 320; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; 20 A L. J. 684; 43 M. L. J. 78; A. I. R. 1922 P. C. 80 (P. C.).

We, therefore, dismiss this appeal with costs.

Fawcett, J.—I would only add with reference to the first point that the executing Court has not unnaturally been misled in committing the informality under consideration by the practice that existed when the procedure followed in such cases was that prescribed by the Transfer of Property Act. Under that Act there was only a decree, which was followed by an order absolute. Unfortunately that old practice is often followed in spite of the changes made by the Legislature by the provisions of O. XXXIV of the present Civil Procedure Code. On the other hand, as was pointed out in *Harjivan Devraj* v. *Gajanan Kashinath Naik* (4), the Legislature unfortunately did not then make the position as clear as it should have, and the prescribed forms for preliminary mortgage-decrees embody much that should more properly have been put in the form of final decree. In these circumstances, there is obviously room for paying more regard to the equities and substantial principles of justice rather than to the informalities that have occurred. The forms of preliminary mortgage-decrees have been altered by this Court under the Government Notification No. 1646 published at pages 575 *et seq* of the *Bombay Government Gazette* for 1926, Part I; and it is to be hoped that such informalities will not occur in future. No doubt, it is a possible contention, which has in fact been urged, that there was no proper application by the decree-holders for a final decree. But in the first *Darkhast* of 1914 they did include a prayer that the decree should be made absolute, and it would be an obvious technicality to say that the Court ought not to have made any order except on a separate application in the suit. Though it was called a *darkhast*, it was really an application to make the decree final, and, therefore, should be held to be a proper application.

I agree, therefore, that the appeal should be dismissed with costs.

Shah, J.—I desire to express my agreement with the observations of my learned brother as to the necessity of following properly the rules of the Code and the forms of preliminary and final decrees as now amended.

A. N. A. *Appeal dismissed.*

(4) 73 Ind. Cas. 187; 25 Bom. L. R. 459; A. I. R. 1923 Bom. 420.

PATNA HIGH COURT.

CRIMINAL REVISION No. 383 OF 1926.

July 14, 1926.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

MAINI MISSIR—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 17, 144, 195—Sanction by Magistrate for prosecution—Application for withdrawal—Proper forum—Sessions Judge or District Magistrate—Court to whom Magistrate 'is subordinate', meaning of.

For the purposes of the Criminal Procedure Code, unless it is shown that there is some express provision to the contrary, the District Magistrate and not the Sessions Judge is the authority to whom the Sub-Divisional Magistrate is subordinate, and, therefore, when we find in this Act words relating to an officer to whom the Sub-Divisional Magistrate is subordinate we must construe that as meaning not the Sessions Judge but the District Magistrate. [p. 963, col. 2.]

A complaint made under the provisions of s. 195 (*a*) of the Code of Criminal Procedure by a Magistrate acting as a public servant is not a judicial order, and even if it were so, under the provisions of that section, there being no exception from the broad rule laid down in s. 17 of the Code, the officer to whom he is subordinate is the District Magistrate and not the Sessions Judge. An application for withdrawal of a complaint under s. 195 (*a*) made by a Sub-Divisional Magistrate should, therefore, be made to the District Magistrate and not to the Sessions Judge. [p. 964, col. 1.]

Where a Magistrate acts under cl. (*a*) of s. 195 (1) of the Code of Criminal Procedure he acts not as a Court but as a public servant, and sub-s. (3) of s. 195 of the Code does not, consequently, apply to such a case. [*ibid.*]

Criminal revision against an order of the Sessions Judge, Purnea, dated the 20th May, 1926, confirming that of the District Magistrate, Purnea, dated the 4th March, 1926.

Mr. *S. Sinha* (with him Messrs *Kailaspati*, *B. P. Varma* and *P. P. Varma*), for the Petitioner.

Mr. *H. L. Nandkeolyar*, (Assistant Government Advocate), for the Opposite Party.

JUDGMENT.

Miller, C. J.—This is an application in revision from an order of the Sessions Judge of Purnea refusing to consider the question of withdrawing a complaint preferred by a Sub-Divisional Magistrate under the provisions of s. 195 of the Code of Criminal Procedure. The learned Sessions Judge considered that he had no jurisdiction to grant the relief sought and consequently refused to interfere.

From that decision the present proceedings are brought asking us to interfere in revision after finding that the learned Sessions Judge had jurisdiction to interfere. In order to understand how the point arose, and ultimately it depends upon the construction of ss. 17 and 195 of the Code of Criminal Procedure, it is necessary to state shortly the facts out of which the case arises. It appears that in the District of Purnea there are certain *melas* held at certain times of the year. They are organised by *zemindars* in the neighbourhood and where two such *melas* are held at or about the same time there is a certain amount of rivalry which at times is of such dimensions that it is apt to create a breach of the peace. During the holding of two *melas*, one at Sankerpur and the other at Simarbani, which are two villages a short distance apart, the rivalry between the proprietors of these two *melas* was so great that something in the nature of a riot occurred last year several people being injured, and I believe three being killed. Babu Maini Missir, who is the petitioner in this case, is the proprietor of the *mela* held at Sankerpur and Babu Sundar Lal is the proprietor of a similar *mela* held at Simarbani a few miles distant. It has been usual for the petitioner to hold his *mela* sometime in February but before it comes to a conclusion it has also been the custom for Babu Sundar Lal to hold his *mela* a few miles distant with the consequence that they are both going on at the same time and the sort of trouble which I have indicated is apt to arise. In order to obviate any such trouble during the present year proceedings were taken by the Sub-Divisional Magistrate of Araria, who is a Magistrate of the First Class, under s. 144 of the Code of Criminal Procedure, and both the parties to whom I have referred were called upon under that section to show cause why they should not take action upon their property in a certain manner indicated by the Sub-Divisional Officer. They appeared before him and in the result the Sub-Divisional Officer passed an order that the first *mela*, the one held at Sankerpur by the petitioner, should take place between the 14th and the 27th February, and that it should end on the latter date, and that the *mela* held at Simarbani should subsequently take place beginning a week later on the 6th March and should end on the 19th March.

From this order Babu Sundar Lal moved the District Magistrate under s. 144 (4) of the Criminal Procedure Code and when the

matter came before the District Magistrate he had the parties before him and apparently they were willing to pay for the services of armed Police during the time that the *mela* should be going on concurrently in the two different villages if the Magistrate would modify the order passed by his subordinate and allow the *melas* to be held in the same manner as they had been on previous occasions. In the result the District Magistrat passed the following order:—

"Each party is prepared to pay for armed Police to ensure that there should be no breach of the peace in his *mela*. That being the case there is no necessity for any order against the petitioner under s. 144, Criminal Procedure Code. The Superintendent of Police will please report the cost of deputing a sufficient number of armed Police to each *mela*, to-day if possible. On receipt of his report I shall pass final order."

The report was submitted from which it was found that the cost of providing Police for the days when the two *melas* would be going on concurrently would be Rs. 110. Thereupon the Magistrate ordered that upon Sundar Lal depositing half the amount the order under s. 144 against him would be rescinded, and he further ordered that if the opposite party, that is, the petitioner in the present proceedings, deposited the other half as payment, which he should do without delay, he had no doubt that the learned Sub-Divisional Officer would be prepared to consider the order with regard to his *mela*.

The petitioner whose *mela* was to take place first did not deposit his share of the cost of providing armed Police but on the 4th March, sometime after the first *mela* had been in progress, the other party Babu Sundar Lal did deposit his share. Meantime, the petitioner's *mela* continued notwithstanding that the petitioner had deposited nothing. On the 4th March Babu Sundar Lal, as I say, having deposited his share the Magistrate stated that the petitioner Maini Missir had not fulfilled his undertaking to deposit half the cost of the Police force and, therefore, there was no reason to modify the order under s. 144 against him. The order against him was that he should close his *mela* on the 27th February and, therefore, on the 4th March he was contravening the order passed by the Sub-Divisional Officer. On the 6th March Police protection was afforded half the cost of providing the Police having been paid by the other party and both *melas* went on simultaneously. On the 7th March still the petitioner had not paid his share of the Police protection and so matter continued until the 11th March. In these circumstances it being found difficult to get the money from the petitioner proceedings were taken under s. 188 of the Indian Penal Code against him. These proceedings were taken on the complaint of the Sub-Divisional Officer. The immediate result was that on the following day the petitioner paid his share of the money for the Police protection.

Subsequently the application, to which I have referred, was made to the Sessions Judge to withdraw the complaint put forward by the Sub-Divisional Officer and the Sessions Judge came to the conclusion that he had no jurisdiction to do so and that in fact the proper person to apply to was not himself but the District Magistrate and, therefore, he refused to interfere with the result that the prosecution under s. 188 is still pending against the petitioner.

It is from that order of the Sessions Judge that the present application in revision is brought. Whether or not the Sessions Judge refused to exercise a jurisdiction which he possessed must depend primarily upon the interpretation of s. 195 of the Code of Criminal Procedure. That section provides in sub-s. (1), cl. (*a*), that

"No Court shall take cognizance of any offence punishable under ss. 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate."

It may be mentioned that ss. 172 to 188 are offences in the nature of contempt for, or disobedience of, the lawful orders of public servants, and in such cases no Court shall take cognizance of such offences unless the complaint is made by the public servant himself or by some other public servant to whom he is subordinate. By cl. (*b*) of sub-s. (1) a different class of offences is provided for, a class of offences such as perjury, forgery, using forged documents and matters of that sort which are offences committed in the course of judicial proceedings and in such cases it is provided that no Court shall take cognizance "of any offence punishable under any of the following sections of the some Code, namely, ss. 193, 194, 195, 196, 199, 200,

205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate".

It will be seen by the two clauses of that sub section that there are two distinct classes of offences referred to and there are two distinct classes of persons by whom the complaint must be made in such cases before the Court trying the offences can take cognizance of them. The first class of persons are the public officers themselves whose orders have been disobeyed or brought into contempt. The second class is the Court in which, or in relation to any proceedings in which, the offence has been committed. Then by sub-s. (5) of the same section

"Where a complaint has been made under sub s. (1), cl. (*a*)" (which applies to the present case) "by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court and, upon receipt thereof by the Court, no further proceedings shall be taken on the complaint."

The petitioner's case is that the District Judge is the authority within the sub-section to which the public servant, namely, the Sub-Divisional Officer in this case, was subordinate and, therefore, that in applying to the Sessions Judge he applied to the proper person for withdrawal of the complaint. Whether or not it is the Sessions Judge or the District Magistrate who is the authority to which the Sub-Divisional Magistrate is subordinate seems to me to depend entirely upon the provisions of s. 17 of the Act. Section 17 provides as follows:—

"All Magistrates appointed under ss. 12, 13 and 14," (which includes the Sub-Divisional Magistrate in this case) "and all Benches constituted under s. 15, shall be subordinate to the District Magistrate and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business amongst such Magistrates and Benches."

Then sub-ss. (2) (3) and (4) deal with matters which are not relevant to the present discussion and sub-s. (5), if there was any doubt as to who is the officer to whom the Magistrate was subordinate seems to put an end to it. Sub s. (5) provides as follows :—

"Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under ss. 12, 13, 14 and 15 shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided."

The result of that appears to me to be that for the purposes of the Criminal Procedure Code, unless it is shown that there is some express provision to the contrary, the District Magistrate and not the Sessions Judge is the authority to whom the Sub-Divisional Magistrate is subordinate, and, therefore, when we find in this Act words relating to an officer to whom the Sub-Divisional Magistrate is subordinate we must construe that as meaning not the Sessions Judge but the District Magistrate. There are exceptions contained in the Act which have the effect of modifying the provisions of s. 17, for instance s. 435 gives powers to the High Court, the Sessions Judge and the District Magistrate or the Sub-Divisional Magistrate in certain cases to call for the records of inferior Courts, but appended to that section is an *Explanation* which states.

"All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of s. 437."

We, therefore, have in that section an instance of cases in which Magistrates are to be deemed to be inferior to the Sessions Judge, in other words the Sessions Judge is to be regarded as the authority to which they are subordinate. There are other sections in the Act making somewhat similar provisions but with regard to s. 195 I do not find that there is any provision which takes it out of the general rule laid down in s. 17.

It was argued that as the Sub-Divisional Magistrate being a Magistrate of the first class is subordinate to the Sessions Judge in cases of appeals from his judicial decisions, therefore, he must be treated as being subordinate to the Sessions Judge for the purposes of s. 195, for it is contended that the order passed by the Sub-Divisional Magistrate in the present case was a judicial order and was an order, therefore, which would come, if any appeal

lay to the Sessions Judge and not to the District Magistrate. I am not prepared to find that a complaint made under the provisions of s. 195 (*a*) by the Magistrate acting as a public servant, in other words as a complainant in the case, is a judicial order, but even if it were so, it seems to me that under the provisions of that section, there being no exception from the broad rule laid down in s. 17 the officer to whom he is subordinate would still remain the District Magistrate. For these reasons I think it is unnecessary to consider the cases which have been quoted to us and in which there appears to be a conflict of opinion as to whether orders passed under s. 144 and sanction granted under s. 195, before it was amended in 1922, were judicial or administrative orders. I rest my judgment upon the interpretation of s. 17 of the Act and the fact that there is no exception from the rule laid down in that section to be found within the provisions of s. 195. Therefore, it seems to me that the Sessions Judge was right when he said that he was not the proper tribunal to apply to in order to withdraw the prosecution. An argument was based upon sub-s. 3 of s. 195 which provides that for the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court. This sub-section, however, seems manifestly to refer to the cases mentioned in clauses (*b*) and (*c*) of s. 195 (1) where the complaint must be made by the Court and not to cl. (*a*) where the complaint is to be made by a public servant. The Magistrate, whilst acting under that clause is acting as a public servant and sub-section (3) has, I think, no application in this case. The antithesis between "public servant" in cl. (*a*) and "Court" in cls. (*b*) and (*c*) is marked, and, in my opinion, the Magistrate acting under the former clause is, acting, not as a Court, but as a public servant.

We have been asked in this case, even if we should consider that the Sessions Judge was right in refusing to interfere, to take the view that it has not been shown that any real offence was committed under s. 188 of the Indian Penal Code and on that ground to set aside the whole proceedings or to direct a withdrawal of the prosecution. It has been said that in the particular circumstances of the case it cannot be shown that the disbodience to comply with the order either caused or tended to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed. It has further been argued that the offence, if any was committed, was a purely technical one, because the petitioner had agreed to pay his share of the cost of Police protection, and the mere fact that he had not paid it in time could really make no difference in the case and, therefore, the offence was a purely technical one if any. I do not think it can be said that the fact of holding these two *melas* at the same time having regard to what had taken place in previous years could not by any possibility be regarded as tending to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed. That there was a breach of the Sub-Divisional Magistrate's order cannot be denied. His order was that unless the petitioner should pay his share of the costs of the Police he should close his *mela* on the 27th February. Nevertheless he kept it open and even after the neighbouring *mela* had started on the 5th March still the petitioner kept his own *mela* open and the two were running concurrently notwithstanding the order passed by the Sub-Divisional Officer. It was, therefore, a clear breach of the order passed. I do not think, therefore, that any case is shown for quashing the proceedings or for interfering in any way. At the same time I cannot help feeling that as the affair has passed off without any breach of the peace, without any inconvenience and without subjecting anybody to annoyance, that the matter has now assumed a very different form. The petitioner did in fact, although not till after proceedings were taken by a complaint being lodged by the Magistrate, pay his share of the cost of the armed Police, and I have no doubt that even without those proceedings it would eventually have been recovered. However that may be, I think, if the case is persisted in, and the petitioner should be found to have committed the offence, his punishment would probably be nominal, but that is no reason why we should at this stage interfere. The application is dismissed.

Foster, J.—I agree.

A. N. A. *Application dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1295 OF 1926.
February 10, 1927.
Present:—Mr. Justice Agha Haidar.
MUHAMMADI AND OTHERS—ACCUSED—APPELLANTS
KALA SON OF KHANAN—ACCUSED—NON-APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 239 (d), 537—'Same transaction'—Tests of unity of time and place, value of—Joint trial of offences not in course of same transaction, effect of.

Before different offences can be said to have been committed 'in the course of the same transaction' by the various persons charged with the same, it must be seen whether such persons had a common purpose resulting in actions which constitute a concatena of events ultimately leading to the commission of such offences. The tests of unity of time and unity of place as regards the offences with which the various accused persons may be charged are not always safe criteria for the purpose of determining whether or not these offences were committed 'in the course of the same transaction'. [p. 966, col. 1.]

A joint trial of several persons charged with offences not committed in the course of the same transaction is not an irregularity which is curable under s. 537, Criminal Procedure Code, but is an illegality which vitiates the whole trial. [p. 966, col. 2.]

Gobind Koeri v. *Emperor* (5), followed.

A person committing theft was caught and tied down. On hearing of his condition four of his friends came and rescued him and a fight ensued in which injuries were caused. These five persons were jointly tried for offences under ss. 379, 225, 147, 148, 149, 325 of the Penal Code:

Held, the joint trial was illegal inasmuch as the theft could not be said to be a part of the same transaction as the assault which subsequently ensued. [*ibid.*]

Appeal from an order of the Magistrate, First Class, exercising powers under s. 30, Criminal Procedure Code, Muzaffargarh, dated the 13th November, 1926.

Mr *S. A. Nasir*, for the Appellants.

Mr. *Sleem*, for the Government Advocate, for the Respondent.

JUDGMENT.—The four appellants, Muhammadi, Imam Bakhsh *alias* Imaman, Kariman and Habib, have been convicted and sentenced to various terms of imprisonment by a learned Magistrate, exercising powers under s. 30 of the Criminal Procedure Code. Along with these four persons a lad named Kala was also convicted and ordered to be whipped. The sentence of whipping has not been carried out, I understand, on the ground of physical unfitness. Muhammadi was charged under ss. 379, 225, 148 and 325 and the remaining three appellants under ss. 225, 147, 149 and 325 of the Indian Penal Code. They have all been convicted under the various sections under which they were charged. It may be noted here that Muhammadi alone was charged under s. 379 of the Indian Penal Code. The four convicted persons had filed one appeal from Jail, but at the time of the hearing they were presented by Counsel Mr. S. A Nasir. He has raised a nice preliminary point as to the legality of the trial in the Court below. He says that it was a case of misjoinder of charges which was not saved by s. 239, cl. (*d*) of the Criminal Procedure Code. The point arises in the following manner:

One Imaman, deceased, was watching the mango crop of a certain grove in a village on the 7th of June, 1926. A relation of his, namely, Khuda Bakhsh, brought him his midday meal and they both ate it and lay down under the shade of one of the trees to enjoy to their afternoon siesta. They woke up by the noise caused by the fall of a mango and when Imaman deceased went to pick it up, he saw Muhammadi accused perched on the higher branches of the tree. Muhammadi was apparently plucking mangoes while Imaman and his companion were resting. On seeing Imaman approaching, Muhammadi climbed down from the tree and tried to escape. He was, however, pursued by Imaman and Khuda Bakhsh and was soon overtaken and secured with the help of a third man, named Ghulam Ali, and was tied with his own turban. At this moment Muhammadi saw Dina, his nephew, tending his sheep near the mango grove. Muhammadi hailed him and asked him to go to his (Muhammadi's) brothers who were not very far off and inform them of his plight. Shortly afterwards the other accused, that is to say, Imam Bakhsh, Kariman and Habib along with Kala, came on the spot duly armed with *lathis* and demanded the release of Muhammadi. His captors having refused, the accused Nos. 2 to 5 attacked them and succeeded in rescuing Muhammadi. Muhammadi too, on being thus released, joined his brothers in the attack. Ghulam Ali and Khuda Bakhsh received minor injuries, but Imaman's injuries proved to be more serious so much so that he succumbed to them. This is the story on behalf of the prosecution.

Now, in order to hold that the joint trial of all these five persons under the various charges was legal, it must be proved that it came within the provisions of s. 239,

cl. (*d*) of the Criminal Procedure Code. In other words, it must be shown that the different offences with which these accused persons are charged were committed in the course of the same transaction. The phrase 'same transaction' has, for obvious reasons, not been defined by the Legislature, but it has been interpreted by the various High Courts in India, so that its meaning and intendment are well-understood. The difficulty occasionally arises only in applying the principles deducible from the volume of case-law on the subject, to the particular facts of a case. Before different offences can be said to have been committed "in the course of the same transaction" by the various persons charged with the same, we must see whether such persons had a common purpose, resulting in actions which constituted a concatena of events ultimately leading to the commission of such offences. The tests of unity of time and unity of place as regards the offences with which the various accused persons may be charged, are not always safe criteria for the purpose of determining whether or not these offences were committed "in the course of the same transactions." Cases might occur when such tests may be of very great help, but, on the other hand, there may be cases in which a Court of Justice cannot treat such tests as a proper guide in arriving at the right conclusion. Each case must depend on its own facts and circumstances. The learned Counsel for the appellants has invited my attention to two cases: *Muhammad Shah* v. *Emperor* (1) and *Tilakdhari Mahton* v. *Lali Singh* (2). The Public Prosecutor has referred to *Emperor* v. *Datto Hanmant Shahapurkar* (3). These cases have undoubtedly a bearing upon the case before me. To these cases may usefully be added *Pahlad* v. *Emperor* (4) and *Gobind Koeri* v. *Emperor* (5).

Now, let us turn to the facts of the present case. Muhammadi, according to the prosecution, was caught red-handed while stealing mangoes. There is no suggestion that Muhammadi's act of stealing mangoes was the result of a conspiracy or that the other accused persons even knew of it. In fact it appears that they did not know anything at all about Muhammadi's movement at this time. They came up only when the lad, Dina, informed them that Muhammadi had been captured by the complainant's party, so that Muhammadi's act of stealing mangoes was absolutely separate from the subsequent acts of the rescuing party, the remaining four accused. Therefore, the offence of theft under s. 379 was one which Muhammadi alone is alleged to have committed and with which the other accused had nothing whatsoever to do. There was no intention of committing the theft on the part of the other accused persons who had no knowlenge whatsoever as to what Muhammadi had been doing at that particular time. Hence it cannot be said that the theft committed by Muhammadi was part of the transaction which began with the assault by the other accused persons and subsequently by Muhammadi himself, on the complainant party. It need hardly be said that, in view of the law laid down by their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v *King-Emperor* (6), it is not a mere case of irregularity which can be cured by the provisions of s. 537 of the Criminal Procedure Code; but, on the other hand, it is a case of illegality and vitiates the whole trial. It is unfortunate that the point which was so obvious did not strike either the Public Prosecutor or the learned Magistrate who is apparently a senior Officer with s. 30 powers.

The result is that I quash the conviction of all the five accused and order a re-trial. Muhammadi must be tried separataly on a charge under s. 379 of the Indian Penal Code. He should also be tried along with the other accused under the other sections.

On the merits of the case, it may be noted, I express no opinion whatsoever.

R. L. *Conviction quashed; Re-trial ordered.*

(1) 66 Ind. Cas. 332; 23 Cr. L. J. 268.
(2) 1 Ind. Cas. 69; 13 C. W. N. 804; 9 Cr. L J. 147.
(3) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.
(4) 57 Ind. Cas. 450; 1 Lah. 562; 21 Cr. L. J. 626; 2 U. P. L. R. (Lah.) 135; 7 P. L. R. 1921.
(5) 29 C. 385; 6 C. W. N. 468.
(6) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

PATNA HIGH COURT.

CRIMINAL REVISION No. 689 OF 1924.

February 2, 1925.

Present:—Justice Sir Jwala Prasad, Kt.

BHUBANESHWAR KUER—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 110—'By habit', 'habitually'—Depravity of character, necessity of—Commission of offences in diara *land dispute, whether ground for proceeding under s. 110—'Desperate and dangerous', 'community' 'at large'—Person under conviction, order against, legality of.*

The words 'by habit' and 'habitually' imply frequent practice or use and are used in s. 110 of the Code of Criminal Procedure in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section. [p. 969, cols. 1 & 2.]

Certain lands were thrown out by a river in a *zemindari* tract. The tenants formed themselves into a party to compel the *zemindar* to settle the land with them. They also entered into an agreement among themselves to divide the lands among all of them with whomsoever they were settled and to enforce the agreement themselves. Many loots, assaults and murders were committed by them against the *zemindar* and the recalcitrant members. Apart from this land dispute there was nothing on the record to show that the tenants bore any despicable character or that they were implicated in theft, extortion etc., or that they ever provoked a breach of the peace:

Held that the tenants could not be said to have acquired the habit of committing offences so as to bring them within the purview of cls. *(a)* to *(e)* of s. 110 of the Criminal Procedure Code but that the course of their conduct showed that they had become desperate and dangerous and that, therefore proceedings could be taken against them under cl. *(f)* of the said section. [p. 970, cols. 1& 2.]

Persons who form themselves into a society claiming a common right and professing to have common rights and privileges are members of a 'community'. [p. 970, col. 2; p. 971, col, 1]

Persons who have been convicted and whose sentences have not expired are not 'at large' within the meaning of s. 110 of the Code and, therefore, there is no necessity to pass an order under the section against such persons. [p. 971, col. 2.]

Appeal against an order of the Sessions Judge, Monghyr, dated the 3rd November, 1924, modifying that of the Deputy Magistrate, Monghyr, dated the 18th July, 1924.

Sir *Ali Imam*, (with him Mr. *S. A. Sami*), for the Petitioners.

Mr. *Manuk*, (with him Messrs *H. L. Nandkeolyar*, Assistant Government Advocate, and *N. C. Roy*, for the Opposite Party.

JUDGMENT.—This is an application against an order passed under s. 110 read with s. 118 of the Code of Criminal Procedure, directing the petitioners to furnish bonds and sureties of the amounts detailed in the order of the Magistrate, dated the 18th July, 1924, to be of good behaviour for two years. The order has been upheld in appeal by the Sessions Judge of Monghyr by his judgment, dated the 3rd November, 1924.

The case of the prosecution has been succinctly and clearly set forth in the report of the Sub-Inspector in charge of Bihpur *Thana*, dated the 22nd November, 1923, on the basis of which the proceeding under s. 110 of the Code of Criminal Procedure was drawn up by the Magistrate on the 24th November, 1923. The ground for the proceeding as stated therein is that the petitioners are by habit thieves and habitually commit or attempt to commit or abet the commission of theft, mischief and offences involving a breach of the peace and are so desperate and dangerous as to render their being at large without security hazardous to the community.

The learned Sessions Judge says that grounds for the order under s. 110 of the Code against the petitioners are that they are "Leaders of a formidable gang which is in the habit of committing loot and mischief in furtherance of an unlawful common object and that they have on many occasions promoted breach of the peace and are dangerous people." This observation of the Sessions Judge is taken from the finding of the Magistrate in his judgment of the 18th July 1924.

The petitioners are residents of village Sonebarsa which is merely inhabited by Bhuinhars. During the years 1322 and 1325 *Fasli* a large quantity of land in *Mouza* Sonebarsa, Bishunpur Gopal and Takbazpore in the *zemindari* of one Mr. Grant, which had come out of the river Ganges, became cultivable. He made settlements of a portion of these lands with tenants on payment of *salami* and at Rs. 6 a *bigha* as rent. These tenants are described as *naramdal* or moderate party. Certain other tenants applied for settlement of the lands at the old rate of Rs. 3 a *bigha*, which being refused they formed themselves into an organisation known as *garamdal* or extremists party with a view to force the landlord to accept their terms. The petitioners belong to the *garamdal* party. Many acts of loots and assaults took place, with the result that certain members of the *garamdal* party were bound down on the 3rd of February, 1920, for a year under

s. 107 of the Code of Criminal Procedure (Exs. 61 and 62). Suffice it to say that the situation became so grave that Mr. Grant had to requisition the services of a band of Gurkhas which was followed by the tragic murder of about 20 of them in a riot said to have been committed by the *garamdal* party. Twenty persons were put on their trial, but only one of them Dhally Kuar (who is not before us) was convicted under s. 147, Penal Code, and sentenced to two years' rigorous imprisonment (judgment, Ex. 63). Three of the present petitioners Hari Kuar, Bhutti Kuar and Ramrup Kuar were accused in that case but were acquitted. The gravity of the situation attracted the intervention of the authorities, with the result that Mr. Sen, Commissioner of Bhagalpur Division, held a conference at his house between the parties and had a settlement arrived at between Mr. Curtis as Manager of Mr. Grant and the tenants. It was agreed that a Record of Rights would be prepared and the tract of land which by the fluvial action of the river became the *khudkasht* lands of Mr. Grant would be settled with tenants, but that the tenants who would be able to identify any of the reformed lands as being part of their previous holding would have those lands settled with them. Consequently by orders of the Local Government Survey and Settlement was carried out by Babu N. L. Basu, Deputy Magistrate, who was appointed Assistant Settlement Officer. It is said that during the progress of this Survey a number of armed *lathials* of the *garamdal* party used to wander about the *diara* driving out the tenants going before the Assistant Settlement Officer in support of their claims. The result was that 21 persons of the *garamdal* party were bound down for a year on the 23rd September, 1921. Amongst those bound down were the petitioners Bhubaneshwar Kuar, Ramarup Kuar, Bhokar Kuar, Puchha Rai, Hari Kuar and Dudhraj Kuar (judgment, Ex. 64).

A few months after, in December 1922, the Record of Rights was finally published. As no one was able to identify any of the newly formed lands, they were divided up into three blocks. The larger block was assigned to the *garamdal* party and the lesser area to the *naramdal* party and the Gangoutas. The petitioner No. 1 Bhubaneshwar Kuar, leader of the *garamdal* party, drew up a list of the tenants of his party to whom the lands were to be assigned within the area allotted to them. This list was accepted by Mr. Curtis and the Record of Rights was prepared accordingly.

In the meantime in June 1922, some 234 tenants of the *garamdal* party executed an agreement. The agreement (Ex. A) was registered from June, 1922, to February, 1923. The reason of this agreement is stated therein as well as in the petition before us, and it is that both the 1st and the 2nd parties to the agreement contributed towards the expenses of the litigation between the *zemindar* and themselves on the basis of ploughs, whereas according to the compromise between the *zemindar* and the tenants, some of them only would be recorded in respect of the lands which have come out and which are still under water and others who cultivate jointly with them would not be recorded. So that the interest of these persons might not suffer, and those whose names would be recorded might not acknowledge their rights and possession which might cause endless litigation, both the 1st and the 2nd parties executed the agreement whereby whatever land would be allotted in the names of the 1st and the 2nd parties by the *zemindar* would be divided amongst themselves according to ploughs at present possessed by them, and irrespective of the names of the tenants being recorded in the *zemindar's sarishta* each individual of the 1st and the 2nd parties would pay rent and have his name recorded in the landlord's *sarishta* in accordance with this arrangement, and so long as the landlord would not recognise this division the rent would be paid by the persons holding the lands in accordance with the agreement through the persons recorded in the Survey Record of Rights and in the landlord's *sarishta*.

The agreement further provides that if any member of the 1st party refuses or puts off dividing the land to be recorded in his name according to the terms aforesaid he will get it done by suit or "any other means he thinks fit." A committee of 13 persons including the petitioners Ramrup Kuar, Hari Kuar, Puchha Rai and Jagarup Kuar was nominated to carry out the arrangement.

The penultimate clause of the agreement makes provision for the maintenance of a Middle English School at Sonebarsa by

means of subscription to be paid by the 1st and the 2nd parties at the rate of Rs. 3 per plough annually to the Secretary of the School. The Secretary has been authorized to recover subscription by suit or "any other means he thinks fit".

The prosecution relies upon the terms of the agreement as showing a determination on the part of the parties to the agreement to enforce the terms thereof by whatever means they think fit lawful or unlawful. It is said that the expression in the agreement "any other means he thinks fit" referred to above indicates that the parties were resolved to resort to force in order to give effect to the agreement in question.

The learned Sessions Judge says: "As regards the alleged agreement (Ex. A) it is possible that it may not itself be illegal. However, as I have already pointed out there is one ominous clause therein to the effect that the person with whom the land is to be divided may enforce the agreement by suit or by any other means he thinks fit. Obviously the appellants are not justified in enforcing this agreement by illegal means." The learned Sessions Judge is correct in his view that no party has a right to enforce the terms of the agreement by illegal means, he however, does not definitely find that the clause in question is illegal or unusual though he calls it ominous.

Now, the dispute with regard to the *diara* lands was originally between the landlord and the tenants. The dispute was settled by certain arrangement which resulted in the preparation of the Record of Rights. There is no longer any dispute between the landlord and the tenants. The present dispute is between the tenants *inter se* and the history prior to the preparation of the Record of Rights in December, 1922, is not of much importance except as showing that the petitioners have by a course of conduct acquired a disposition to commit offences such as those mentioned in s. 110 of the Code of Criminal Procedure.

The word "habit" implies a tendency or capacity resulting from the frequent repetition of the same acts. The words "by habit" and "habitually" imply frequent practice or use. The aforesaid words have been used in s. 110 of the Code of Criminal Procedure in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section.

We have not been taken back to a period prior to 1919 when the *diara* lands appeared. We do not know the habits of the petitioners prior to that date and the first thing that brought them within the purview of the criminal law is their attempt to take possession of the lands thrown out by the river Ganges. Apart from this *diara* land dispute, nothing has been brought upon the record to show that the petitioners bore any despicable character, that they were implicated in any theft, extortion, cheating or mischief or that they ever provoked a breach of the peace. To my mind, s. 110, clauses (*a*) to (*e*), of the Code has no application to the present case. Rightly or wrongly they thought that they would get the lands in question and the result shows that they were right in their estimation, for accepting the case of the prosecution they were able to obtain from the *zemindar* a settlement whereby a large tract of land was made available for settlement with them. Their object was gained, and we find that since then they have not committed any offence so far as the *zemindar* is concerned. But the dispute has now arisen with respect to the division of the booty. The large tract of land referred to above was sought to be settled with them by means of a Record of Rights. The Record of Rights was prepared for these lands not with a view to exclusively record the rights and possession which existed at the time of its preparation. Its object was to settle the dispute between the landlord and the tenants whereby the lands were to be allotted to the tenants in a certain way irrespective of whether they had held the lands previously. This is at least true with respect to the block of lands in dispute allotted to the *garamdal* party and in respect of which the agreement in question (Ex. A) was executed. It is conceded by Mr. Manuk that so far as these lands are concerned the Record of Rights is not such as is required to be prepared under the Bengal Tenancy Act which acquires certain presumptions. While the Record of Rights was being prepared the *garamdal* party entered into an agreement to divide the lands allotted to them by the landlord in a particular way. They do not ignore the Record of Rights altogether. It is said in the agreement that the persons whose

names would be recorded would divide the lands allotted to them with other tenants whose names were not recorded on the ground that they had contributed towards the expenses of the litigation which ultimately resulted in the settlement of the lands by the landlord. This agreement, no doubt, is not binding upon the landlord as he is not a party to it, but it is an arguable question as to whether the agreement is not binding upon the executants thereof. The learned Sessions Judge very rightly says that the agreement may be a lawful one. He is also right in pointing out that the parties to the agreement are not justified in enforcing this agreement by illegal means. The case of the prosecution is that in trying to enforce this agreement amongst themselves the tenants have committed loots and assaults against the recalcitrant members of their parties, which coupled with their previous acts of oppression committed against the landlord, bring them within the purview of s. 110, clauses (*a*) to (*e*) of the Code of Criminal Procedure. This contention does not commend itself to me. Rightly or wrongly the petitioners believed that the agreement is a valid agreement and if in enforcing the same in an improper way they committed offences they cannot be said to have acquired the habit of committing those offences or that they were habitually offenders so as to bring them within the purview of the aforesaid clauses. The primary dispute with the landlord, which led them to commit offences, was settled by the lands being allotted to them. The moment this was done they ceased to commit any offence as against the landlord. The present dispute amongst themselves has arisen on account of the division of the booty and the moment this will be settled they would probably cease to commit the offences complained of. Therefore, they cannot be said to be habitual offenders so as to bring them within the purview of clauses (*a*) to (*e*) of s. 110. To bring them within those clauses where there is a land dispute is calculated to seriously prejudice them. They rely upon a registered agreement settling their rights. It is not possible to decide in a Criminal Court the validity or otherwise of this agreement, but surely no tenant, whether he is a party to the agreement or not, has a right to take the law into his own hands. After the execution of the agreement the tenants committed offences of loot and assaults which led to an inquiry being instituted, resulting in the present proceedings under s. 110 against them. After the proceeding was initiated they are said to have committed certain riots which have since been tried. Evidence with respect to these cases has been given in the present case. One of them has ended in acquittal; in two of them tried separately all the petitioners except petitioner No. 1 Bhubaneshwari Kuar were accused and convicted. The investigation into the present case by the Police Officer was occasioned by certain complaints with respect to several occurrences said to have taken place about the 9th of November, 1923. The *kolai* crops of Lachmi, Dhaneshwar, Chandi and Rajeshwar were grazed and a plough of one Panchu Hazari and Dhaneshwar was broken. In most of these cases all the petitioners including petitioner No. 1 Bhubaneshwar Kuar were concerned. Previous to the publication of the Record of Rights the petitioners were concerned in many cases of loot and assault culminating in the murder of twenty Gurkhas mentioned above. Both in the old dispute with the landlord and in the present dispute with the members of their own parties, the petitioners have shewn desperation and disregard of life and properties of others. Formerly their acts of *zulum* were directed against the landlord and his adherents, the members of the *narmdal* party. Their present desperate action is directed against the members of their community who have either not accepted or resiled from the terms of the agreement. The course of their conduct shows that they have become desperate and dangerous and, therefore, it is not safe to let them wander about at large. This would bring them within the purview of clause (*f*) of s. 110 of the Code under which if the course of conduct exhibited by a person shows that he has become so dangerous and desperate that it is not safe to let him remain at large he should be bound down to be of good behaviour. The learned Counsel on behalf of the petitioners contends that this clause does not apply, inasmuch as the recalcitrant tenants, who do not accept the terms of the agreement, cannot be said to form a community. The petitioners along with other persons formed into a party called the *garamdal* party. They claimed to have common interest and professed to have com-

mon rights and privileges. They thus formed themselves into a society of people having common rights, privileges and interests. In other words, they became members of a community. Those who have fallen out are also members of that community and may besides be regarded as forming a separate community. All of them are residing at Sonebarsa within the local limits of the jurisdiction of the Magistrate who has passed orders under s. 110 against the petitioners. The petitioners have by their conduct made themselves dangerous to their fellows brothers living in Sonebarsa, who are members of a community. I, therefore, overrule this contention. In coming to this conclusion I have considered the following authorities cited at the Bar:—

Kali Prasanna Basu Roy v. *Emperor* (1), *Kasi Sunder Roy* v. *Emperor* (2) and *Sri Kanta Nath Shaha* v. *Emperor* (3).

The concurrent finding of the Courts below is that by their behaviour for a number of years the petitioners have made themselves so desperate and dangerous that it is not safe to let them remain at large. The finding is in accordance with the evidence in the case and is not open to challenge in revision. In this view the order passed under s. 110 of the Code of Criminal Procedure is not fit to be disturbed.

It appears, however, that the necessity of the order does not exist in the case of eight of the petitioners, for we find that all the petitioners except Bhubaneshwar Kuar have already been punished for the riot committed on the 7th and 8th February 1924. In those riots the petitioners Ajab Lal Issar, Hari Kuar, Puchha Rai, Jagarup Kuar, Ramarup Kuar and Bhutti Kuar have received punishments of rigorous imprisonment of one year each in one case and nine months in the other case. Thus, these petitioners have to undergo imprisonment for a period of one year and nine months. Similarly, the petitioners Bhokar Kuar and Bilachhan Kuar have got six months' imprisonment in one of these cases and nine months' imprisonment in the other. The convictions and sentences in those two riot cases have now been finally confirmed by this Court on the 28th January, 1925 (Criminal Revisions Nos. 686 and 687 of 1924). I am told that the accused have not served yet more than a few days of the period of imprisonment imposed upon them. So they will have to undergo almost the entire term of imprisonment from now. Therefore the petitioners are not "at large" to quote the words of the section and hence there is no necessity of taking any bonds from them. As to what will happen after they come out of Jail will depend upon the circumstances existing at that time. Certainly, if they do not reform themselves and have recourse to illegal ways of enforcing their rights the authorities will take such action against them as will be applicable under the criminal law. So far as Bhubaneshwar Kuar is concerned, he is not undergoing any term of imprisonment and he is said to be the ring-leader of the accused persons in the sense that they are guided entirely by his counsel and advice, besides active part taken by him in many cases. I would, therefore, uphold the order of the Magistrate so far as he is concerned.

I would commend the action taken by the authorities in this case and the careful inquiry made by the investigating officer and the judgments of the Court below.

A. N. A. *Order accordingly.*

(1) 9 Ind. Cas. 916; 38 C. 156; 15 C. W. N. 366; 12 Cr. L. J. 164.
(2) 31 C. 419; 1 Cr. L. J. 438.
(3) 9 C. W. N. 898; 1 C. L. J. 616; 2 Cr. L. J. 554.

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 1505 OF 1926.

January 21, 1927.

Present:—Mr. Justice Campbell.

HARI CHAND—ACCUSED—PETITIONER

versus

DURGA DATT—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 139A (ii)—Stay of proceedings by Magistrate—Magistrate's power to direct a particular party to go to Civil Court.

If a Magistrate stays his proceedings under s. 139A (*ii*), of the Criminal Procedure Code, these proceedings remain stayed until there is a decision by a competent Civil Court and there is nothing in the new section which entitles the Magistrate to say which party is to file the suit. On passing an order of stay under the section, the Magistrate ousts his own jurisdiction to decide anything about the question of title including the onus of proof [p. 972, cols. 1 & 2.]

Manipur Dey v. *Bidhu Bhusan Sarkar* (1) and *Ram Sagar Mondal* v. *Alek Naskar* (2), distinguished.

Petition, for revision of an order of the District Magistrate, Simla, affirming that of the Magistrate, First Class, Simla,

Mr. *Hargopal*, for Mr. *Nawal Kishore*, for the Petitioner.

JUDGMENT.—In this case Durga Datt presented an application to the Magistrate of the First Class, Simla, under s. 133, Criminal Procedure Code, complaining that Hari Chand had unlawfully obstructed a path or road alleged by him to be public. The Magistrate passed a preliminary order under s. 133, Criminal Procedure Code, calling upon Hari Chand to remove the obstruction within ten days or to appear before him in accordance with s. 135 (*b*). Hari Chand appeared and objected that the place alleged to have been obstructed was not public but was his private property. Under s. 139-A, he was directed to produce evidence in support of his claim in order that the Magistrate might enquire into the matter. Four witnesses were produced, and Durga Datt produced other witnesses in rebuttal. The Magistrate came to a finding that the claim by Hari Chand that the place was private property was not frivolous and was not intended merely to oust the jurisdiction of the Court. Accordingly the Magistrate recorded an order staying proceedings under s. 139-A (*ii*).

He then proceeded to decide which party should be ordered to go to the Civil Court and after referring to *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1) ordered Hari Chand to file a civil suit to establish his claim and directed that, if within reasonable time a suit was not filed, he intended to proceed under the law and would either discharge the Rule or make it absolute.

Hari Chand has come to this Court on revision contending that s. 139-A (*ii*) gave the Magistrate no jurisdiction to order him to file a civil suit. The petition has been heard *ex parte* since the respondent has not appeared.

It seems to me that this contention is correct. *Manipur Dey* v. *Bidhu Bhusan Sarkar* (1) and the subsequent Full Bench decision *Ram Sagar Mondal* v. *Alek Naskar* (2) were delivered before s. 139A of the Code of Criminal Procedure was enacted. If under s. 139-A (*ii*) the Magistrate stays his proceedings, those proceedings remain stayed until there is a decision by a competent Civil Court, and there is nothing in the new section which entitles the Magistrate to say which party is to file that suit. In fact it seems to me that by passing an order of stay under s. 139-A (*ii*) the Magistrate ousts his own jurisdiction to decide any thing about the question of title, including the onus of proof.

I accordingly accept the petition, set aside that portion of the Magistrate's order directing Hari Chand to file a civil suit.

R. L. *Petition accepted.*

(1) 26 Ind. Cas. 146; 42 C. 158; 18 C. W. N. 1086; 15 Cr. L. J. 698.

(2) 67 Ind. Cas. 177; 49 C. 682; 26 C. W. N. 442, 35 C. L. J. 247; 23 Cr. L. J. 353 (F. B.).

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 236 OF 1926.

November 17, 1926.

Present:—Mr. Justice Crump: on difference between Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

EMPEROR—PROSECUTOR

versus

MAHADEVAPPA HANMANTAPPA—ACCUSED.

Explosives Act (IV of 1884), s. 5, rr. 32, 138—License—Breach of condition by servant—Master's liability—Acting 'in the scope of employment,' meaning of.

The accused held a license under the Explosives Act to manufacture gun-powder, containing a condition that the explosive shall be manufactured in a tent or lightly constructed building exclusively appropriated for the purpose and separated from any dwelling house, highway, street, public thorough fare or public place by a distance of one hundred yards. The accused constructed a building which complied with this condition. One of his servants employed by him to manufacture gun-powder took the necessary ingredients from this building to the accused's house and performed part of the process of manufacture there. An explosion occurred and the servant and another were injured. On a trial for breach of the conditions of the license:

Held, per *Fawcett* and *Crump, JJ.* (*Shah, J.* dissenting)—that inasmuch as the servant was acting in the course of her employment and inasmuch as the Statute imposed an absolute liability on the holder of the license the accused was guilty. [p. 978, col. 2; p. 980, col. 2.]

Per *Shah, J.*—In leaving the licensed building and going to the accused's house the servant acted outside the scope of her employment and the accused was not, therefore, guilty. [p. 975, col. 2.]

Criminal appeal by the Government of Bombay from an order of acquittal by the Honorary Magistrate, First Class, at Bagalkot.

JUDGMENT.

Shah, J.—(*September 21, 1926*)—This is an appeal by the Government of Bombay

against the acquittal of the accused Mahadevappa Hanmantappa. The accused was charged with:

(1) a breach of condition No. 4 in the license in from A of the rule under the Indian Explosives Act IV of 1884.

(2) with doing a rash and negligent act so as to endanger human life under s. 286, Indian Penal Code, and

(3) with causing the death of one Bhimava by doing a rash and negligent act under s. 304A, Indian Penal Code.

The prosecution case was that, on September 7, 1925, the deceased Bhimava and another woman Sangava, employed by the accused, were pounding gun-powder with pestles in his house that in consequence of an explosion that occurred there Bhimava got burns, of which she died, and Sangava got slight injuries on her feet.

The accused was said to be responsible for this act. This was at Kerur in the Badami Taluka. The Honorary First Class Magistrate of Bagalkot who tried the case has recorded his view of the evidence in para. 8 of his judgment in detail. In effect he found that the deceased pounded gun-powder in the house of the accused unauthorizedly when he was absent in his grocery shop and knew nothing about what was going on in his house until the explosion occurred. He also held that there was nothing in the evidence to show that the accused knowingly did any act which endangered human life or which caused the death of Bhimava. On these findings he found the accused not guilty and acquitted him of all the charges. The appeal from this order is confined to the first charge only under the Indian Explosives Act. The acquittal as regards the charges under ss. 286 and 304A, Indian Penal Code, is not questioned.

In support of the appeal it is urged:

(*a*) that the view of the evidence taken by the trial Court is wrong and that in effect the accused was aware of and responsible for the gun-powder being manufactured in his house and, therefore, responsible for the breach of condition 4;

(*b*) that whether he was aware of Bhimava's act or not, and even if Bhimava's act was unauthorized in taking the materials to his house and manufacturing the gun-powder there, he is responsible for the act of his servant as having been done in the usual course of her employment.

As regards the first contention I see no reason to differ from the lower Court in its appreciation of the evidence. The accused held a license under the rules framed under the Indian Explosives Act and published in the *Bombay Government Gazette*, 1914, Part I, pages 1300-1350. Rule 32 provides that no explosive shall be manufactured except under and in accordance with the conditions of the license granted under the rules for such manufacture subject to certain proviso; and a breach of any condition is punishable under r. 138 read with s. 5 of the Act. Condition 4 of the license in this case provides that the explosive shall be manufactured in a tent or lightly constructed building exclusively appropriated for the purpose as provided in that clause. The accused had provided such a house at Kerur outside the village. Bhimava used to work as a servant of the accused. About the time of the occurrence Sangava also had been employed with her to do the work. On the morning of September 7, 1925, she took the keys from the accused, who was at his grocery shop in the village, and went to the house in question for her usual work. She, however, left the house sometime after with the materials for manufacturing gun-powder with Sangava to drink water and went to the residential house of the accused in the village. After drinking water both Bhimava and Sangava sat down there in the *padsali* of the house to manufacture gun-powder and used pestles which would be used for threshing rice, and which did not satisfy the requirements of condition 6 of the license. There was an explosion which resulted in injuries to the two women and Bhimava died of the injuries. The accused arrived on the spot after this accident occurred. The learned Magistrate found in effect on the evidence that the accused had no knowledge of this and the women went to his house and sat down to manufacture gun-powder there unauthorizedly. He observes that there is no special reason forthcoming to show why these labourers worked in the accused's residential house, that his house is full of women and children and no body would be so to foolish as to endanger their lives much less the accused. The view is challenged by the learned Government Pleader and reliance is placed upon the accused's statement that he learnt that Bhimava told his people that he (accused) had

asked her to manufacture the blasting powder in his house and in the licensed house. But the accused denies this and it is intelligible that Bhimava might have said so in apparent justification of her conduct, even if the accused had never told her like that. Sangava's evidence may be open to criticism but the trial Magistrate has believed her and I see no reason to doubt the correctness of the Magistrate's finding that this was an unauthorized act of Bhimava, of which the accused was quite ignorant.

The next question is whether in consequence of Bhimava having acted in this manner unauthorizedly and without the knowledge of the accused, the accused can be said to have manufactured the explosive contrary to condition 4 of the license. In other words, is he responsible for the act of his servant under these circumstances? This must depend upon the view which one takes of the question as to whether Bhimava can be said to have acted in the usual course of her employment on the facts found. It is clear that the master would be criminally liable for the acts of his servant, if and when the servant acts in the course of his or her employment. The law on this point is summarised in Lord Halsbury's Laws of England, Vol. XX, para. 611 (pages 258—260); and it is dealt with generally in Smith's Law of Master and Servant in Ch. V under the heading of "In Cases of Tort-Criminaliter." In the words used in *Attorney-General* v. *Siddon* (1) (page 225*):—

"Whatever a servant does in the course of the employment with which he is entrusted, and as a part of it is the master's act. The legal presumption is so, unless the contrary is shown."

In the same case Bayley, B., observes (page 227*):—

"In order to form a judgment, whether this is the master's act or not, and within the scope of the authority which ought to be considered as given by the master to the servant, you must look at the nature of the act, and see with what view that act was done, and the participation which the master had in anything to which that act referred."

There are numerous cases under different Statutes in which the master has been held responsible for the act of his servant criminally and there are cases also in which he has not been so held liable.

It must depend upon the terms and purpose of the particular Statute and the nature of the act. I am of opinion that, having regard to the terms of this Act, as also to its purpose, the master would be liable if the servant has acted within the "scope of his employment." The same principle has been recognized by this Court in *Queen-Empress* v. *Tyab Alli* (2) and *Emperor* v. *Jeevanji* (3).

The whole question is whether in leaving the licensed house and going to the accused's house Bhimava acted within the scope of her employment. She was employed to do work in the licensed house and the scope of her employment was to work there. If without any authority and out of ignorance of the consequences she goes elsewhere and does what she was to do in the licensed house, can she be said to have acted within the scope of her employment? I have considered this question with care. I have referred to several decided cases. I am unable to find any parallel to an act of this nature. After all the question has to be answered with regard to the circumstances of the case and the nature of the act. It seems to me that her going to the accused's house or to any other house with the materials for manufacturing gunpowder would be outside the scope of her employment. The prosecution may establish that going to the accused's house was within the scope of her employment. But in the absence of any explicit allegation and evidence it cannot be so presumed against the accused. The accused can be held liable for Bhimava's act in this case if it be held that the master is absolutely responsible for his servant's act, whether she has acted within the scope of her employment or not, that is, if it is obligatory upon the master to prevent the servant from going beyond the scope of her authority. No decided case has gone so far: and however desirable it may be to control the servant's conduct effectively, unless the act is within the scope of her employment the master cannot be held cri-

(1) (1830) 1 Cr. & J. 220; 1 Tyr. 41; 9 L. J. Ex. (o. s.) 7; 148 E. R. 1400; 35 R. R. 701.

*Pages of (1830) 1 Cr. & J.—[*Ed.*]

(2) 24 B. 423; 2 Bom. L. R. 52; 12 Ind. Dec. (N. S.) 815.

(3) 31 B. 611 at p. 627; 9 Bom. L. R. 967; 6 Cr. L. J. 240.

minally responsible even in this class of cases.

In *Queen Empress* v. *Tyab Ali* (2) the servant acted clearly within the scope of his employment and so did the agent in *Emperor* v. *Jeevanji* (3). In fact in the latter case it was found that the servant was expressly authorized to enter into the agreement.

I may refer to *Harrison* v. *Leaper* (4), *Newman* v. *Jones* (5) and *Phelon & Moore* v. *Keel* (6) as instances where the master was not held liable for the acts of the servant. In the first case Cockburn, C. J., observes (page 641*):

"It strikes me in this way, if a servant in the care of such an engine negligently were to run up against another with it, his master would be liable. If, however, he wilfully does so, his master would not be liable. So here, if he wilfully erected this machine in an improper place, without his master's orders to do so, the master could not be made liable under the Act of Parliament."

The Act in that case was 5 and 6 Will. IV, c. 50, s. 70. I may also point out that the observations of Lord Hewart, C. J., in *Burns* v. *Scholfield* (7) indicate that when a servant who has been authorized to do a certain act does another act, the master may not be liable for the act of his servant.

However, unfortunate the accident may be, I think the liability of the accused must be determined with reference to the scope of her employment. It must be decided as a question of fact in the light of the circumstances and the evidence in this case. She was employed to work in the licensed house and to manufacture the explosive there. No doubt, she manufactured the explosive in the accused's house: but that act was, in my opinion, outside the course of her employment. She left the house on her own account and thought of manufacturing the explosive there to save herself time or trouble or inconvenience which had nothing to do with her employment.

Lastly, as regards the use of pestles in the residential house of the accused, there was no charge on that point. Such pestles would be ordinary articles in a household at Kerur: and if she was acting outside the scope of her employment her use of the pestles there would be as much beyond the scope of her employment as the manufacture ing of the explosive there would be.

Suppose she had gone to some other house and acted in this way could she be said to have acted within the scope of her employment? In my opinion the answer should be in the negative. Equally it should be in the negative even when that place happens to be the accused's house, provided, of course, she acted unauthorizedly. In this particular case the prosecution was started on the basis of the accused having connived at her transgression and of having acquiesced therein being conscious of her act, as the joinder of the charges under ss. 286 and 304A of the Indian Penal Code would go to show. The prosecution failed to establish that case: and unless the prosecution can establish that her act was within the scope of her employment, the appeal cannot succeed.

I admit that the matter is not free from difficulty but on the best consideration that I can give to it I think that Bhimava is not proved, and cannot be presumed, to have acted in the course of her employment in going to the house of the accused and in doing there the work which she was to do at the licensed house outside the village.

I would, therefore, dismiss the appeal.

I regret that I have not been able to agree with my learned brother in this case. In view of this difference of opinion, the case will be laid before another Judge under s. 429, Criminal Procedure Code.

Fawcett, J.—(*September 21, 1926.*)—In my opinion, even on the facts found by the Magistrate, the accused should have been convicted of a contravention of r. 32 and consequently an offence punishable under r. 138, cl. 4 or cl. 9 of those framed under s. 5 of the Indian Explosives Act, 1884.

The case, in my opinion, is one of those where the effect of the Statute is to make the master liable for his servant's act *in any event*, so long as the act was done by the servant in the course of his employment. In such a case, as stated in Halsbury's Laws of England, Vol. XX, Art. 611 (1), at pages 258-259,

(4) (1862) 5 L. T. 640; 26 J. P. 573; 128 R. R. 982.

(5) (1886) 17 Q. B. D 132; 55 L. J. M. C. 113; 55 L. T. 327; 50 J. P. 373.

(6) (1914) 3 K. B. 165; 83 L. J. K. B. 1516; 111 L. T. 214; 78 J. P. 247; 12 L. G. R. 950.

(7) (1923) 128 L. T. 382; 27 Cox. C. C. 378; 87 J. P. 54; 21 L. G. R. 39.

*Page of 5 L. T.—[*Ed.*]

"The liability of the master arises solely from his relation to the servant, and the absence of personal guilt is immaterial. He cannot, therefore, escape criminal responsibility on the ground that he himself had acted in good faith and had forbidden the servant to do the act, or that he was unaware of what the servant had done."

This principle has been applied in England to cases like the present of the manufacture of a dangerous article. Thus in the case of the use of alum, in making bread, it was held that the defendant, who did not himself make the bread, was criminally liable for the act of his servant in using it to excess. *R.* v. *Dixon* (8). There Lord Ellenborough, C. J., said (page 14*):—

"He who deals in a perilous article must be wary how he deals, otherwise, if he observe not proper caution, he will be responsible; and the statute having interdicted alum in the making of bread, shews that it must be considered as a perilous article."

In the leading case of *Attorney-General* v. *Siddon* (1) the case of manufacture is thus referred to in the judgment of Bayley, B. at page 227† of the report:

"Neither is this the case of an act done by a servant in the manufacture of articles which the master is himself to manufacture. There the servant is merely acting in the business of the master, and within the scope of the authority which he actually receives from his master. The authority which he receives from his master is an authority to make and manufacture, and the master is responsible for his conduct *prima facie*, as to the means he adopts in making and manufacturing."

It was the accused alone who, as the licensee, has primarily to see that the conditions of his license are observed. If he employs an ignorant woman, who does not realise the danger of manufacturing explosives in an inhabited house and of using iron or steel implements for the purpose, and chooses to absent himself on other private business such as a grocery shop, so that no proper check is kept on the servant acting against the conditions of the license in the course of her employment, then he seems to me clearly to fall within the penal clause in the rules under the Indian Explosives Act. The fact that he may have been unaware of the servant's intention to manufacture the gun-powder at his house, or that she even acted against his orders in doing so, is immaterial. Thus, in *Commissioners of Police* v. *Cartman* (9), where the master was prosecuted for the act of his servant in selling intoxicating liquor to a drunken person, Lord Russell of Killowen, C. J., said (page 658*):—

"It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons, were it otherwise, the object of the section would be entirely defeated. We may take as an illustration the case of a sporting publican who attends race-meetings all over the country, and leaves a manager in charge of his public-house; is it to be said that there is no remedy under this section if drink is sold by the manager in charge to any number of drunken persons? It is clear that there is no machinery by which the person actually selling can be convicted; a penalty can only be inflicted on the licensee. It is impossible for us to place upon the section the narrow construction suggested."

This reasoning applies to the present case because it is only the accused, as the licensee, who can be convicted of committing a breach of a condition in his license under r. 138.

The above conclusion also accords with the rulings of this Court in *Queen-Empress* v. *Tyab Alli* (2), *Emperor* v. *Jeevanji* (3). As remarked by Chandavarkar J., at page 627† of the latter report:—"The Statute should be construed not merely with reference to its language, but also its subject-matter and object." In the present case the whole object of the statutory rules in question would be defeated, if a master could evade liability on the pleas set up for him in this case. The case Lord Russell was dealing with was, no doubt, one of a master putting a servant in his place to sell articles that the master is licensed to sell; but the case of a master putting a servant in his place to manufacture articles he is licensed to manufacture

(8) (1814) 3 M. & S. 11; 105 E. R. 516; 4 Camp. 12; 15 R. R. 381.

*Page of (1814) 3 M. & S.—[*Ed.*]
†page of (1830) 1 Cr. & J.—[*Ed.*

(9) (1896) 1 Q. B. 655; 74 L. T. 726; 44 W. R. 637; 18 Cox. C. C. 341; 60 J. P. 357.

*Page of (1896) 1 Q. B.—[*Ed.*]
†Page of 31 B.—[*Ed.*]

seems to me to be on all fours, as is re-cognized in the judgment of Bayley, B. in *Attorney-General* v. *Siddon* (1) already cited.

The principle in question is all the more applicable, in view of the fact that we are dealing with a case of manufacture of explosives, *i. e.*, articles dangerous in themselves. Thus in *Dominion Natural Gas Co.* v. *Collins* (10), their Lordships of the Privy Council say (page 646*):—

"It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity."

The case of *Jefferson* v. *Derbyshire Farmers Ltd.* (11), supplies an instance of the application of that principle, as making all the difference between that case and one like *Williams* v. *Jones* (12). As Atkin, L. J. remarked in the former case (at page 284†) "If he (the servant) had been making gun-powder instead of a sign-post the decision might have been otherwise." *Jefferson's case* (11) was one of a servant smoking and throwing away a lighted match, in a garage while drawing motor-spirit from a drum into a tin. The master was held liable for the resulting damage on the ground that the servant being engaged in an act which was within the scope of his employment, and required special caution, and having failed to exercise caution was guilty of negligence in the course of his employment. This was in spite of the decision of the House of Lords in *Williams* v. *Jones* (12), which the trial Judge had followed. In that case, a carpenter who was making a sign-board in the plaintiff's shed lit his pipe from a shaving, dropped the shaving, and set fire to the shed; and the House of Lords held that it was not in the course of his employment to light his pipe and smoke and consequently the master was not liable. The Court of Appeal held that the two cases were quite distinguishable, because the making of a sign-board is not in itself a dangerous operation (like pouring motor-spirit from a drum into a tin), demanding the exercise of any precautions. I refer in particular to the portion of the judgment of Warrington, C. J., at page 288*, which very lucidly points out the difference between the two cases.

Therefore, there is clear authority for distinguishing this case from that of a servant doing a wilful or capricious act entirely outside what he is employed to do, and for holding that the servant Bhimava's act of going to the accused's house and making gun-powder there was an act *within the scope of her employment*. Even if there had not been the distinguishing feature of *danger* in this case, I should hesitate to say that her act of manufacturing what she was employed to manufacture, though in an improper place, was not within the scope of her employment. The case is somewhat similar to a chauffeur taking his master's car for his own purposes contrary to the master's instructions, and having an accident at a place where otherwise he would never have been. Yet Pratt, J., in such a case held the master liable on the ground that the chauffeur at the time of the accident was acting in the course of his employment: see *Roberts* v. *Shanks* (13).

The fact that the servant went to an unauthorized place to make the gun-powder, in my opinion, makes no difference. It is not a sufficient answer to say that she was employed to work *only in the licensed house*. She was employed to make gun-powder, and it was the accused's business to see that she complied with all the conditions of his license. It might just as well be said that she was employed to make gun-powder *only with due care*, and that, therefore, any negligence on her part would be outside the scope of her employment. But the law clearly negatives such a contention.

The case most favourable to the accused that I have been able to find is *Rank, Ltd.* v. *Craig* (14). Carters were employed by a contractor by the day to take rubbish from certain works to his dumps, and to tip it there, and were strictly forbidden to tip

(10) (1909) A. C. 640; 79 L. J. P. C. 13; 101 L. T. 359; 25 T. L. R. 831.

(11) (1921) 2 K. B. 281; 90 L. J. K. B. 1361; 124 L. T. 775.

(12) (1865) 3 H. & C. 602 at p. 609; 11 Jur. (N. S.) 843; 12 W. R. 1023; 13 L. T. 300; 159 E. R. 668; 140 R. R. 631.

*Page of (1909) A. C.—[*Ed.*]

†Page of (1921) 2 K. B.—[*Ed.*]

(13) 94 Ind. Cas. 551; 27 Bom. L. R. 518; A. I. R. 1925 Bom. 360.

(14) (1919) 1 Ch. 1; 88 L. J. Ch. 45; 119 L. T. 751; 63 S. J. 39; 35 T. L. R. 8.

*Page of (1921) 2 K. B.—[*Ed.*]

it anywhere else. Some of the carters, without the knowledge of the contractor, and in contravention of their orders, took the rubbish to a piece of unfenced land, the property of the plaintiffs, and tipped it there. They did this for their own convenience and for a purpose of their own. The unfenced land was nearer to the works than the dump of the contractor. It was held by the Court of Appeal that the illegal acts complained of were not within the sphere of the carters' employment, and consequently that the contractor was not liable for them. This decision is based on the view that the carters' acts were "done deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer." (per Swinfen Eady, M. R, at page 9). That is to say, it was a case of the servant doing an act "on a frolic of his own", to use the well known expression of Parke, B., in *Joel* v. *Morison* (15). Such a case is entirely different from one like this of a negligent act in this course of a dangerous occupation which calls for special care, as is pointed out in *Jefferson* v. *Derbyshire Farmers Ltd.*, (11), already cited. In fact Swinfen Eady, M. R., in his judgment says (page 9*):—

"The acts of which they were guilty were their own deliberate acts. *It is not a case of carelessness or negligence in the course of their employment.*"

Had it been such a case, the decision doubtless would have been different. Also there was no express statutory prohibition against the rubbish being put where it was, corresponding to the prohibition against the manufacture of gun-powder elsewhere than in the license that there is in the present case. Moreover, against this case may be cited *Reg* v. *Stephens* (16) where the facts were somewhat similar. But there it was held that the defendant was liable on an indictment for obstructing navigation by throwing rubbish into a river from a quarry owned by him but managed by his son, although it was proved that the men employed at the quarry had been by order prohibited from doing the acts complained of. This case is a recognized authority for the proposition that, apart from Statute, a master may be criminally liable for the act of his servant, though there is no *mens rea: cf. Coppen* v. *Moore* (17).

To sum up, this is, in my opinion, a case of a Statute relating to the mode in which a particular business is to be conducted. The effect of it is to prohibit expressly the manufacture of gun-powder except in the special place licensed for the purpose. This is as much an essential part of the mode of manufacture as any other condition of the license—in fact it is perhaps the most important condition, because its breach involves the danger of proximity of other parties that is specially referred to by the Privy Council in *Dominion Natural Gas Co. Collins* (10). Having regard to the decision in *Jefferson* v. *Derbyshire Farmers Ltd.* (11), I think the act of Bhimava was clearly within the scope of her employment, in spite of its being done for her own convenience and in spite of instructions to the contrary received from the accused. It is, therefore, a case of express statutory prohibition, where the master is criminally liable for the acts of his servant committed in the scope of his employment: *cf. Varaj Lall* v. *Emperor* (18). I would, therefore, set aside the acquittal, convict the accused of a breach of condition No. 4 of the conditions of his license, and thus having committed an offence under r. 138 of the Rules under s. 5 of the Indian Explosives Act, 1884, and sentence him to pay a fine of Rs. 500. It is a serious case, which resulted in the servant's death; and I think the maximum penalty provided for an offence falling under cl. (9) of r. 138 should be imposed on the accused, who took no clear or adequate steps to prevent the condition in question being broken by the deceased.

The case was heard by Mr. Justice Crump who passed the following judgment.

Mr. *Nilkant Atmaram*, for the Accused.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

Crump, J.—The accused held a license under the Indian Explosives Act, 1884, to manufacture gun-powder. The fourth condition of that license contains the following words:—

(15) (1834) 6 Car. & P. 501 at p. 503; 40 R. R. 814.

(16) (1866) 1 Q. B. 702; 7 B. & S. 710; 35 L. J. Q. B. 251; 12 Jur. (N. S.) 961; 14 L. T. 593; 14 W. R. 859.

*Page of (1919) 1 Ch.—[*Ed.*]

(17) (1898) 2 Q. B. 306 at p 312 62 J. P. 453; 67 L. J. Q. B. 689; 78 L. T. 520; 14 T. L. R. 414; 46 W. R. 620; 19 Cox. C. C. 45.

(18) 82 Ind. Cas. 137; 51 C. 948; at p. 952; 28 C. W. N. 854; A. I. R. 1924 Cal. 985; 25 Cr. L. J. 1209.

"The explosive shall be manufactured in a tent or lightly constructed building exclusively appropriated for the purpose and separated from any dwelling-house, highway, street, public thoroughfare or public place by the distance in the case of gun-powder of one hundred yards."

The effect of this positive injunction, no doubt, is to forbid the manufacture of gun-powder otherwise than in accordance with this condition.

The accused lived in the village of Kerur and he constructed a building outside the village, which complied with this condition, and employed a woman named Bhimava to manufacture gun-powder there. Bhimava engaged one Sangava to assist her. On September 7, 1925, Bhimava went to this building with Sangava and took some sulphur, some salt-petre, and some charcoal, the three ingredients necessary for the manufacture of gun-powder. She and Sangava, for reasons which are not, in my opinion, clearly established then went with these ingredients to the house of the accused in the village, and performed part of the process of manufacture there. On these facts the accused is charged with committing a breach of this condition of his license. The question is whether that charge is sustainable. I am informed by the Government Pleader that the second and third heads of the charge, *viz.*, of offences arising out of the death of Bhimava are not now pressed. Therefore, I am not concerned with the results of this failure to comply with the conditions of the license. And the appeal is, moreover, confined to the breach of the condition which has already been set out. That there was a breach of this condition is clear. The question is whether the accused is criminally liable for an act done by Bhimava. It does not appear on the evidence or on the statement of the accused that he had ordered Bhimava not to manufacture gun-powder at any other place than the building specially constructed for the purpose. That he did not do so may be inferred from the fact that the two women went to the accused's own house for the purpose. The accused did not know that Bhimava was manufacturing gun-powder elsewhere than in the specially constructed building. Such is the finding of the Magistrate and I accept it for the purposes of this appeal.

In my opinion two questions arise for determination. The first question is whether the penal clause is so drafted as to place upon the master criminal responsibility for the acts of his servant. The second question is whether the servant Bhimava was acting within the general scope of her employment. Upon the first question many cases have been cited but the conclusion to be drawn is, I think, that the question is one of construction and that in construing the Statute regard must be had to its language, scope and object That will be found laid down by Lord Russell, C. J., in *Coppen* v. *Moore* (17). The test suggested there is: "Did the Legislature intend having regard to the language, scope and object of the Statute to fix criminal responsibility upon the master for acts done by his servant in the course of his employment although such acts were not authorised by the master?" The same principle may be deduced from the judgment of the same learned Judge in *Commisioner of Police* v. *Cartman* (9). Whether there must be in any case personal knowledge of the licensed person depends primarily upon the language of the Statute. Here there are no words which can be held to require such knowledge before the offence is complete. In a similar case *Mullins* v. *Collins* (19) the Statute under consideration prohibited the commission of a certain act by a licensed person. The act was committed by a servant. There were no words which required that the licensee should have knowledge of the commission of the act. Blackburn, J., said (page 295*): "if we hold that there must be a personal knowledge...we should make the enactment of no effect." Similarly in *Cundy* v. *Le Cocq* (20) Stephen, J., remarked (page 209†):—

"Our answer to the question put to us turns upon this, whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only where the licensed person knows or has means of knowing that the person served with intoxicating liquor is drunk, or whether the offence is complete where no such knowledge is shown. I am of opinion that the words of the section

(19) (1874) 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 22 W. R. 297.

(20) (1884) 13 Q. B. D. 207; 53 L. J. M. C. 125; 51 L. T. 265; 32 W. R. 769; 48 J. P. 599.

*Page of (1874) 9 Q. B.—[*Ed.*]

*Page of (1884) 13 Q. B.—[*Ed.*]

amount to an absolute prohibition of the sale of liquor to a drunken person."

Here, too, we have an absolute prohibition of the act done by the servant. Here, too, if we hold that there must be personal knowledge we make the enactment of no effect. The scope of the Statute is to regulate the manufacture of explosives, the object or at least one of the objects to ensure the safety of the public. Similar considerations were given effect to by this Court in *Queen-Empress* v. *Tyab Alli* (2) and it was held that where a Statute prohibited the sale of arms to any person not legally authorized to possess the same, and a servant did so sell arms, the master could not defend himself by a plea of want of knowledge. The principles established by these decisions appear to me to apply here and though I have referred to all the cases which have been cited I do not find it necessary to discuss any others. There is, in my opinion, a distinction between those cases where it is sought to apply a penal Statute, and those cases where a third party seeks relief by way of damages against the master for the negligent act of the servant.

If then Bhimava was acting within the general scope of her employment the accused is, in my opinion, liable to be punished for her act. I feel no doubt that she was so acting. What she did was in furtherance of her master's business, and not in pursuance of any purpose of her own. It was argued that the scope of her employment was to act according to the conditions of the license, and that, therefore, any breach by her of those conditions must be an act outside that scope. Enough has been said to show that this argument cannot prevail. Were it sound it might have been a successful defence in each and every one of the cases which I have cited. She was employed to manufacture gun-powder for her master. That was the general scope of her employment, and the breach of the condition of the license was committed while she was so engaged. The case of *Phelon & Moore* v. *Keel* (6) is plainly distinguishable. Here Bhimava did not take the materials for her private ends and for a purpose unknown to the master. The case is indeed against the accused in one respect for it recognises in the words of Avory, J., that (page 170)* :

"The Legislature may, and sometimes does, impose an absolute duty on a person, a breach of which duty is made a criminal offence even in the absence of *mens rea*."

On these grounds I agree with the view expressed by Fawcett, J., I must, therefore, set aside the order of acquittal and find the accused guilty of committing a breach of condition 4 of the conditions of the license and of thus having committed an offence under r. 138 of the Rules made under s. 5 of the Indian Explosives Act, 1884. Upon the question of penalty, I would remark that in such cases the employer's ignorance has often been held to be a mitigating circumstance, that the accused is a petty grocer in a remote village and presumably totally unable to pay a heavy fine. Further, it is to be remembered that these proceedings have lasted over a year and have been carried up to the High Court I would impose a fine of Rs. 150.

A. N. A. *Appeal allowed.*

*Page of (1914) 3 K. B.—[*Ed.*]

RANGOON HIGH COURT.

CRIMINAL REVISION No. 1456-B OF 1926.
December 23, 1926.
Present:—Mr. Justice Mya Bu.
KALI KUMAR DE—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Opium Act (I of 1878), ss. 14, 15—Criminal Procedure Code (Act V of 1898), s. 103—Search—Procedure—Non-compliance with provisions of s. 103, whether vitiates conviction.

The provisions of s. 103 of the Code of Criminal Procedure are applicable to searches made under s. 14 of the Opium Act, but where a person is searched in an open place under s. 15 of the Act compliance with the provisions of s. 103 is not obligatory. [p. 981, col. 1.]

Criminal review of an order of the Sub-Divisional Magistrate, Kyaukpyu, in Criminal Regular No. 121 of 1926.

JUDGMENT.—The learned Sessions Judge appears to have made it his main ground that the search in the case was not in accordance with the provision of s. 103 of the Criminal Procedure Code. These provisions apply to searches made under Ch. VII of that Code under which searches of various kinds of places may be made for certain purposes and under certain conditions.

Section 14 of the Opium Act empowers officers mentioned therein to make searches in any building, vessel or enclosed place. Section 15 provides, *inter alia*, that the said officers may detain and search any person believed to be guilty of any offence under the Act and if such person has opium in his possession may arrest him.

Section 16 of the Act enacts that all searches under s. 14 or s. 15 shall be made in accordance with the provisions of the Code of Criminal Procedure. It, however, does not specify the particular provision or provisions of the Code of Criminal Procedure applicable to searches under s. 14 or to searches under s. 15. But by a comparison of the provisions of Ch. VII of the Code of Criminal Procedure with these three sections of the Opium Act, it is clear that the provisions of s. 103 of the Criminal Procedure Code are applicable to searches made under s. 14 of the Act.

In the present case, the applicant was arrested and searched in an open place under the provisions of s. 15 of the Act and compliance with the provisions of s. 103 of the Code of Criminal Procedure was not obligatory. There are certain kinds of searches permitted by the Criminal Procedure Code, which do not fall within Ch. VII, which are not governed by the provisions of s. 103, for example, searches under s. 15.

It is clear to my mind that non-compliance with the provisions of s. 103 of the Criminal Procedure Code in conducting the search in this case does not form a good ground of attack against the applicant's conviction. Whether the conviction should be upheld or not, is, therefore, merely a matter depending upon the consideration of the evidence in the case.

The trial Court believed the evidence of the Sub Inspector of Excise, the complainant, which was corroborated by the evidence of Mg. Ba Gyaw (P. W. No. 3) as well as by the evidence of the Excise peon, Nga Mrwit (P. W. No. 2). The evidence of these witnesses did establish the fact that 6½ *tolas* of opium were found in the applicant's basket and judging the evidence of Tarasarang Das (P. W No. 4) in the light of the evidence of the said 3 witnesses, the views expressed by the trial Court against the evidence of Tarasarang Das do not appear to be at all unreasonable. In short I may say that there are no grounds for believing that the consideration of the evidence in the case by the trial Court was so unreasonable as to call for interference in revision.

For the above reasons I find that there is no ground for interference with the conviction and sentence passed by the Magistrate. I direct that the records be returned with these remarks.

A. *Application rejected.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION NO. 299 OF 1926.

November 30, 1926.

Present:—Mr. Justice Crump : on difference between Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett

SEJMAL PUNAMCHAND AND ANOTHER—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 235, 239, 429—False statements by different persons in same case with same object—'Same transaction'—Joint trial, legality of—Distinct statements in same deposition—Separate charges, legality of—Reference, legality of—Revision—Power to investigate into facts.

Accused No. 1 brought a suit as a member of a firm in whose favour a promissory note had been passed to recover the amount due thereunder on the basis that full consideration for the promissory note had been paid. He gave false evidence that full consideration had been in fact paid and denied the allegation of the executant of the instrument that a certain amount had been deducted. Accused No. 2 was a member of a firm which had a half interest in this loan. He also went to the witness-box and deposed similarly that full consideration was paid, in support of accused No. 1's case. The accused were charged and tried for offences under s. 193 of the Penal Code and convicted:

Held, Per *Fawcett* and *Crump, J.J.* (*Shah, J.* dissenting) that the two acts of the accused of giving false evidence were committed in the course of the same transaction within the meaning of s. 239 of the Criminal Procedure Code and that the joint trial was not, therefore, illegal. [p. 985, cols. 1 & 2; p. 988, col. 1.]

Held, further, Per *Fawcet* and *Crump, J.J.*, that an accused can be separately tried and convicted for two false statements made on different subjects though in one and the same deposition. [p, 986, col. 2; p. 988, col. 1.]

Per *Shah, J.*—The mere fact that evidence is given by two or more witnesses with reference to the same purpose or to the same point involved in any judicial proceeding, either a suit or a criminal case, is not sufficient to justify the joint trial of different persons as to statements made by them separately in that proceeding. [p. 983, col. 1.]

Per *Fawcett, J.*—A distinct charge is not a condition precedent to abetment being a link which brings a case under the expression 'the same transaction' in s. 239 of the Criminal Procedure Code. [p. 985, col. 2.]

Per *Crump, J.*—A reference under s. 429, Criminal Procedure Code, where the point of difference does not necessarily involve conflicting decisions as to the disposal of the whole case is likely to lead to inconvenient results. [p. 987, col. 1.]

Where two persons committing offences are animated by a common purpose and there is continuity in their actions then there is only one transaction so far as they are concerned. [p. 987, col. 2.]

The High Court can, in criminal revision, consider how far findings of fact are justified though in practice it is unusual to do so. [p. 988, col. 1.]

Criminal application against conviction and sentence passed by the Chief Presidency Magistrate, Bombay.

JUDGMENT.

Shah J.—(*October 8, 1926.*)—This is an application by two accused persons, who were charged with having given false evidence in the course of their statements in a suit filed on the Original Side of this High Court. The charges against accused No. 1 were two, first, that he made a false statement "Not true that I then deducted Rs. 750 for first ten months' interest"; and secondly, that he made the following false statement, "No letter was brought to me along with that cheque. I got no letter from defendant in which he alleged we had deducted Rs. 750." The charge against accused No. 2 was that he made the following statement which he knew or believed to be false, "Not true that Rs 750 deducted for interest." There was separate charges against each of the accused.

In the suit in which the two accused gave evidence, one of the questions raised at the instance of the defendant in that case was whether the sum of Rs. 750 was paid back by him as interest at the time of the loan. The trial Court having made a complaint under s. 476, Criminal Procedure Code, in respect of these statements, these proceedings were started against the accused in the Court of the Chief Presidency Magistrate, and the charges were framed against each of the accused, as above indicated. The learned Magistrate, after considering the evidence, came to the conclusion that these statements were proved to be false to the knowledge of the accused persons, and, accordingly, convicted them under s. 193, Indian Penal Code, and passed sentences against accused No. 1 of three months' and one month's rigorous imprisonment and against accused No. 2 of three months' rigorous imprisonment respectively.

The present application has been filed by the accused for a revision of these convictions and sentences. The first point of law raised on behalf of the applicants is that the joint trial of the two accused persons in respect of each one giving false evidence with reference to the particular statement is not legal. In support of this contention reliance is placed upon the decisions of this Court in *Reg* v. *Bhavanishankar Haribhai* (1) and *King-Emperor* v. *Krishnarao* (2). Secondly, it is urged that the two charges against accused No. 1 in respect of two statements made in the course of the same deposition are not legal; and that the offence committed by the accused in respect of these statements is really one offence. And reliance is placed upon *Rakhal Chandra Laha* v. *Emperor* (3). For the purpose of this judgment I need not state the further point raised as to the merits of the case.

We have heard the Government Pleader in respect of the first two points without hearing the applicants as to the last point relating to the merits. As regards the first point it is urged on behalf of the Crown that these depositions were given with reference to a suit, which related to a promissory note, in which both the accused persons were interested, and that the evidence given in support of the suit by these two persons must be treated as given in the course of the same transaction, that transaction being the suit or the claim made in the suit, and that the joint trial was permissible under s. 239 (*a*), Criminal Procedure Code. As regards the second point, it is urged that if a witness makes more statements than one which are false, and which he knows to be false in the course of the same deposition he commits not one offence, but as many offences as the false statements he makes in the course of his deposition.

As regards the first point, I am of opinion that the applicants' contention is correct. It is supported by the decisions of this Court, to which reference has been made, and it is possible to refer to cases of other High Courts also to the same effect. It is not necessary, however, to do

(1) 5 B. H. C. R Cr. C. 55.
(2) 4 Bom. L. R. 53.
(3) 2 Ind. Cas. 697; 36 C. 808; 9 C. L. J. 690; 13 C. W. N. 942; 10 Cr. L. J. 150.

so. In this Court the view taken in these cases has been consistently followed so far as I am aware. The mere fact that the evidence is given by two or more witnesses with reference to the same purpose or to the same point involved in any judicial proceeding, either a suit or a criminal case, has not been held to be sufficient to justify the joint trial of different persons as to statements made by them separately in that proceeding. The deposition in the course of which the statement is made is a transaction by itself, and each witness making a statement in the witness box acts on his own account, and it is that act of his for which he is to be prosecuted. There may be cases in which the prosecution may allege abetment of perjury or conspiracy to commit perjury, and the evidence may be given as a part of the conspiracy formed by several persons together. In such a case on proper allegations it may be possible to secure a joint trial in respect of charges relating to making false statements in the course of depositions by different persons. As an illustration of this position, I may refer to the decision in *Emperor* v. *Ganesh Narayan Dikshit* (4) where one of the accused persons who had given evidence in a criminal case to support a false charge which was laid as a part of the scheme which was formed by several accused persons, and the evidence was given by the particular accused as a step in the carrying out of that scheme. In the present case there is no such allegation, and the depositions of the two witnesses also do not disclose any such case.

It may be mentioned that in the complaint of the Court, which tried the suit, reference is made to offences under ss. 193, 209 and 210, Indian Penal Code, or attempt to commit offences under ss. 209 and 210 read with s. 511, Indian Penal Code, as regards accused No. 1 and the particular statements made by accused No. 1 are set forth. As regards accused No. 2 the offence referred to is one under s. 193, Indian Penal Code, and the particular statement is mentioned. There is no reference there to any abetment of the offence of one accused by another nor is there any reference to any conspiracy between the two as regards the giving of false evidence. In the evidence given at the trial by the defendant in the civil suit, there is no reference to any such allegation of abetment or conspiracy. Beyond the statement that at the time of the loan, both the accused were present, there is nothing to suggest that his allegation was that either accused abetted the other or that there was a criminal conspiracy between the two to give false evidence. The learned Chief Presidency Magistrate charged each accused separately, as the charges framed clearly show.

It is urged, however, that as these statements were made with reference to a suit, these accused persons had a common purpose to carry out and the joinder of charges would be permissible under s 239, cl. (*a*), Criminal Procedure Code. This aspect has been considered in *King Emperor* v. *Krishnarao* (2) and in that case the learned Judges could not see their way to hold the trial to be legal, and they relied upon the decision in *Subrahmania Iyer* v. *King-Emperor* (5) in support of their conclusion. Thus, to my mind, according to the decisions, the joinder of charges in this case cannot be justified under s 239, cl. (*a*), (*b*) or (*d*), Criminal Procedure Code, on the allegations of the prosecution. As regards the prejudice to the accused I do not think that it is necessary to go into this question. But if it were necessary I should say that it is very difficult to say that the joint trial may not prejudice the accused. For instance, in this case, the offence of accused No. 2 is quite distinct and there is a good deal in the case as regards the second charge against accused No. 1 as to which it would be difficult to say that it would not prejudice the case of accused No. 2. I am of opinion that the joint trial of these two accused persons on two distinct offences punishable under s. 193, Indian Penal Code, is not legal.

As regards the second point, I think it is one of minor importance in the case. Whatever view may be taken of that point, it really affects the question of sentence only under the circumstances of this case. The observations of Jenkins, C. J., and Mookerjee, J., in *Rakhal Chandra Laha* v. *Emperor* (3) at page 814* of the report show that the making of any number of false statements in the same deposition is one

(4) 17 Ind. Cas. 705; 14 Bom. L. R. 972; 13 Cr. L. J. 833.

(5) 28 I. A. 257; 3 Bom. L. R. 540; 25 M. 61; 11 M. L. J. 233; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

*Page of 36 C.—*Ed.*

aggregate case of giving false evidence, and such charges of false evidence cannot be multiplied according to the number of false statements contained in a deposition. Under the circumstances of this case, I do not desire to express any final opinion on this point.

In my view the convictions and sentences should be set aside and the accused should be ordered to be re-tried separately.

I may state that I have come to this conclusion without hearing the applicants on the merits. Having regard to the nature of the case, and the nature of the point, which vitiates the trial, that is the order which I would make.

Fawcett, J.—(*October 8, 1926*).—I quite admit that there are numerous rulings under which the ordinary rule is that persons who are charged with perjury, even though the alleged false statements were made in the course of the same trial should be tried separately; and I have no desire to question those rulings, so long as they are applied within reasonable limits. But at the same time this Court has recognized that there may be cases where a joint trial may be properly held. Thus, in the case cited by the learned Counsel for the applicants, *viz*, *King-Emperor* v. *Krishnarao* (2), the Court in its judgment referred to the possibility of an exception to the general rule. They say that in that particular case (page 54*):—

"There was no charge of mutual abetment or conspiracy such as under s. 239 (Criminal Procedure Code) might possibly have justified a joint trial. The circumstances it is true, may have given fair ground for suspicion of pre-arrangement but it is clear that in neither case (*i. e.*, the case of either accused) was there any evidence on which a charge of abetment could have been sustained."

Again in the case referred to in my learned brother's judgment, *viz.*, *Emperor* v. *Ganesh Narayan Dikshit* (4) it was held that s. 239, Criminal Procedure Code, was distinctly applicable, inasmuch as there was one sustained and continuous plot for the purpose of screening the real offenders in a certain robbery, and that to secure that end various means had to be resorted to, one of which was the giving of false evidence. There was complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of s. 239, Criminal Procedure Code. Reference is made to the decision in *Emperor* v. *Datto Hanmant* (6) where it was held that the main test for judging of what was "the same transaction" was not necessarily proximity in time, so much as continuity of action and purpose.

In the present case, I think it is important to see exactly what is alleged by the prosecution and has been found proved by the Magistrate. In doing this, I only take what is apparent from the judgment, without prejudice to the question whether the findings of the learned Magistrate are open to revision on the merits.

It is common ground that the executant of the promissory note by name Awte, and the two accused, were all three present when the note was passed. Awte says that in spite of the note being for Rs. 5,000, as a matter of fact Rs. 750 were deducted for advance interest. The accused deny that and say that the full amount of Rs. 5,000 was paid to Awte. The circumstances, therefore, are such that one of the two stories must be false. There can be no question of any mistake.

Accused No. 1 brought a suit, as a member of the firm in whose favour the promissory note had been passed, to recover a certain amount from Awte on the basis that full consideration of Rs. 5,000 had been paid. He gave evidence to the effect that that consideration had been in fact paid, and denied Awte's allegation that Rs. 750 had been deducted. Accused No. 2 admittedly is a member of a firm, which had a half interest in this loan to Awte. He also went into the witness-box and deposed that full consideration was paid, and denied Awte's allegation as to the deduction of Rs. 750. That was in support of the plaintiff's case that full consideration as mentioned in the promissory note had been paid.

Now supposing that accused No. 1 had succeeded in obtaining a decree for the full amount due on the basis of Rs. 5,000 having been paid at the time of the promissory note, when in fact only Rs. 4,250 were paid, then the case clearly falls under s. 210, Indian Penal Code, that is, fraudulently obtaining a decree for a sum not due. In the present case the suit did not succeed, and, therefore, supposing the facts

*Page of 4 Bom. L. R.—[*Ed.*]

(6) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578

are as found by the Magistrate, it would only be a case of attempting to commit this offence under s. 210, Indian Penal Code.

I have already mentioned that the second accused had a joint interest in the loan, and if the promissory note had been passed in favour of the two firms that really advanced the money jointly, then he also would have been a plaintiff in the suit. It is simply due to the omission of the name of the other firm in the note that he was not himself a plaintiff. But he does appear as a witness in the case, and necessarily an important witness, and he supports the story of the first accused. On the facts found, that is equivalent to saying that he intentionally aided the first accused in committing an offence under ss. 210 and 511, Indian Penal Code. Certainly it is to my mind, clear, in view of the fact that admittedly the two accused were both present at the time the consideration for the note was paid, that the case would fall, first, under s. 34, Indian Penal Code, which says: "When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." In this case, one of the two persons made a false claim and the other gave false evidence in furtherance of the common intention to obtain a fraudulent decree for an amount not due. Secondly, it seems to me that the case obviously comes under s. 107, Indian Penal Code, in that either the second accused engaged in a conspiracy with the other accused for the doing of the act in question, or he intentionally aided in the doing of that act by going into the witness box and swearing falsely in support of the first accused's case. Thirdly, it seems to me that the case would fall under the new s. 120-A relating to criminal conspiracy and that accused No. 2 could have been prosecuted under s. 120-B, Indian Penal Code. Therefore, to say, in the circumstances of the present case, that because there has not been a charge such as there might have been of conspiracy or abetment, the joint trial is illegal, seems to me to be perverting the rulings of this Court to an absurd and unreasonable extent. In my opinion, on the allegation of the prosecution, and on the facts found, there is no sufficient reason for saying that the case does not properly fall within cl. (*a*) of s. 239, Criminal Procedure Code, namely, that the two accused are persons accused of the same offence committed in the course of the same transaction, *i. e.*, the transaction in which there was an attempt by a suit to obtain a fraudulent decree for an amount not due. There was continuity of purpose, which satisfies the test laid down by this Court as to what is the same transaction.

It is said that there is no allegation in the complaint of the charges of consipiracy or abetment. In my opinion this is immaterial. The complaint did refer to ss. 209 and 210, Indian Penal Code, and the facts admitted and held proved establish of themselves abetment by accused No. 2, which covers conspiracy (s. 107, Indian Penal Code). As pointed out in *Barindra Kumar Ghose* v. *Emperor* (7):

"Though to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design."

Res ipsa loquitur in the present case. It seems to me quite clear that there need not be a distinct accusation of *abetment* or *attempt* to bring the case under s. 239 (*a*) for otherwise cl. (*b*) of that section would be unnecessary. Here, there certainly was an accusation that an offence had been committed by accused No. 1 under ss. 209 and 210, read with s. 511, Indian Penal Code, and though the complaint did not specifically allege that accused No. 2 had committed abetment of that offence both the accused were alleged to have given false evidence in regard to the claim for Rs. 750 and for the purpose of supporting that claim. The findings of the Magistrate should be looked into for seeing if the parties could legally be jointly tried: *cf. Asutosh Das Gupta* v. *Purna Chandra Ghose* (8). On these findings abetment by accused No. 2 is clearly established, though there was no charge framed. But a charge is not made a condition precedent to abetment being a link which brings a case under the expression "the same transaction" in s. 239. In my opinion it is the

(7) 7 Ind. Cas. 359; 37 C. 467 at p. 507; 14 C. W. N. 1114; 11 Cr. L. J. 453.

(8) 71 Ind. Cas. 670; 50 C. 159 at p. 164; 36 C. L. J. 287; A. I. R. 1923 Cal. 11; 24 Cr. L. J. 206.

proved and/or admitted facts which show abetment (not the formulation of a charge of abetment) that have to be considered for deciding whether the acts of two or more accused form part of "the same transaction." This is recognized in *King-Emperor* v. *Krishnarao* (2) where the Court referred to there being *no evidence* on which a charge of abetment could have been sustained, as well as to the absence of a *charge* of abetment. Similarly, in *Tepanidhi Gobinda Chandra Bharati* v. *Emperor* (9) there was no charge of abetment, but the Court considered whether the *evidence* showed a continuity of action or purpose between the acts committed by the three accused, and held that if the Crown had been able to show by evidence some association between them, acting for a common purpose in execution of a common design, then the charges against the respective accused might be jointly tried and disposed of together. Such continuity of purpose and association is fully established on the facts found and admitted in the present case.

Accordingly, I do not agree with my learned brother that the joint trial of the two accused should, in the circumstances, be held illegal.

I admit that, on the ruling of this Court in *King-Emperor* v. *Krishnarao* (2) by which we are bound, the joint trial must be held to be illegal, if it does not fall within s. 239, Criminal Procedure Code, although at the same time, if this or a similar case goes before a Full Bench, I think, it might be considered whether the ruling in *Subrahmania Iyer* v. *King-Emperor* (5) can properly be applied to a case like the present, where no objection is taken in the lower Court, and the point is raised for the first time in revision, and where the evidence against the two accused is exactly the same, so that it is a pure waste of time and money to have separate trials.

No doubt it can be said that, if you have separate trials, each accused can call the other to give evidence in support of his case. That was a point that was made, I see, by the Pleader in *Reg.* v. *Bhavanishankar Haribhai* (1). But that certainly is not in itself a sufficient basis for saying there is prejudice, in a case where the accused do not themselves object to a joint trial and where there is legitimate ground for thinking the case falls under cl. (*a*) of s. 239, Criminal Procedure Code.

A point was made that there was a second charge against the first accused of another false statement in his deposition, with which the second accused had no concern. If s. 239 applies, then it is perfectly clear from the illustrations to that section that the two accused may be tried together, both of them being charged with the common false statements which they made, and the one accused being charged also with the alleged false statement with which alone he was concerned.

It has also been urged that if a person makes twenty false statements in a deposition, he can only be tried and charged with one offence of perjury. No doubt, there is authority for that statement. Speaking for myself, it seems to me an absurd proposition. I want to except a case where a second, third or fourth false statement repeats merely in another form the first false statement. Then, of course, there is one offence. But take the case of a man who first makes one deliberate false statement at 4 o'clock, his cross examination continues and at 5 o'clock he makes another false statement on another subject, are you going to say that he has not committed separate offences? I say he has committed two separate offences. The mere fact that they are included in one deposition does not make it any the less two offences. The case is analogous to that of an assault or beating, where fifty blows are inflicted. The Indian Penal Code in s. 71 recognizes that each blow can be treated as a separate offence, but lays down limitations as to punishment. So I certainly do not agree that accused No. 1 could not be separately tried and convicted for two false statements on different subjects in one deposition, in accordance with sub-s. (1) of s. 235, Criminal Procedure Code. *cf. Queen-Empress* v. *Kabhai* (10).

Shah, J.—In view of the difference of opinion between my learned brother and myself on the fundamental question which relates to the legality of the trial, we think that a situation has arisen, in which, without our going into the merits, the case may be laid before a third Judge under

(9) 54 Ind. Cas. 769; 5 P. L. J. 11 at p. 16; 21 Cr. L. J. 161.

(10) Rat. Un. Cr. C. 336; Cr. Rg. No. 26 of 1887.

s. 439 (1) read with s. 429, Criminal Procedure Code. The same bail as regards both the accused to continue during the pendency of this application.

The Reference came on for hearing before Mr. Justice Crump and the following judgment was passed.

Mr. *Little*, for the Accused.

Mr. *P. B. Shingne*, Acting Goverment Pleader, for the Crown.

Crump, J.—(*November 17, 1926*).—Three points were suggested by Mr. Little on behalf of the accused as arising for determination in this case. Briefly they are as follows:—

(1) Were the accused properly charged and tried together?

(2) Could accused No. 1 be convicted of two offences with reference to two false statements made in the course of one and the same deposition?

(3) Were the accused properly convicted on the merits?

Upon the first point the learned Judges who formed the Divisional Bench have differed. On the second point there is no expressed difference of opinion, for Shah, J., has refrained from answering the question. The third point has not been dealt with at all. This being so I have heard arguments on the first point only, for if I agree with the view expressed by Shah, J., the other points will not arise. If, however, I hold that there is no fundamental error in the trial the whole case is open to me, so at least I understand s. 429 of the Code of Criminal Procedure. I would, however, with all deference, remark that the course which has been followed in this case is likely to lead to inconvenient results. I am not aware of any previous case where a point of difference has been referred under s. 429 where such difference does not necessarily involve conflicting decisions as to the disposal of the whole case.

The rule applicable here is contained in s. 239 (*d*) of the Code of Criminal Procedure. I would apply this clause rather than cl. (*a*) for the words "the same offence" in cl. (*a*) appear to me to indicate the same physical act of crime. But for the purposes of the present case it makes no difference whether the matter falls under s. 239 (*a*) or 239 (*d*). If the two acts of giving false evidence were committed "in the course of the same transaction" these two persons could be charged and tried jointly. The Legislature, though more than once invited to do so, has studiously, and I think, speaking with all respect, wisely refrained from attempting a definition of the phrase "in the course of the same transaction." Each case must (in my opinion) be considered on its merits, and, therefore, it is peculiarly true here that no case can be an authority except upon its own facts. The test, I take it, is whether the two persons concerned are engaged in one transaction, and to determine that it is necessary to regard the facts from the point of view of those two persons. If they are animated by a common purpose, and there is continuity in their actions, then surely there is one transaction so far as they are concerned. It may even be that community of purpose is not necessary, but I speak strictly with reference to the alleged facts of this case. Put shortly those facts are as follows:—

Accused No. 1 was the plaintiff in a suit on a pro note executed by one Awte. The defendant Awte pleaded that Rs. 750 had been deducted as interest at the time of execution. Both the accused swore that Rs. 750 had not been deducted as interest. It has been found that the evidence so given was untrue to their knowledge. The Magistrate has found that the two accused were partners in this transaction, and it is at least conceded that accused No. 2 was interested in the sense that he had advanced part of the consideration to accused No. 1. Both learned Judges assume for the purposes of this question that there was a common purpose in pursuance of which each of these persons gave false evidence. It is, no doubt, true that each act of giving false evidence is the act of the person giving that evidence, and, therefore, the transaction of that person, but it does not (in my opinion) follow that there is not a major transaction, so to speak, embracing these two minor transactions. If there was a common purpose to make out a false claim so far as concerns the sum of Rs. 750 then it seems to me that from the point of view of these two persons there was one transaction.

If the reported cases are examined they do not (in my opinion) suffice to establish as an universal rule that in no case can two persons each of whom has given false evidence be jointly charged and tried for those offences. *Reg.* v *Bhavanishankar Haribhai* (1) was decided in 1868. The

Criminal Procedure Code of 1861 was then in force, and I cannot find in it any provision corresponding to s. 239 of the present Code. That provision first appears in s. 458 of the Code of 1872, and the statutory provision if applicable overrides any earlier judicial decision. The case of *King-Emperor* v. *Krishnarao* (2), was decided in 1902 when the Code of 1898 was in force. And s. 239 of that Code as it then stood is substantially reproduced by the amending Acts of 1923. But I fail to find any universal rule laid down in that decision. The facts are not stated with sufficient fulness to make it possible to deduce any such rule and the language of the judgment does not indicate that any question arose there whether the offences were or were not committed "in the same transaction." I cannot regard that case as binding upon me with reference to the facts here. What was in reality decided was that the facts of that case did not fall within the provision which now appears as s. 239 (*b*). The other cases cited turn strictly upon their own facts, and are thus distinguishable. In my opinion, therefore, there is no authority which can be invoked beyond the words of the Legislature, and applying those words to the facts found by the Magistrate I agree with Fawcett, J. that there is no fundamental illegality which vitiates the trial. I would only add that this conclusion is without prejudice to any opinion which I may form upon the merits of the case.

The matter will stand over for further hearing on two other points raised.

The case was heard on the two remaining points by Crump, J., on 30th November, 1926.

Mr. *Jinnah*, for the Accused.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

Crump, J.—After hearing Mr. Jinnah on the two points reserved in my judgment of November 17, though this is not an appeal I have allowed the merits to be fully argued. I can find no reason to suppose that the Magistrate has committed any error of law in arriving at his conclusions. This Court can, no doubt, in revision consider how far findings of fact are justified though in practice it is unusual to do so. It is enough to say that I have examined the record and that I feel that the Magistrate's findings of fact are in all probability correct. There is, therefore, no ground for interference.

As for the remaining point I am unable to see that it has any substance. A deposition is one transaction. Each lie (to put it shortly) told in a deposition is an offence. The case is thus covered by s. 235 (1) of the Code of Criminal Procedure. Section 71 of the Indian Penal Code was invoked but the case is not within that section at all. The first paragraph might at first sight seem to apply, but that could only be so if the whole deposition were an offence. It is no offence to make a deposition in Court. The offence, if any, is confined to any false statement made in the course of such deposition. The case in Illustration (*a*) to the section is a different case. There the whole beating is an offence and each of the fifty strokes making up the whole is also an offence. With all deference I see no real analogy between this case and the case in Illustration (*a*). Here the two statements are as to two separate and unconnected matters and, in such a case at least, I see no reason why an accused person cannot be tried and convicted for each offence.

The bail-bonds must be cancelled and the accused remanded to custody to serve the unexpired period of their sentence.

A. N. A. *Order accordingly.*

BOMBAY HIGH COURT.

CRIMINAL APPEALS NOS. 395 AND 396 OF 1926.

November 26, 1926.

Present :—Mr. Justice Patkar and Mr. Justice Baker.

KALIA AMRA AND OTHERS—ASSUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 224—Arrest—Escape from custody—Acquittal of accused—Conviction for escape from custody, legality of—'Charged,' meaning of.

An accused person legally arrested for an offence must submit to be tried and dealt with according to law and if he gains his liberty before he is delivered by due course of law he commits the offence of escaping from lawful custody under s. 224 of the Penal Code. [p. 989, col. 1.]

Queen-Empress v. *Muppan* (1) and *Public Prosecutor* v. *Ramaswami Konan* (2), followed.

It would be an offence for a man to escape from custody after he has been lawfully arrested on a charge of having committed an offence although he may not have been subsequently convicted of such latter offence. [p. 989, col. 2.]

Deo Sahay Lal v. *Queen-Empress* (3), followed.

The word 'charged' is used in s. 224 of the Penal Code in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial. [p. 989, col. 2.]

Criminal appeals against convictions and sentences passed by the Sessions Judge, Broach.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

JUDGMENT.—In this case sixteen accused were tried before the Sessions Judge of Broach on charges under s. 224, 147, 332 and 333, Indian Penal Code. The prosecution case was that accused Nos. 1, 2 and 3 imported liquor from Navagama in the Rajpipla State into British limits, and having been lawfully arrested accused Nos. 1, 2 and 3 escaped from lawful custody, after the rest of the accused committed riot and assaulted the Abkari Officers and secured the release of accused Nos. 1 to 3 by use of force. All the accused except aceused Nos. 8, 9, 13 and 16 were convicted. Accused Nos. 1, 2 and 3 were sentenced to suffer rigorous imprisonment for six months under s. 224, Indian Penal Code; and accused Nos. 5 and 15 each to six months' rigorous imprisonment under ss. 147 and 225, and to three years' rigorous imprisonment under s. 333, Indian Penal Code; and accused Nos. 4, 6, 7, 10, 11, 12 and 14 each to six months' rigorous imprisonment under ss. 147, 225 and 332, Indian Penal Code. The appeals of accused Nos. 1 and 2 were admitted by this Court. It appears that in the regular trial for importation of liquor into British limits accused Nos. 2 and 3 were held not guilty and acquitted. So far as accused No. 1 is concerned the case is covered by the decision in *Queen-Empress* v. *Muppan* (1) where it was held that an accused person legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of escaping from lawful custody under s. 224, Indian Penal Code. This view is accepted in *Public Prosecutor* v. *Ramaswami Konan* (2).

With regard to accused No. 2, we think, that though accused No. 2 was subsequently acquitted, he was rightly convicted under s. 224, Indian Penal Code The words "for any such offence" in s. 224, Indian Penal Code, mean for any offence with which a person is charged, or of which he has been convicted. It would be an offence to escape from lawful custody before the trial just as it would be an offence to escape from lawful custody after conviction. The word "charged" is used in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial. It would be, in our opinion, an offence for a man to escape from custody after he had been lawfully arrested on a charge of having committed an offence, although he may not have been subsequently convicted of such latter offence. In this case, accused No. 2 was lawfully arrested, under s. 36, clause (*e*), of the Abkari Act, V of 1878, for an offence under s. 43 (1) (*a*) for importation of liquor. We think that accused No. 2 was in custody and was lawfully detained for an offence with which he was charged and that he committed the offence under s. 224, Indian Penal Code, when he escaped from such lawful custody. The case is covered by the decision in *Deo Sahay Lal* v. *Queen-Empress* (3) where it was held that though the accused was subsequently acquitted, he was guilty if he escaped from lawful custody. We think, therefore, that both the appeals should be dismissed.

A. N. A. *Appeals dismissed.*

(1) 18 M. 401; 1 Weir 203; 6 Ind. Dec. (N. S.) 628.
(2) 31 M. 271; 8 Cr. L. J. 200; 18 M. L. J. 540.
(3) 28 C. 253; 5 C. W. N. 289.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 238 OF 1926.
(CRIMINAL REVISION PETITION NO. 217 OF 1926.)
October 18, 1926.

Present:—Mr. Justice Curgenven.

In re K. R. UPPASINI—ACCUSED NO. 1—PETITIONER.

Penal Code (XLV of 1860), s. 405—Contract Act (IX of 1872), s. 30—Betting business—Undertaking by owner of business to forward money to race centres—Omission to forward money, whether constitutes criminal breach of trust—Contract being void, effect of.

The accused started a betting business, the principal object of which was to provide facilities to constituents to back horses at various race meetings in India. He was to remit sums furnished by customers for this purpose to some person present at the race meeting, who would put them on the selected horses either through the totalizator or otherwise. Certain sums of money were placed in his hands as bets on horses running in the Poona races then taking

place and on a charge against the accused of criminal breach of trust, under s. 405, Penal Code, in that he failed to forward the money to Poona as he was bound to do under the terms of the contract:

Held, that the contract being one of wager, within the meaning of s. 30 of the Contract Act, was void and there was, therefore, no violation of a legal contract within cl. (*b*) of s. 405, Indian Penal Code, and that the accused was not guilty of criminal breach of trust.

Petition, under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Third Presidency Magistrate, Georgetown, Madras, in C. C. No. 27569 of 1925

Mr. *V. L. Ethiraj*, for the Petitioner.

The Crown Prosecutor, for the Crown.

JUDGMENT.—The petitioner has been convicted by the Third Presidency Magistrate of criminal breach of trust by an agent under s. 409, Indian Penal Code, and sentenced to rigorous imprisonment for six months.

The prosecution evidence shows that, under the name of Mr. V. Joshi, the petitioner, in April 1925, started a betting business in Madras which he called the Star Sports Club. According to r. 4 of the Rules which he issued as secretary, an object, and undoubtedly the principal object, of the Club was to provide facilities to constituents to back horses at various race meetings in India. He was to remit sums furnished for this purpose to some person present at the race meeting, who would put them on the selected horses either through the totalizator or otherwise. In point of fact, it is admitted that no such sums were remitted, but it was the petitioner's practice to carry on an independent business as book-maker receiving bets and paying winnings according to the odds published in the newspapers. This went on until 9th September, 1925, when the petitioner got into difficulties and next day left Madras owing a considerable sum of money to numerous clients.

The charge framed was in respect of a sum of Rs. 4,383-4-0 collected by the petitioner's clerks in Madras and placed in his hands on the 9th September, as bets on horses running in the Poona races taking place at that time. The basis of the charge was that, according to the petitioner's own rule, he undertook to forward the money to Poona, there to be used for making bets and that he failed to fulfil this obligation. At the trial, however, all but three of the witnesses who proved payment of money to the petitioner or his agents admitted that they were aware of the petitioner's *modus operandi*, so that in respect of sums subscribed by such persons, it could not be said that a breach of the agreement, as it in fact existed between them and the petitioner, had taken place. There remained the 3 persons P. Ws. Nos. 2, 5 and 10 who deposed to being under the impression that the petitioner was conducting the business in accordance with r. 4. In respect of the sums paid by them, aggregating Rs. 262-8-0, the learned Third Presidency Magistrate has found the charge to be established, on the ground, as I understand his judgment, that the petitioner accepted the money upon the undertaking that it would be dealt with under the rule referred to and that he intentionally omitted so to deal with it.

This finding has been attacked upon two grounds: The first, that the charge was not sufficiently specific has, I think, no substance. The sum in respect of which the petitioner has been found guilty, was included in the total sum named in the charge, and I see no reason to doubt that he was aware of the nature of the case he had to meet. The second point of view arises from the definition of criminal breach of trust contained in s. 405, Indian Penal Code, which runs as follows:—"Whoever, being in any manner entrusted with property or with any dominion over property dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direcrion of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do commits 'criminal breach of trust.'"

It will be seen that the offence may be committed in two ways, (*a*) when the person dishonestly misappropriates or converts to his own use the entrusted property, (*b*) when he dishonestly uses or disposes of it in violation (to confine ourselves to the portion here relevant) "of any legal contract, express or implied, which he has made touching the discharge of such trust."

Now, except that the learned Magistrate observes that the petitioner spent some portion of the sum of Rs. 4,383-4-0 collected, he has not specifically found that he dishonestly misappropriated or converted to

his own use the sum of Rs. 262-8-0 which forms the subject-matter of the conviction. I conclude, therefore, that the offence found was deemed to fall under (*b*) above as in violation of an express or implied legal contract. What is a contract (the qualification 'legal' appears to be redundant) is defined in s. 10 of the Contract Act and excluded from that term are agreements which that Act expressly declares to be void. Section 30 declares agreements by way of wager to be void and it is quite clear, from the language of that section, that the agreements now under reference were of this character and that no suit could have been brought to recover the money from the petitioner. See also *In re Chinna Karuppa Muppan* (1) and for a statement of English Law, see *Cohen* v. *Kittell* (2). The learned Public Prosecutor has not seriously contested this conclusion and has endeavoured to bring the conviction under the first part of s. 405, although for the reasons which I have given, I cannot uphold his contention.

In these circumstances, I have no alternative but to set aside the conviction. The case is, I think, of sufficient gravity and importance to justify me in according to the prosecution the opportunity for which it asks to establish that the offence of criminal breach of trust, as defined by the first part of s. 405, Indian Penal Code, has been committed in respect of this sum of Rs. 262-8-0. It will, of course, be open to the Court to consider also whether the facts proved amount to the offence of cheating. I have myself refused to enter upon this question, as I do not think, that assuming the evidence to substantiate that offence, I ought to convict of cheating a person tried only of criminal breach of trust.

I set aside the conviction and sentence and remand the case to the Third Presidency Magistrate, George Town, for re-trial.

Case remanded.

V. N. V.

(1) 1 Weir. 463.

(2) (1889) 2 Q. B. D. 680; 58 L. J. Q. B. 241; 60 L. T. 932; 37 W. R. 400; 53 J. P. 469.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 750 OF 1926.
(CRIMINAL REVISION PETITION No. 630 OF 1926).

September 27, 1926.

Present:—Mr. Justice Jackson.

In re RAMASWAMI AND ANOTHER —ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 342—Duty of Magistrate to examine accused after prosecution case is closed—Specific questions, whether necessary.

Section 342, Criminal Procedure Code, merely requires that after the witnesses for the prosecution are examined, the accused should be questioned generally on the case. It is not necessary that specific questions should be put to the accused in detail, since the general questioning is followed by the specific charge.

Emperor v. *Alimuddin Naskar* (2) and *Durga Ram* v. *Emperor* (1), not followed.

Petition, under ss. 435 and 439 of the Criminal Procedure Code, 1898, praying the High Court to revise the judgment of the Court of the first Class Sub-Divisional Magistrate, Devakotta, dated the 2nd June, 1926, and passed in Cr. A. No. 32 of 1926, preferred against the judgment of the Court of the Taluk Magistrate, Tirupathur, dated the 24th April, 1926, and passed in C. C. No. 26 of 1926.

Mr. *L. Venkatanarasiah*, for the Petitioner.

ORDER.—Two points are raised in this petition.

The Magistrate has not complied with s. 342 of the Criminal Procedure Code, 1898, by questioning the accused generally on the case after the witnesses for the prosecution were examined; he should have put specific questions. This is not laid down in s. 342 and has not been the practice in this Province so far as I am aware. Apparently another practice prevails in Patna: see in *Duraga Ram* v. *Emperor* (1) and possibly in Calcutta, see *Emperor* v. *Alimaddin Naskar* (2). Considering that the general questioning is followed by the specific charge, accused does not seem to be prejudiced by the Magistrate not discussing the case with him in specific detail before the charge; and there seems to be no practical objection to the Madras practice nor is it illegal.

Accused had no motive to compel the complainant to endorse the pro-note. Accused

(1) 86 Ind. Cas. 156; 6 P. L. T. 33; A. I. R. 1925 Pat. 342; 26 Cr. L. J 716.

(2) 85 Ind. Cas. 919; 41 C. L. J. 101; 29 C. W. N. 231; A. I. R. 1925 Cal. 361; 26 Cr. L. J. 631; 52 C. 522.

can hardly have anticipated that complainant would admit payments not endorsed in writing, so the motive is plain. Nor would this Court interfere in revision on a mere question of motive which is at best guess-work. It is not understood why the accused was first sentenced to and then after the event relieved from imprisonment till the rising of the Court. It seems to be a solemn farce. The petition is dismissed.

V. N. V. *Petition dismissed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 517 OF 1926.
(CRIMINAL REVISION PETITION No. 429 OF 1926).
December 3, 1926.
Present:—Mr. Justice Wallace.
In re T. R. BALAKRISHNA REDDIAR—ACCUSED No. 1—PETITIONER

Criminal Procedure Code (Act V of 1898), ss. 202, 346—Case referred by Sub-Magistrate to Police for investigation—Charge sheet—Sending of case to superior Magistrate—"Evidence", whether confined to depositions recorded by Magistrate—"Inquiry," when begins.

The word 'evidence' in s. 346, Criminal Procedure Code, includes all facts and statements disclosed by the inquiry held by the Magistrate and is not confined to depositions recorded by him.

When a Magistrate directs under s. 202, Criminal Procedure Code, inquiry by another Magistrate or Police Officer or other person, he is doing so in the course of his own enquiry into the offence and his own enquiry is, therefore, already begun. It is not necessary that the Magistrate should begin to take evidence before the enquiry can be said to begin.

Where a Sub-Magistrate refers a case under s. 202 to the Police for investigation and the Police send a charge-sheet to the Sub-Magistrate it is competent to the Magistrate to accept it and send the case up to a superior Magistrate under s. 346, Criminal Procedure Code where the trial is beyond his powers.

Petition, under s. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate, Vellore, dated 19th June, 1926, in C. C., No 21 of 1926.

Mr. *K. S. Jyarama Iyer*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—It appears that the real facts in this case are that when the Sub-Magistrate referred the case under s. 202 to the Police for investigation the Police sent in a charge-sheet to the Sub-Magistrate, who accepted it and sent it up to the Sub-Divisional Magistrate under s. 346, as he was of the opinion that it was a first class case. It is argued that s. 346 does not permit such action by the Sub-Magistrate at such a stage of proceedings. The argument takes up two positions (1), that evidence in s. 346 is 'evidence' taken by the Magistrate himself and not the statements recorded by the Police, (2) that "inquiry" does not begin until the Magistrate himself begins to take evidence. No authority is cited for either position.

As to (1), I see no reason to restrict the word "evidence" to depositions recorded by the Magistrate. Evidence in this section I take it to mean all facts and statements which have been disclosed by his enquiry. As to (2), I also see no reason for so restricting the meaning of the word "enquiry". I take it that when the Magistrate directs under s. 202, Criminal Procedure Code, inquiry by another Magistrate or Police Officer or other person, he is doing so in the course of his own enquiry into the offence and that his own enquiry is, therefore, already begun. It was open to the Sub-Magistrate when he received the Police report under s. 202, which in this case took the form of a charge-sheet, to dismiss the complaint or proceed with it. He chose to proceed with it on the facts disclosed in that report and refer it under s. 346 to the Sub-Divisional Magistrate. I cannot find here any lack of jurisdiction.

I note that the petition to the Sub-Divisional Magistrate objecting to his jurisdiction was not put in till several months after the trial of the case began before him and after several of the prosecution witnesses had been examined. There is thus considerable ground for the Public Prosecutor's contention that the petition was merely put in for the purpose of delaying the trial. The petition is dismissed.

V. N. V. *Petition dismissed.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 388 OF 1926.

November 29, 1926.

Present:—Mr. Justice Maung Ba.

S. R. M. M. NARAYANAN CHETTIAR—APPELLANT

versus

MAGANLAL—RESPONDENT.

Fraudulent transfer—Transfer just before attachment, whether can be presumed to be fraudulent—Undue preference.

The mere fact that a transfer in favour of a creditor is effected after the passing of a decree against the transferor and just before an attachment under that decree is not by itself sufficient to raise a presumption of fraud.

Special second appeal from the District Court, Maubin, in Civil Appeal No. 23 of 1926.

Mr. *Maung Aye*, for the Appellant.

JUDGMENT.—The respondent attached the property in suit as the property of his judgment-debtor Ma Wet. The appellants then successfully put forward a claim to it. The respondent in consequence filed a regular suit under O. XXI, r. 63, Civil Procedure Code. His case was that the sale relied upon by the appellant was a fraudulent one. The Township Judge held that the respondent had failed to prove his case and dismissed the suit. But on appeal the Additional District Judge disagreed with the Township Judge and decreed the suit.

The two Judges found some difficulty in deciding whether the earlier case of *Tha Dwe* v. *A. L. V. R. S. Allagappa Chetty* (1) or the later one of *Maung Din* v. *Ma Hnin Me* (2) was applicable to the present case. The Township Judge thought the later one was applicable while the Additional District Judge thought the earlier one was applicable.

It may be pointed out that in no two cases circumstances can be exactly alike. Each case must be decided according to its own peculiar circumstances. In the present case the transferee was another creditor of the judgment-debtor Ma Wet and is in no way related to her. It is true that the transfer by sale was effected after the decree was passed and just before attachment. This circumstance was not, in my opinion, sufficient in itself to raise a presumption of fraud. It might mean either that the transferee was somewhat vigilant or that the transferor was showing him an undue preference. So the learned Township Judge was right in requiring the respondent to prove the fraud alleged. There can be no doubt that in that he has entirely failed. The District Court's decree is, therefore, set aside and that of the Township Court restored with costs throughout.

A. N. A. *Decree set aside.*

(1) 4 L. B. R. 211.
(2) 89 Ind. Cas. 436; 3 R. 71; A. I. R. 1925 Rang. 227.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 32 OF 1926.

November 22, 1926.

Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell.

DEVSHI HARPAL—PLAINTIFF—APPELLANT

versus

BHIKAMCHAND RAMCHAND AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 30, 45—Pacca adatia business, nature of—Pacca adatia's right to demand margin money—Principal and agent—Contract giving absolute discretion to agent—Duty to prove existence of circumstances for exercise of discretion—Partnership—Surviving partner's right to sue.

Although in accordance with the ordinary practice in Bombay the *pacca adatias* are entitled to call for margin if the rise or fall in the market justified such a demand for margin, yet, the onus lies clearly on them to establish that circumstances had arisen which justified the exercise of their powers. [p. 994, col. 1.]

Even where a contract purports to give an agent an absolute discretion as to calling for margin, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion. [*ibid.*]

Diwan Chand v. *Kirpa Ram* (1), followed.

The common type of business dealing between a *pacca adatia* in Bombay and his up-country constituent may be speculative but is not necessarily a wager in the eyes of the law. [p. 995, col. 2.]

A partner may sue as such making his co-partners defendants where substantial grounds are shown for following such a procedure. [p. 996, col. 1.]

Notwithstanding s. 45 of the Contract Act it is not imperative to add the legal representatives of a deceased co-partner to an action for recovery of a debt by the surviving partners. [p. 996, col. 2.]

Motilal Bechardass v. *Ghellabhai Hariram* (6), followed.

Appeal from the decree of Mr. Justice Madgavkar.

Mr. *B. J. Desai* (with him Mr. *M. C. Setalvad*), for the Appellant.

Mr. *Pettigara* (with him Mr. *Kanga*, Advocate-General), for the Respondents.

JUDGMENT.

Marten, C. J.—The main point in this case is whether the plaintiff's firm of Khemchand Keshavlal were entitled, in the events which happened, to call for margin from their constituents, the first defendants, and to close the contract in default of that margin being provided. The learned Judge found that the plaintiff's firm acted as *pucca adatias* in this transaction, and we see no reason to disturb his finding on that point. That being so, it is admitted that, in accordance with the ordinary practice in Bombay, the *pacca adatias* would be entitled to call for margin, if the rise or fall in the market justified a demand for margin. The defendants have set up a special agreement not to charge margin, but, in my opinion, that agreement is not made out. In this connection it is material to observe that this special agreement is nowhere alleged in the correspondence before suit, nor is it expressly pleaded. And the defendant's evidence that the moneys were to be paid "at the end of the time," *viz.*, the *vaida*, even if believed, would not necessarily negative the right of the *pacca adatia* to call for margin. For that expression might merely indicate what would be the normal course of business, *viz.*, payment at the *vaida*.

But although, in my judgment, the firm had the right, under proper circumstances, to call for margin, the onus clearly lies on them to establish that circumstances arose which justified the exercise of their powers. The decision in *Diwan Chand* v. *Kirpa Ram & Co.* (1) shows that even where the contract purports to give an agent an absolute discretion as to calling for margin, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion. Now, in the present case the plaintiff's evidence is strangely deficient in this respect. The contract sued on was made on October 21, 1921, for the purchase by the first defendants of one hundred bales of Broach cotton for April-May, 1922, delivery at Rs. 533 per candy. It is alleged that the market went down, and by a telegram of November 14, 1921, Ex. M, the defendants called for Rs. 5,925 for margin at the rate of Rs. 415 to be paid by November 16, in default of which the transaction would be closed on November 18. In fact the contract was purported to be closed on November 28, at Rs. 435, and, according to the particulars, Ex. B to the plaint, there was a loss of Rs. 5,018 in that respect.

The only evidence on behalf of the plaintiff's firm is the plaintiff himself, who states that the market was falling after the purchase. But he gives no evidence as to the period during which the market was falling, nor what rate it fell to, if at all, at the material dates on November 14, 16, 18 and 28. This omission is all the more strange in view of the allegations in paras. 8 and 9 of the written statement denying that the market was going down and pleading that on the due date for delivery the price was higher than that on the day of the contract. By the due date I take it the pleading refers to April-May 1922.

It is true that in the correspondence there are statements in the plaintiff's firm's letters as to the rates at the time. For instance, the letter, Ex. 3, of October 27, 1921, says that the rate was fixed at Rs. 482 by the clearing house, but that the rate in the cotton market on October 26, was Rs. 518, and on the 27th was Rs. 490, and that the tendency was dull. A letter by defendant No. 2, a deceased partner of the plaintiff, dated November 1, 1921, Ex. 5, states that the rate was then Rs. 475 and expected to go down: but later on to go up to a great deal. But mere allegations in the plaintiff's correspondence do not amount to proof of what the actual market rate was. Still less could the Court, on the existing evidence, find that the market rate on the alleged date of closing, *viz.*, November 28, was Rs. 435, for there is really no evidence to support that statement.

It was, however, urged for the appellant that we could remand the suit for further evidence on this point and O. XLI, r. 25, was referred to in this respect. But we have looked at the learned Judge's note book and it is clear from his notes of the arguments at the conclusion of the case that Counsel for the defendants expressly raised this point as to the absence of evidence to show the market rates at the material dates. And this is borne out by what Mr. Pettigara has stated as his personal recollection of what took place at the time. On the other hand, plaintiff's Counsel in his final reply does not appear to have asked the Judge for any adjournment to call further evidence. Indeed, from

(1) 88 Ind. Cas. 54; 28 Bom. L. R. 1488; A. I. R. 925 P. C. 150; (1925) M. W. N. 459 (P. C.).

what Mr. Pettigara tells us the Court asked Counsel for the plaintiff whether he had any other evidence on that point available and was given no satisfactory answer. It appears, therefore, to me to be a case where the plaintiff cannot be said to be taken by surprise. He has failed to produce adequate evidence on a vital point notwithstanding a specific warning in the written statement. Nor has he contended at any stage of the trial that he was taken by surprise, or would be able to meet the point if an adequate opportunity was furnished to him.

On the other hand, it is clear that it is a point on which the learned Judge largely relies in dismissing the plaintiff's case. He says :—

"As to the margin money demanded, apart from the entry of sale, there is no independent evidence before the Court as to the rates of cotton when on November 1 and 2 the demand for margin money was first made by the plaintiff."

Then lower down he says :—

"As to the exact rate between November 1 and 2, there is no independent evidence and, thefefore, defendant No. 1 was, I think, right in his contention that there was no immediate necessity for margin money, that the so-called closing was a purely nominal transaction which plaintiff was not entitled to do in order to get for himself with a cousin a possible gain of Rs. 5,000."

The reference to this closing transaction is that it was alleged to have been made with a firm of Anandlal Keshavlal consisting of the plaintiff and a cousin of his not before the Court. But the circumstances surrounding the alleged transaction with this firm are of a highly suspicious character, and I do not think that the entry of the alleged sale to this firm of Anandlal Keshavlal on November 28, can be said to prove that the market rate at that date was Rs. 435 as alleged.

Therefore, in the present case I think it would be wrong of us to send the case back for further evidence or a remand, and that to do so would only open a most undesirable door to loose practices, and in some cases to possible fabrication of further evidence. Nor do I regard it as any hardship on the plaintiff that we should take this particular course. The transactions in question were not of a nature that need excite any particular sympathy from the Court. The plaintiff's firm was a mushroom firm, and the transactions in question would seem to have been clearly speculative transactions, even if they were not wagering transactions as found by the learned Judge.

Accordingly, in my judgment, the plaintiff fails because he does not establish the facts necessary to justify his call for margin and subsequent closing of the contract.

In that view of the case it is unnecessary to decide whether the transaction was a wagering one. But if contray to the view which I take the plaintiff ought still to be allowed to lead further evidence to prove the market rate on the material dates, I should, with all respect to the learned Judge, be unable to agree with his finding on the question of wagering, as I do not think that on the facts of this case we should hold it proved that there was a common intention to wager. The difficulties in establishing a defence of wager are set out in the judgment of Sir Norman Macleod in *Manalal Raghunath* v. *Radhakison Ramjiwan* (2). And although the Court in that particular case was able to infer from the surrounding circumstances that the transactions were wagering ones, they are insufficient, in my opinion, in the present case, to enable the Court so to do. It is true that the plaintiffs have not satisfactorily established the existence of genuine contracts with third parties as in *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (3) and *Sobhagmal Gianmal* v. *Mukundchand Balia* (4). But, speaking for myself, I see little to distinguish the present transaction from a common type of business dealing between a *pacca adatia* in Bombay and his up-country constituent. It may be speculative, but it does not follow that it was a wagering contract in the eyes of the law.

I should also notice one further defence, *viz.*, as to the form of this action and the prayer in the plaint. The plaintiff was one of three partners, and he brought this suit in his own name describing himself

(2) 62 Ind. Cas. 361; 45 B. 386; 22 Bom. L. R. 1018.

(3) 44 Ind. Cas. 284; 45 I. A. 29; 20 Bom. L. R. 561; 23 M. L. T. 203; 34 M. L. J. 305; 4 L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 7 L. W. 577; 42 B. 373; 11 Bur. L. T. 211 (P. C.).

(4) 98 Ind. Cas. 338; 28 Bom. L. R. 1376; A. I. R. 1926 P. C. 119; (1926) M. W. N. 830; 51 M. L. J. 809; 44 C. L. J. 509; 53 I. A. 241; 38 M. L. T. 16; 51 B. 1 (P. C.).

in the title as "till lately carrying on business under the name style and firm of Khemchand Keshavlal," and joining his two partners Nandlal and Madhavlal as defendants Nos. 2 and 3. In para. 1 he pleaded that "the plaintiff was until recently carrying on business in partnership with defendants Nos. 2 and 3 under the name style and firm of Khemchand Keshavlal," which firm was dissolved in or about the beginning of the *Samvat* year 1978 (October 31, 1921) and that "the defendants Nos. 2 and 3 are at present at their respective native places," and he did not seek any relief "against them but they are made mere formal parties to this suit." In para. 7 he pleaded that there was then due by defendant No. 1 to the said firm of Khemchand Keshavlal the sum of Rs. 5,583. And after pleading in para. 9 that defendants Nos. 2 and 3 resided at Takadi (in the Ajmer District) and Chandpore (in Jaipore) the plaintiff prayed for the payment of the above sum to himself.

In so far as the plaint prays for payment to himself this difficulty can, I think, be got over under O. VII, r. 7, which provides that it is not necessary to ask for further or other relief. Consequently, I think, it would have been open to the Court to treat the plaint as having a prayer for further or other relief, and, accordingly, to decree payment, if at all, not to the plaintiff alone but to the plaintiff and the defendant partners. In this respect I am unable to agree with the view to the contrary which the learned trial Judge took.

A further point as to whether it was open to the plaintiff to sue as such making his co-partners defendants is more doubtful. As pointed out in *Luke* v. *South Kensington Hotel Co.* (5) by Sir George Jessel, this course may be adopted where substantial grounds are shown. But I am not satisfied that it is sufficient merely to plead that the co-partners are at their native places. Nor is it shown that the plaintiff made any request to his co-partners to join him as co-plaintiffs and that they refused. On the other hand, the evidence at the trial is to the effect that there were disputes between the partners, and that there were cross accusations as to misappropriation of partnership property. Under these circumstances, it would hardly be possible for them to join as co-plaintiffs and act by a common Solicitor. On the whole, therefore, I should have been prepared to decide this point in favour of the plaintiff subject to imposing some penalty for his defective pleading.

There is yet a further point taken by defendant No. 1, *viz.*, that the suit abated by reason of the death of defendant No. 2 after the filing of the plaint and the failure to bring his legal representatives on the record. Having regard to *Motilal Bechardass* v. *Ghellabhai Hariram* (6) we do not think that that contention is well-founded. In that case Mr. Justice Bayley and Mr. Justice Farran decided that, notwithstanding s. 45 of the Indian Contract Act, it is not imperative to add the legal representatives of a deceased co-partner to an action for recovery of a debt by the surviving partners. This follows the English practice as exemplified in *Ellis* v. *Wadeson* (7). Moreover, under the English practice, it is clear from *In re Bourne, Bourne* v. *Bourne* (8) that a surviving partner has the right and indeed the duty to wind up the partnership affairs, and for that purpose to recover the assets and pay the debts.

Under these circumstances, I should, if necessary, have been prepared to hold that the alleged debt passed to the surviving partners and that, accordingly, it was not necessary to bring the personal representatives of the deceased partner on to the record. In the view, however, which I take of the point as to margin I think that the appeal should be dismissed with costs.

Blackwell, J.—I concur.

A. N. A. *Appeal dismissed.*

(5) 1879) 11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638; 27 W.R. 514.

(6) 17 B. 6; Chitty's S. C. C. R 336; 9 Ind. Dec. (N. S.) 4.

(7) (1899) 1 Q. B. 714; 68 L. J. Q. B. 604; 47 W. R. 420; 80 L. T. 508; 15 T. L. R. 274.

(8) (1906) 2 Ch. 427; 75 L. J. Ch. 779; 54 W. R. 559; 95 L. T. 131.

RANGOON HIGH COURT.

CIVIL REVISION No. 451 OF 1925.

January 6, 1927.

Present:—Mr. Justice Maung Ba.

P. L. T. L. CHETTYAR FIRM AND OTHERS —APPLICANTS

versus

MAUNG THA LU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 4—

Receiver's account—Objection by party—Procedure—Order directing party to file regular suit against Receiver, legality of.

Where after the submission of accounts by a Receiver a Commissioner appointed to ascertain the mesne profits gives a higher figure as mesne profits than that shown by the Receiver, the proper course to be adopted is to hold an enquiry to find out whether the Receiver has occasioned any loss by his wilful default or gross negligence and to pass an order under O. XL, r. 4, Civil Procedure Code, or if desired to proceed against the sureties under s. 145. It is not proper to direct the parties to institute a regular suit against the Receiver and his sureties.

Civil revision from the order of the Additional District Judge, Pegu, in C. R. No. 35 of 1919.

Messrs. *Cawasjee Sen* and *Banerjee*, for the Applicants.

Mr. *Paw Tun*, for the Respondents.

JUDGMENT.—This is an application to revise the order of the learned Additional District Judge of Pegu, directing the institution of a regular suit against the Receiver and his sureties.

That order is obviously wrong. The Receiver was appointed to collect rents of the suit paddy lands for one year, namely, 1919-20. He was discharged on 3rd May, 1920. He filed accounts on 16th June, 1920. Those accounts were unchallenged. The amount admitted as received by him was Rs. 4,455 and the same was paid into Court later.

The Commissioner appointed later to find out the amount of mesne profits seems to have given a different figure. The proper course to pursue was to hold an enquiry to find out whether the Receiver had occasioned any loss by his wilful default or gross negligence and to pass an order under O. XL, r. 4, Civil Procedure Code, or if desired to proceed against the sureties under s. 145 as pointed out in *Maung Po Thein* v. *Ma Waing* (1).

I set aside the order of the Additional District Judge and direct that an enquiry be held as indicated above. The applicants are entitled to their costs in this Court.

A. *Order set aside.*

(1) 59 Ind. Cas 844; 10 L. B. R. 236; 13 Bur. L. T. 91.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2222 AND 2233 OF 1923

February 10, 1926.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

HARA PRASAD GAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOPAL CHANDRA GAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Public Demands Recovery Act (III B. C. of 1913), ss. 7, 23, 37—Sale—Omission to fill up certificate, to serve notice of proclamation of sale, etc., effect of—Signing of notice with stamped signature—Death of debtor after attachment and before sale—Suit to set aside sale on ground of fraud and irregularities—Fraud not proved—Failure of entire suit—Limitation Act (IX of 1908), Sch. I, Art. 12—Time when begins to run—'Final confirmation'—Lis pendens, *plea of.*

The omission to fill up the blanks in the certificate portion of form No. 1 of the Appendix to the Bengal Public Demands Recovery Act is not a material omission invalidating the certificate where the tabular statement in the form has been duly filled up. [p. 999, col. 1.]

Mohi-ud-din v. *Pirthichand Lal Choudhury* (1), distinguished.

A notice under s. 7 of the Bengal Public Demands Recovery Act may be signed by the Certificate Officer with a lithographic signature. [p. 999, col. 2.]

Failure to give notice to the certificate debtor before drawing up the proclamation of sale is a mere irregularity. [*ibid.*]

It is not open to the debtor or his legal representative to take exception to the validity of a sale on the ground that the statement that the holding should be sold with power to annul all encumbrances, was wanting in the sale proclamation. [p. 998, col. 2; p. 1000, col. 1.]

Under the tenancy law, the purchaser of an occupancy holding sold for arrears of rent takes it with certain defined rights and the omission to mention such rights cannot invalidate the sale. [p. 1000, col. 1.]

Omission to publish a sale proclamation at the local *Thana* as required by the rules is not fatal to the sale. [*ibid.*]

In view of the provisions of s. 23 of the Bengal Public Demands Recovery Act a sale cannot be set aside by a Certificate Officer without proof of material irregularity and consequent substantial injury, and it cannot be set aside without such proof even in a separate suit. [*ibid.*]

The death of a debtor after attachment of his property and before sale does not necessarily invalidate the sale; such a sale holds good until appropriate steps are taken to set it aside. [p. 1000, col. 2.]

Sheo Prasad v. *Hira Lal* (2) *Net Lall Sahoo* v. *Sheikh Kareem Bux* (3) and *Bepin Behari Bera* v. *Shashi Bhushan Datta* (4), followed.

A suit by a debtor to set aside a sale under the Bengal Public Demands Recovery Act on the ground of fraud and material irregularity in the conduct of the sale must fail where the debtor fails to prove fraud inasmuch as in the absence of fraud the questions can only be determined by the Certificate Officer. [p. 1001, col. 1.]

Limitation for a suit to set aside a sale under the Bengal Public Demands Recovery Act runs under Art. 12 of Sch. I of the Limitation Act only from the date of the final confirmation of the sale, and so long as the sale is under the consideration of the Revenue Authorities it cannot be said to have been confirmed and become final. [p. 1001, col. 2; p. 1002, col. 1.]

Baijnath Sahai v. *Ramgut Singh* (6) and *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (7), followed.

The plea of *lis pendens* cannot be allowed to be raised for the first time at the hearing of a second appeal. [p. 1003, col. 1.]

Appeals against the decrees of the District Judge, Midnapur, dated the 13th August, 1923, reversing those of the Subordinate Judge, Midnapur, dated the 21st August, 1922.

Dr. *Dwarka Nath Mitter*, Mr. *Amarendra Nath Bose*, Babus *Apurba Charan Mukherjee* and *Pramatha Nath Bandopadhya*, for the Appellants.

Messrs. *Ram Chunder Mozumdar*, *Satya Charan Sinha* and *Sisir Kumar Ghoshal*, Babu *Surendra Nath Gaha* and Moulvi *Nuruddin Ahmad*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—These appeals arise out of a suit by the appellants for recovery of possession of one-half share of the plaint lands on declaration of their alleged title therein and setting aside the sales of the properties under the Public Demands Recovery Act (III of 1913 B. C.). It will be necessary to mention a few dates in order to understand fully the contentions raised by the parties in these cases. The properties are four in number, and are described in Schedules *ka*, *kha*, *ga* and *gha* of the plaint. The Schedule *ka* property was sold under a certificate issued by the Certificate Officer under the Public Demands Recovery Act and purchased by defendant No. 1 on the 28th October, 1918. The sale was confirmed on the 3rd January, 1919, and delivery of possession was given to the purchaser on the 23rd August, 1919. The sale of '*kha*' property was held on the 23rd December, 1918, and confirmed on the 24th February, 1919, and delivery of possession made to the purchasers, defendants Nos. 2 and 3 on the 1st September, 1919. '*Ga*' property was sold on the 28th October, 1918, and the sale was confirmed on the 3rd January, 1919, and delivery made to the purchasers, defendants Nos. 2 and 3, on the 1st November, 1919. The sale of *gha* property was held on the 2nd December, 1918, and confirmed on the 3rd February, 1919, and delivery of possession given to the purchaser, defendant No. 1, on the 1st September, 1919. The plaintiffs based their title on a mortgage executed by defendants Nos. 5 to 15 who had an 8-annas share in the properties in favour of the plaintiffs in December, 1903. A suit upon the mortgage was brought by the plaintiffs in 1917 and a decree for foreclosure was passed in favour of the plaintiffs on the 8th March, 1919. The other 8-annas share was also mortgaged by the owners thereof to defendant No. 1 who obtained a decree on it and in execution thereof purchased the property. It is not necessary to consider it as it is not in controversy in these cases.

The Subordinate Judge in the trial Court held that the sales were not liable to be set aside; but as he found that they were vitiated by fraud he held that they were not binding on the plaintiffs and did not affect the plaintiffs' 8-annas share in the property. The defendants appealed and the learned District Judge was of opinion that the plaintiffs had failed to prove fraud and that the sales were not liable to be set aside on the ground of irregularities mentioned by the plaintiffs. In this view the learned Judge reversed the decision of the trial Court and dismissed the plaintiffs' suits. Against these decrees these appeals have been preferred by the plaintiffs and various grounds have been urged on their behalf which will be noticed in the course of the judgment.

It is argued, in the first place that the principle of *lis pendens* should apply in the present case and it should be held that the purchasers in the certificate sale took the properties subject to plaintiffs' mortgage-decrees. This ground was not taken in the plaint or in any of the Courts below nor in the grounds of appeal presented to this Court. It was taken for the first time at the hearing and we have disallowed the plaintiffs' prayer to raise it at this stage of the case. I need not say further upon this matter.

It is next argued that the sales were void and illegal on the grounds: (1) that there was no proper certificate under the Public Demands Recovery Act in virtue of which the sales were held and, secondly, that notice under s. 7 of the Act was not properly served. As to the first of these grounds the objection is that all the blank spaces in the form appended to the Act

and the certificate under it, being form No. 1 of the Appendix to the Act, were not filled up. The columns of the tabular statement in that form were properly filled up but the blanks in the certificate portion were not written up. The sentence runs thus: "I hereby certify that the above-mentioned sum of Rs. . . . . is due to the above . . . from the defendants . . . . I further certify that the above mentioned sum of Rs. . . . . is justly recoverable and that its recovery by suit is not barred by law." The ellipses in this form were not supplied and it is objected that due to this omission the certificate is not one which can be called a valid certificate under ss. 4 and 6 of the Public Demands Recovery Act. It appears from a perusal of the certificate filed in this case that the columns in the tabular form were properly filled up; namely, the name and address of the certificate-holder, the name and address of the certificate debtors and the amount of public demand for which the certificate was signed were mentioned. The omission, therefore, to mention these names and the figures in a portion of the form cannot be taken to be a material omission which would go to the length of invalidating the certificates. The idea underlying the filling up of the form is that the debtor should have information of the specific sum claimed from him and the particulars thereof. In the certificate, as it stands, all the necessary information is given. In this connection reference has been made to the case of *Mohiuddin* v. *Pirthichand Lal Choudhury* (1). There the facts were very different and the learned Judges on those facts were justified in holding that the certificate was not a valid one under the law. In that case, as here, blank spaces under the tabular statement were not filled up and in the columns of the table the amount recoverable from the debtors was not correctly stated. Under column 4 where the amount of public due for which certificate is signed has to be put the sum mentioned was different from the amount put in column 5 which requires particulars of the public demand to be inserted. The debtors, therefore, it was rightly assumed were not in a position to ascertain as to what was the actual amount demanded from them. On these facts the learned Judges rightly remarked: "It is consequently impossible to say to what precise figure 'in the tabular statement reference was intended to be made by the expression 'the above-mentioned sum of Rs. . . . . .' in the certificate." No such doubt with regard to the precise figure of the amount recoverable from the debtors exists in the present case. The "above-mentioned sum of Rs. . . ." was the sum mentioned in column 4 and there can be no doubt about it. I am accordingly of opinion that the certificate cannot be held to be invalid on the ground that the blank spaces were not filled up before it was signed by the Certificate Officer.

As to the other ground with regard to the non-service of notice under s. 7 of the Act, it has been found by the Courts below that notice was served. But the objection on behalf of the appellants rests on the informal nature of the notice. The notice bears the lithographic signature of the Certificate Officer. It is argued that it is not signed by the Certificate Officer as required by Form No. 3 of the Appendix to the Act read with s. 7 of the Act. I have not been able to discover any law under which it is incumbent on the Certificate Officer to sign the notice with his own hand. In s. 2 (20) of the Civil Procedure Code 'signed' is defined 'save in case of a judgment or decree', as including 'stamped.' A notice is neither a judgment nor a decree. This objection with regard to the facsimile signature of the Certificate Officer would have been effective in case of a certificate which has the force of a decree. But under the ordinary law of procedure a notice may be and is generally signed with stamped signature. This objection also fails.

Several irregularities have been pointed out in the procedure adopted in connection with the sale before the Certificate Officer which, it is contended, would make the sales liable to be set aside. It is pointed out that notices were not served under r. 46 (2) of the Rules framed by the Local Government under the Act. That sub-rule says that the proclamation of sale shall be drawn up after notice to the certificate debtor. This notice, it is argued, was not served, and, therefore, the sale should be held to be bad. In my opinion, this is a mere irregularity which it is not proved has caused injury to any party. It is also stated that under rule 46 (4), the sale proclamation should state that the holding should be sold with power to annul all

(1) 31 Ind. Cas. 664; 19 C. W. N. 1159.

encumbrances, and as this statement is wanting in the sale-proclamation the sale is not one under the law. This objection, if there is any force in it, is available to the purchaser; but it does not lie in the mouth of the debtor or his representative to take exception to the validity of the sale on this ground. It may be mentioned here that the properties are occupancy holdings under the Government *Khas Mehal*. Under the tenancy law, the purchaser of an occupancy holding sold for arrears of rent takes it with certain defined rights the omission to mention which cannot invalidate the sale.

Then it is argued that the sale-proclamation was not published at the local *Thana* under r. 47 (3). This omission, too, is not fatal to the sale. Even if these irregularities are taken to be material irregularities, they must be such as to cause injury to the debtor. The plaintiffs' case is that the properties were sold at an inadequate price. But none of the Courts below has held that this inadequacy of price was due to any of these irregularities or that the inadequacy is such as to raise a presumption to that effect. After the sales the plaintiffs applied under s. 23 of the Act to have the sales set aside on the ground of these irregularities and the application was dismissed. That section provides that a sale may be set aside on the application of any person whose interests are affected by the sale on the ground that notice was not served under s. 7 or on the ground of irregularity in the certificate proceedings or in publishing or conducting the sale, provided that no such sale shall be set aside on any such ground, unless the Certificate Officer is satisfied that the applicant has sustained substantial injury by reason of irregularities. This suit having been brought to set aside a sale, held under the Public Demands Recovery Act, can only succeed and the sale set aside on the ground mentioned in s. 23, namely, that there was a material irregularity which has caused substantial injury. If the sale is not liable to be set aside by the Certificate Officer without proof of material irregularity and consequent substantial injury, it cannot be set aside in a separate suit without such proof.

An objection is also taken to the validity of the sale on the ground that in S. A. No. 2222 of 1923 one of the judgment-debtors had died after attachment, but before the sale. It is contended that, at any rate, the share of that judgment-debtor is not affected by the sale. This objection also should not prevail. It has been held in the cases of *Sheo Prasad* v. *Hira Lal* (2) and *Net Lall Sahoo* v. *Sheikh Kareem Bux* (3) that the death of a judgment-debtor after attachment of the property and before sale does not necessarily invalidate the sale; and it has been pointed out in *Bepin Behary Bera* v. *Shashi Bhushan Datta* (4) that such a sale is good unless appropriate steps are taken to have it set aside.

The next question which is of some importance in this case is as to the nature of the suit brought by the plaintiffs. The plaint, as it stands, seeks to recover possession of the properties after setting aside the certificate sale. The prayers in the plaint are to the following effect:—(*ka*) After setting aside the sales the plaintiffs may be given possession of their 8-annas share after declaration of their title thereto; (*kha*) the certificates and the sales held by the Certificate Officer of Contai in the following cases (Nos. .....) were fraudulent and collusive; and the processes not having been served in the *mofussil* the sales may be held as not binding on the plaintiffs; (*ga*) that it may be held that defendants Nos. 1 to 3 have acquired no right under those sales and a decree may be passed against them. The other two prayers are in respect of costs of the suit and mesne profits. The suit, as made out in the plaint, is one for setting aside the sales on the ground of fraud and also on the ground of irregularities pointed out therein. It, therefore, comes within the ambit of s. 37 of the Act. That section says that all matters relating to execution, discharge or satisfaction of a certificate should be determined by the Certificate Officer; and that a suit may be brought in a Civil Court in respect of any such question on the ground of fraud. This section is analogous to s. 47, Civil Procedure Code. Matters relating to execution of the certificate must be determined by the Certificate Officer who answers to the executing Court within the meaning of s. 47, Code of Civil Procedure. A suit in

(2) 12 A. 440; A. W. N. (1890) 103; 6 Ind. Dec. (N. S.) 1026.
(3) 23 C. 686; 12 Ind. Dec. (N. S.) 456.
(4) 22 Ind. Cas. 95; 18 C. L. J. 628; 18 C. W. N. 766.

the Civil Court will only lie on the ground of fraud and not on the ground of irregularities in the conduct of the sale. It having been found by the lower Appellate Court, which finding of fact we are unable to disturb, that the plaintiffs failed to prove any fraud, the plaintiffs' suit must necessarily fail as in the absence of fraud it is taken out of s. 37 of the Act, and the rest of the questions can only be determined by the Certificate Officer. Reference in this connection may be made to the case of *Basanta Kumar Pal* v. *Harendra Nath Mukhopadhya* (5).

The next question that arises in this connection is whether the plaintiffs are representatives of the certificate debtors within the meaning of s. 37 of the Act. It has been found by the learned District Judge that the certificates were issued against the tenants who were recorded in the Settlement Record and they were the persons recorded as tenants in the landlord's *sherista*. On these facts the learned Judge has held that the certificates that were issued against the recorded tenants had the effect of rent decrees and, therefore, the plaintiffs must be taken to be bound by them as representatives of the debtors. It is further to be noted in this connection that the defendants became purchasers of the shares of these holdings after the certificate sales and even after the confirmation of the sales. There can, therefore, be no doubt that if the sales were good as against the defendants Nos. 5 to 15, they were binding upon the plaintiffs also. On the above considerations it is clear that the suit is one by its constitution and scope under s. 37 of the Act and as the plaintiffs have failed to prove fraud it is liable to be dismissed.

The learned Judge has also taken the view that the suit is barred by limitation. If I could have agreed with the view taken by the learned Judge on the ground of limitation it would not have been necessary to go into the other matters. But it seems to me that the view taken by the learned Judge is not on the authorities correct. The learned Judge holds that the suit is barred under Art. 12 of the Limitation Act. There can be no doubt that that Article is applicable. It says that a suit to set aside a sale such as a sale under the Public Demands Recovery Act must be brought within one year from the date when the sale is confirmed or otherwise becomes final and conclusive. The question, therefore, is, when did the sales become final and conclusive? By the use of the word "otherwise" in the third column it is meant that the time runs from the date when the sale is confirmed and takes effect as conclusive or when it otherwise becomes final and conclusive. The starting date, therefore, for limitation should be the date on which the sale has become final and conclusive and cannot be disturbed by any of the means provided in the law of procedure except by means of a suit to which the Article is held to apply. In the present case we find that the sales were confirmed on the 3rd January, 3rd February and 24th February, 1919. The suit was brought on the 3rd June, 1921. Apparently it was brought more than one year after the confirmation of the sale. But it appears that an application was made to the Certificate Officer to set aside the sales and it succeeded. The sales were set aside on the 19th April, 1920. An appeal was taken from this order to the Collector who set it aside and restored the sales on the 18th May, 1920. There was a further application for review before the Commissioner but as there are no proper materials on the record to find out the date on which that application was dismissed, it cannot be referred to in this connection. The fact that appears on the evidence is that the sale was set aside in April, 1920, and that no suit to set aside the sale could have been brought till the sale was again confirmed in May, 1920. The present case is governed by the decision of their Lordships of the Judicial Committee in the case of *Baijnath Sahai* v. *Ramgut Singh* (6). In that case similar circumstances existed and the sale which was set aside at one stage of the proceedings in the Revenue Courts was finally confirmed by the Board of Revenue. Their Lordships held that time under Art. 12, Limitation Act, should run from the date of the final confirmation of the sale. In fact, there is enough indication in the judgment of the Judicial Committee in support of the view that so long as the sale is under consideration of the Revenue Authorities, it cannot be said to have been confirmed and become

(5) 91 Ind. Cas. 796; 30 C. W. N. 36; A. I. R. 1926 Cal. 107.

(6) 23 C. 775; 23 I. A. 45; 7 Sar. P. C. J. 1; 12 Ind. Dec. (N. S.) 514 (P. C.).

final and conclusive. The date from which time is to be counted under Art. 12 must be the date on which the sale is confirmed and has also become final and conclusive. If time is counted from the 18th May, 1920, when the order of the Certificate Officer setting aside the sale was reversed by the Collector and the sale restored, which must be the date on which it can be said that the sale was confirmed and acquired its conclusive character, the plaintiffs' suit is within time, if allowance is made for the period occupied in serving notice on the Secretary of State under s. 80, Civil Procedure Code, as is provided for in s. 15 (2), Limitation Act. In this connection the principle which should govern the case where such circumstances exist is also indicated in the decision in the case of *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (7). It may also be argued with sufficient force that when a sale is once set aside, it ceases to exist and the cause of action which accrued at its confirmation also ceases to exist and if it is again confirmed by the Appellate Authority it must be taken that confirmation should date from the judgment of such authority. It is also worthy of note that s. 9 of the Limitation Act has not been extended to proceedings under the Public Demands Recovery Act. In this view I hold that the suit is not barred by limitation. But in the view that I have taken on the merits of the case it must fail.

One other submission is made which requires notice. It was suggested that the plaintiffs, at any rate, are entitled to relief under the Bengal Tenancy Act as their interest in the properties is an encumbrance within the meaning of s. 161, Bengal Tenancy Act, and as it has not been avoided, a decree should be made in their favour in respect of their mortgage or purchase of 8-annas share in the property. As I have said, the suit is not framed in such a way as to give the plaintiffs any relief under this head. The suit is purely and simply one under the Public Demands Recovery Act and no further relief was prayed for by the plaintiffs in the suit nor can it be given to them in the present stage of the pleadings. This question was raised before the Subordinate Judge but as he was of opinion that the sale was liable to be set aside on the ground of fraud he did not enter any finding upon it. There is no indication that this point was taken before the Court of first appeal. But it may be argued, on the other hand, that as the plaintiffs were respondents, they had no opportunity of taking it before that Court. Be that as it may, this question is foreign to the present suit and cannot be determined in it.

The result of the above consideration is that these appeals fail and must be dismissed with costs. The Secretary of State should get separate costs.

Graham, J.—These two appeals have arisen out of a suit brought by the plaintiffs, who are now the appellants before us, to recover possession of an 8-annas share in the plaint lands on declaration of their title and after setting aside four sales thereof held under the Public Demands Recovery Act. The lands in suit are Government *khas mahal* lands and appertain to 4 *jotes* described in 4 Schedules to the plaint *ka*, *kha*, *ga* and *gha*. The landlord is the Secretary of State in Council, and was defendant No. 4. The defendants Nos. 1, 2 and 3 purchased the lands at certificate sales and obtained delivery of possession on the 23rd August and 1st September, 1919. The suit was instituted on the 3rd June, 1921, and was contested by the defendants Nos. 1 to 4. Some of the other defendants filed written statements, but did not contest the suit. A number of issues were framed into which it is not necessary to go in detail. The trial Court found that the plaintiffs had got a subsisting right in a half share of the lands in suit and that the certificate sales had not affected that right. It accordingly gave the plaintiffs a decree together with a declaration that the certificate sales were not binding upon them, and that defendants Nos. 1 to 3 had not thereby acquired any right as against the plaintiffs. On appeal that decision was reversed by the learned District Judge who held that the suit was barred by limitation, that the allegations of fraud had not been substantiated, and that the certificates were issued against the recorded tenants and had the effect of rent decrees.

The plaintiffs have now appealed and the following points have been argued by the learned Advocate who appeared on their behalf:—

1. *Firstly*, it is contended that the principle of *lis pendens* applies to the case,

(7) 33 Ind. Cas. 452; 43 C. 660; 24 C. L. J. 1; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 20 M. L. T. 10 (P. C.).

and that the plaintiffs, who have a paramount title, cannot be deprived of their rights by anything that took place at the certificate sales.

2. *Secondly*, it is urged that the sales were vitiated by a number of irregularities, seven of which have been particularly referred to.

3. *Thirdly*, it has been argued that the Court of Appeal below erred in law in holding that the certificate sales had the effect of a sale under a decree for arrears of rent, and that they were binding on the plaintiffs.

4. *Fourthly*, that the learned District Judge should have gone into the question whether notices under s. 167 of the Bengal Tenancy Act were served or not, this point not having been decided by the trial Court owing to the view taken by it of the case which rendered a decision by it on this point unnecessary.

5. *Lastly*, it was contended that the Court below erred in holding that the suit was barred by limitation.

With regard to the first contention, *viz.*, *lis pendens*, it may be observed that this point was never raised in the pleadings, no issue was consequently framed thereon, nor has it been even included in the numerous grounds of appeal taken in this Court. Furthermore, we are informed that notice was served upon the respondents shortly before the date fixed for hearing this appeal of a new ground of appeal, and that even at that late stage the question of *lis pendens* was not raised. In these circumstances I do not think that this ground ought now to be allowed to be entertained.

The second point relates to the alleged irregularities in connexion with the certificate sales. It does not appear to have been made clear at any stage of the case whether the plaintiffs, who sought to set aside the certificate sales, relied upon s. 36 or s. 37 of the Public Demands Recovery Act. Section 36 apparently has no application, as it is confined to a suit to set aside such a sale on the ground of non-service of notice. That is not the case here and it has been found as a fact that notice was served. The learned Advocate for the appellants has conceded that s. 36 does not apply. He has argued that s. 37 is equally inapplicable, and that the plaintiffs base their suit upon their paramount title and come under the general law quite irrespective of the Public Demands Recovery Act. Such a position cannot, in my opinion, be maintained. Where a special procedure is provided by a special Act for setting aside such sales, it seems to me that that procedure must be complied with. Section 37 refers to certificate debtors, or their representatives, and the plaintiffs must, I think, be held to come within the latter category. The proviso to the section says that "a suit may be brought in a Civil Court in respect of any such question (setting aside a sale being included) upon the ground of fraud." The plaintiffs alleged fraud in their plaint, but the finding upon this point in the Court of Appeal below is against them, and the learned Advocate who appeared on their behalf in this appeal very properly intimated that he did not challenge that finding. That being so, it appears to me that, the allegation of fraud having been negatived, the suit under the provisions of the Public Demands Recovery Act must be held to have failed : *Basanta Kumar Pal* v. *Harendra Nath Mukhopadhya* (5). I may mention here incidentally that though the plaintiffs-appellants disclaim any reliance upon the above-mentioned Act, and seek to base their claim upon what is termed their paramount right under the general law, they did at an earlier stage of the proceedings make an application under s. 23 of the Act, and in so doing may be said to have tacitly recognised that it was incumbent upon them to proceed under the Act. The case of superior right now set up was never made in their plaint, nor indeed can it be said to have been raised in the ground in this appeal.

The third point is that the Court of Appeal below erred in holding that the sales had the effect of a sale under a decree for arrears of rent, and were binding on the plaintiffs. The learned District Judge has found that the certificates were issued against the recorded tenants and had, therefore, the effect of rent-decrees. On behalf of the appellants reliance has been placed, as in the Court below, upon the entries made in previous certificates, but it is difficult to see how those entries can prevail over the Settlement Record. Those entries may, moreover, have been wrong, or again different persons may have been tenants at the time when those certificates were issued. In my opinion, the

decision of the Court below upon this point is right.

With regard to the fourth point the trial Court did not go into the question whether notices were served under s. 167 of the Bengal Tenancy Act, because in the view it took of the case a decision on the point was unnecessary. It has been argued that the Court of Appeal below should have gone into this question. The argument, if substantiated, would necessitate a remand, but as the suit has been held to fail in connection with the second point, no effect can be given to this contention.

Finally, there is the question of limitation with which my learned brother has dealt in his judgment. On the authorities, including the case of *Baijnath Sahai* v. *Ramgut Singh* (6) decided by their Lordships of the Privy Council, it would appear that the suit cannot be held to be barred by limitation.

The suit, however viewed as a suit under the Public Demands Recovery Act, failed as already held above and the appeals must, therefore, be dismissed with costs.

A. *Appeals dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 100 OF 1926.

November 23, 1926.

Present:—Mr. Justice Henry Sheldon Pratt, Acting Chief Justice, and Mr. Justice Cunliffe.

BHOLAI KARIM—APPELLANT

versus

D. D. DESAI—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 24—Application for insolvency—Inability to pay debts—Debtor's evidence, whether sufficient.

An application for adjudication of insolvency should not be dismissed on the ground that the applicant has not produced witnesses to prove his inability to pay his debts, where he has himself deposed to his inability to pay his debts and this evidence is not disbelieved by the Court.

Civil Miscellaneous Appeal from the Additional District Court, Insein, in Civil Miscellaneous Case No. 65 of 1926.

Mr. *Sastri*, for Mr. *N. N. Sen*, for the Appellant.

JUDGMENT.—Applicant applied for an adjudication on the ground that he could not pay his debts. On affirmation he deposed to his inability but the Judge dismissed his application on the ground that he brought no witness.

Applicant was in the best position to know his own capacity to pay.

The Judge did not record that he disbelieved him. We are of opinion applicant established a *prima facie* case that he was unable to pay and his application should not have been refused.

We set aside the order of the District Court and direct that appellant be granted an applicication order.

A. *Order set aside.*

BOMBAY HIGH COURT.

APPEAL FROM ORDER No. 69 OF 1925.

July 21, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice and Mr. Justice Patkar.

BHAVAN LALLU—PLAINTIFF —APPELLANT

versus

UMAR MAHOMED BHAIJI AND ANOTHER —DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 116—Landlord and tenant—Estoppel of tenant against denying landlord's title—Mortgage of unrecognised sub-division of bhag *—Mortgagor continuing in possession under rent-note—Suit by mortgagee on rent-note—Plea of illegality of transaction—Estoppel—Bombay Bhagdari and Narwadari Tenures Act (V of 1862), s. 3.*

The owner of an unrecognised sub-division of a *bhag* who has mortgaged the same but continues to remain in possession by executing rent-notes to the mortgagee from time to time is not estopped from contending, in a suit brought by the mortgagee on the basis of one of such notes, that the rent-note was part of a transaction amounting to an alienation of an unrecognised sub-division of a *bhag* which is expressly prohibited by the Bombay Bhagdari and Narwadari Tenures Act, and consequently illegal. [p. 1006, col. 2.]

Laxmanlal v. *Mulshankar* (1), *Shridhar Balkrishna Vaidya* v. *Babaji Mula Agarya* (2) and *Javerbhai Jorabhai* v. *Gordhan Narsi* (3), followed.

Devidas Dwarkadas v. *Shamlal Gopal* (4), not followed.

Appeal from an order of the District Judge, Broach, in Appeal No. 40 of 1924 reversing the decree passed by the Joint Second Class Subordinate Judge at Broach, in Civil Suit No. 57 of 1924.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *R. J. Thakor*, for the Respondents.

JUDGMENT.

Marten, C. J.—The plaintiff here sues for possession under a rent-note. The defence is that the rent-note is only a part of other documents forming one transaction, and that if all the documents are looked at, it will be found that the transaction was

an illegal one inasmuch as it amounted to an alienation of an unrecognised sub-division of a *bhag* contrary to the express provisions of s. 3 of Bombay Act V of 1862. The plaintiff retorts that the defendants being tenants under the rent-note are estopped under s. 116 of the Indian Evidence Act. Accordingly, issue No. 1 was raised on that point, *viz.*, "Whether it is open to the defendants to raise the plea about the void nature of the transaction and about its having been passed for interest without first surrendering possession to the plaintiff ?"

In the trial Court the learned Subordinate Judge decided that issue in the negative. Consequently, the evidence which the defendants wanted to adduce in support of the remaining issues was shut out, except to this limited degree that by some blunder the plaintiff's Pleader allowed certain mortgages which formed part of the documents relating to this transaction to be let in evidence, although, strictly speaking, having regard to his plea of estoppel, he ought to have objected to their being exhibited. But when the defendants tendered other documents to show that the suit property was an unrecognised *bhag* and tendered other evidence in support of their defence, this was rejected.

The lower Appellate Court reversed the decree of the trial Court, and remanded the case for a decision on the merits. The alleged landlord appeals. A preliminary objection is taken by the alleged tenants that no appeal lies. But we think that here the case was decided on a preliminary point within the meaning of O. XLI, r. 23, and that consequently an appeal lies to us under the provisions of O. XLIII, r. 1 (*u*).

Next, as regards the present appeal itself, we think the point of law as to estoppel raised by issue No. 1 should be determined on the same basis as if the above mortgages had not, in fact, been admitted in evidence, but had been tendered and rejected by the trial Judge. On that basis we think that, as the defendants were contending that the documents they tendered were part of one and the same transaction as the suit rent-note, and that the transaction when viewed as a whole was an illegal one and was expressly prohibited by the Bhagdari Act, they were entitled to have an opportunity of adducing that evidence. It must be remembered here that the alleged landlord never got possession, as the alleged tenants were in possession from first to last. There is no evidence that the alleged tenants have paid any rent, and consequently everything depends on these alleged rent-notes as to whether they effectually create the relationship of landlord and tenant between the parties. But, having regard to the defence of illegality, this is a case not necessarily of disputing so much a landlord's title as raising a defence that the whole transaction is an illegal one under the law of the land.

That being so, different considerations apply from those in which in the ordinary course a tenant is estopped from disputing his landlord's title. For instance, in *Laxmanlal* v. *Mulshankar* (1) to indemnify a Pleader against any loss which he might suffer under a bail-bond, a nominal sale-deed and a nominal rent-note were passed by the defendant to the plaintiff. The plaintiff subsequently brought a suit on the rent-note, but it was dismissed on the ground that the consideration for the sale-deed was opposed to public policy, and was void under the Indian Contract Act. It was further held that as the sale-deed and rent-note, which latter was merely intended to secure interest on the principal sum, were part and parcel of one single transaction, the rent-note was tainted with the same illegality as that which affected the sale-deed, and was, therefore, also void. In dealing with the question of estoppel at page 454* it was said:—

"Next it was urged that the defendant was estopped under s. 116 of the Evidence Act from pleading the true facts, inasmuch as he was a tenant of the plaintiff. But this, it seems to us, begs the whole question which is simply whether there was a valid tenancy or not."

Then again, in *Shridhar Balkrishna Vaidya* v. *Babaji Mula Agarya* (2), which was a Khoti case, and where certain transactions were entered into in breach of the Act, Mr. Justice Beaman said (page 714†)—

"There is no estoppel against an Act of Parliament or in this country against an Act of the Legislature. It is to be remembered that the transfer or resignation and the lease were made at the same time and formed parts of what is virtually one transaction. If the transfer is found to be

(1) 32 B. 449; 10 Bom. L. R. 553.
(2) 28 Ind. Cas. 134; 38 B. 709; 16 Bom. L. R. 586.

*Page of 32 B.—[*Ed.*]
†Page of 38 B.—[*Ed.*]

tainted with any illegality as being in contravention of any provision of the Statute Law the letting must go with it."

Then, in *Javerbhai Jorabhai* v. *Gordhan Narsi* (3), which was a decision of Sir Basil Scott and Mr. Justice Batchelor on this very Act, *viz.*, the Bhagdari Act, there was a mortgage and also rent-notes, and it was held that the mortgage as well as the rent-notes were void under the provisions of the Act in question. And the judgment says (page 265*):—

"The rent-notes were, we think, part and parcel of the one indivisible transaction; they are, therefore, tainted with the illegality which affects the mortgage, and they must suffer the same fate. We hold that both the mortgage, and the rent-notes are void."

For the appellant a decision of Sir Norman Macleod and Mr. Justice Heaton in *Devidas Dwarkadas* v. *Shamlal Gopal* (4), on the same Act, was strongly relied upon. It was there held that the tenants under the rent-note were estopped despite the fact that there was a lease which, it was argued, was void under the Act. But as I read the case, it does not seem to me clear that the point to which we attach importance in this case was clearly negatived by the judgments in that case. I notice that, so far as Sir John Heaton was concerned, he founded his decision on the facts of that case, *viz.*, (page 153†):—

"The defendant was in the position of a tenant,.....that he was placed in possession of this land by the person, the plaintiff, who purports to be the landlord, and his possession since then has been continuously possession of a tenant under a landlord."

Now, here if the tenants had been placed in possession by the alleged landlord of the property and had been paying rent and so on for a series of years, it may be that in law different considerations would arise. But, speaking for myself, I am far from being satisfied that the facts of this case are really similar to those in *Devidas Dwarkadas* v. *Shamlal Gopal* (4). But if, and so far as they are similar, then, speaking for myself, I prefer the reasoning and the principles laid down in the earlier cases to which I have referred, than those in *Devidas Dwarkadas* v. *Shamlal Gopal* (4).

It was argued that the suit rent-note was not the original rent-note which was given at the time of the original mortgage, and that, accordingly, it is not open to the defendants to treat the case on the latter basis. That will be a question of evidence. The case that the defendant wants to prove, and tenders evidence to prove, is that at the date of this rent-note there was a contemporaneous mortgage, and that a part of the arrangement was that that first rent-note which was for one year was to be succeeded the next year by a similar rent-note and so on, and that the third rent-note is in fact similar in pursuance of that understanding or agreement. If he succeeds in proving that, then, for all intents and purposes, the suit rent-note is in the same position as the rent-note at the date of the mortgage.

After all it must be remembered that this Court does not favour devices to evade the strict prohibitions of the Legislature, and if we were to hold that passing successive rent-notes every year instead of passing one rent-note for a long term of years would evade the Act, we should be opening an extremely easy door to the fraud on the Act which the present plaintiff is alleged to have effected.

Giving, then, our best consideration to this case, we think that the decision of the lower Appellate Court was correct, *viz.*, that the first issue raised in the trial Court should have been answered "Yes", and that consequently the lower Appellate Court was correct in remanding the case for a decision on the other issues raised in the case, *viz.*, issues Nos. 2, 3 and 4.

But to guard against any misunderstanding we are not deciding that it is open to the defendants to raise now any plea they like against the title of their landlord, or against the suit rent-note. All we are deciding is that they are entitled to adduce evidence in support of issues Nos. 2, 3 and 4 so as to show that the suit rent-note was part and parcel of an illegal transaction under the Bhagdari Act. Whether, when they adduce that evidence, they will prove their case or not is a matter for the trial Court to determine.

Accordingly this appeal will be dismissed with costs.

Patkar, J.—I agree.

A. N. A. *Appeal dismissed.*

(3) 28 Ind. Cas. 442; 17 Bom. L. R. 259; 39 B. 358.

(4) 58 Ind. Cas. 595; 22 Bom. L. R. 149.

*Page of 17 Bom. L. R.—[*Ed.*]

†Page of 22 Bom. L. R.—[*Ed.*]

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 680 OF 1924.
December 20, 1926.
Present:—Mr. Justice Devadoss.
NUKALA SUBBAYYA—DEFENDANT—APPELLANT
versus
NARAGAM KRISTAYYA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 12—Madras Estates Land Act (I of 1908), s. 118, suit to set aside sale under, whether falls within Art. 12.

A sale under s. 118 of the Madras Estates Land Act is not by virtue of an order or a decree of a Collector or other officer of revenue within the meaning of Art. 12 of Sch. I of the Limitation Act, inasmuch as in such a case the Collector does nothing more than merely appoint an officer for conducting the sale under s. 117 of the Act.

Second appeal against the decree of the Court of the Subordinate Judge, Masulipatam, in A. S. No. 48 of 1923, (A. S. No. 2 of 1923, District Court, Kistna) preferred against that of the Court of the District Munsif, Masulipatam, in O. S. No. 668 of 1920.

Mr. *Venkatachalam*, for the Appellant.
Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.—The contention of Mr. Venkatachalam for the appellant is that the suit is barred under Art. 12 of the Limitation Act. This question of limitation was not pressed before the lower Appellate Court and was not put in issue in the first Court. Though the written statement vaguely says that the plaintiff's suit is barred by limitation, yet no issue was taken on it and the plaintiff had no opportunity of meeting the point. It is urged that the point being one of limitation it can be raised at any time. Granting that the appellant is entitled to raise the point here, I am satisfied that Art. 12 of the Limitation Act has no application to the present case. The clause under which the suit is sought to be brought is cl. (*b*) of Art. 12 which deals with "sale in pursuance of a decree or order of a Collector or other officer of revenue." A sale under s. 118 of the Estates Land Act is not by virtue of an order or a decree of a Collector or other officer of revenue. The landholder is entitled to bring a tenant's holding to sale under s. 192. Section 115 provides for the course that is to be pursued in case a suit is instituted. Under s. 114 the landholder may apply to the Collector for sale; and under s. 116 all that the Collector has to do is to appoint an officer to conduct the sale. Under s. 117 the selling officer shall by order fix a date for the sale and cause it to be proclaimed by beat of drum in the village in which the holding is situated; what else he has to do is provided for in the section, and the sale takes place under s. 118. It is difficult to see how a sale under s. 118 could be said to be in pursuance of a decree or order of the Collector or other officer of revenue. All that the Collector is asked to do is to appoint an officer for conducting the sale in accordance with the provisions of s. 117. I think there is nothing in this point.

There is no other point raised and the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL REVISION No. 426 OF 1925.
December 7, 1926.
Present:—Mr. Justice Maung Ba.
MAUNG SAN U—APPLICANT
versus
MA PYAW GYI AND OTHERS—RESPONDENTS.

Burmese Buddhist Law—Adoption—Right of adopted son, whether lost by mere living apart.

A *kittima* adopted son does not lose his right to inherit merely because he was living apart. The real question to be decided in such a case is whether the filial relation has been maintained or severed.

Civil revision from the Additional District Court, Yamethin, in Civil Miscellaneous Case No. 107 of 1925.

Mr. *Shaffe*, for the Applicant.
Mr. *Leong*, for the Respondents.

JUDGMENT.—Applicant Mg. San U applied to the District Court of Yamethin for permission to sue as a pauper. He wants to claim inheritance valued at nearly Rs. 70,000 as *kittima* adopted son. The Court examined him on the merits of the claim and in the course of such examination he admitted having lived apart from his adoptive parents for five years before the death of the surviving adoptive father, the adoptive mother having died many years before. The learned Judge rejected the application observing, "from s 195 of the Digest of Burmese Buddhist Law, Vol. I it is clear that an adopted child living apart shall not inherit. Hence applicant has no claim against the estate of U Oh."

The learned Judge has evidently ignored

the case-law on the point. The real question is whether filial relationship has been maintained or severed. This question cannot be decided without taking evidence.

I set aside the orders rejecting the application and direct that it be admitted and the claim decided on the merits. Costs of this Court shall be paid by the respondents.

A. *Orders set aside.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1925.

July 23, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Patkar.

DIGAMBAR TATYA UTPAT—DEFENDANT—APPELLANT

versus

HARI DAMODAR UTPAT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (1), O. XXI, rr. 65, 76—Right to share in offerings to idol, whether can be attached and sold—'Utpat Vritti' of Pandharpur temple, nature of—Execution sale—Power of Court to restrict bidders to particular class of people.

The share of a priest of the temple of Shri Rukhmini of Pandharpur, in the *Utpat Vritti* (right to receive the net proceeds of the offerings of the temple) comes within s. 60 (1) of the Code of Civil Procedure and can be attached and sold in execution. [p. 1008, col. 2; p. 1003, col. 1.]

An executing Court may, for good cause, restrict bidders at a Court sale to a particular class or classes of persons. [p. 1009, col. 2.]

Second appeal from the decision of the District Judge, Sholapur, in Appeal No. 32 of 1923, confirming the decree of the Subordinate Judge at Pandharpur, in Civil Suit No. 1287 of 1921.

Mr. *S. Y. Abhyankar*, for the Appellants.

Mr. *P. V. Kane*, for the Respondent.

JUDGMENT.

Marten, C. J.—This case essentially depends on its own particular facts. The point is whether on those facts a certain interest in connection with the offerings at the temple of the Goddess Rukhmini at Pandharpur can be validly mortgaged and sold in execution to a member of the class of Utpats, the owners of the Vritti of officiating as priests in this temple.

The first question is the true construction of the mortgage of January 4, 1888, (Ex. 28). I will not quote the mortgage in detail, but our construction of it is that it mortgages the share amounting to 1/288ths of the mortgagor in the net proceeds of the offerings made by devotees to the Goddess after providing for all the customary expenses of the temple payable out of the funds thus arrived at. We do not think that it gives the mortgagee the right himself to worship the Goddess and to take himself the offerings placed at the foot of the idol. All that the mortgagor is entitled to is this small aliquot share.

The custom in this temple, which is similar to the custom obtaining in the main temple at Pandharpur, (which the Appellate Court had to consider exhaustively in another case) is for the Utpats or priests to farm out amongst themselves by auction the actual right of officiating and taking the offerings. Then the proceeds thus arrived at are divided amongst the particular class of priests. We are told, in the present case, that the priests number some forty-seven, while in the case of the main temple at Pandharpur they are far more numerous.

Further, the learned trial Judge has found as a fact that not only are the daily services farmed out in this way, but also that the individual shares have been frequently mortgaged and redeemed. He says:—

"I am satisfied that the Utpat Vritti shares have been frequently mortgaged and redeemed, the transaction, however, being confined among the Utpats themselves, and no outsider being allowed to have a share in the Vritti even temporarily. The system of collecting revenue by farming also shows that legal alienations by one Utpat to another are recognised; for otherwise the farmer would have no right against any sharer who receives his share of the auction-money and afterwards insists upon attending the Goddess to the detriment of the farmer's interests. Apart from the question of farming, however, it is clear that Vrittis can be mortgaged, and this is sufficient for the purposes of this suit."

So far as the question of custom is concerned it is conceded by Counsel for the appellant that he is bound by the finding in the Court below, and that finding is not here challenged.

The next question arises as to whether, on that custom and on the construction which we have placed on the mortgage-deed, the mortgage-debt can be enforced by sale and execution. Both Courts below have held that it can be. *Prima facie*, on the construction which we adopt, the right

to receive this fraction of the net proceeds of the offerings comes within s. 60, sub-s. (1), of the Civil Procedure Code. It is, however, alleged that the property falls within proviso (*f*) as being a right of personal service, and that consequently it cannot be attached or sold. In this particular case, we think that contention is not correct In our view, all that is mortgaged is the interest in the mortgagor's share in the net balance of the offerings. Consequently the numerous authorities such as *Rajaram* v. *Ganesh* (1), *Girijanund Datta Jha* v. *Sailajanund Datta Jha* (2), *Shoilojanund Ojha* v. *Peary Charan Dey* (3), *Puncha Thakur* v. *Bindesri Thakur* (4) or *Ganesh Ramchandra Date* v. *Shankar Ramchandra* (5) which refer to the right of the officiating priest to worship the idol directly and to receive the offerings directly, are, in our opinion, clearly distinguishable.

In particular we throw no doubt whatever on the propositions there laid down that ordinarily the offerings to an idol are the property of the idol and not the property of the priest, in the absence of any special custom or any express intention to the contrary by the donors. Similarly, we must, in no way, be taken in any way to dissent from the conclusions in those cases that the priests' rights of officiating and receiving offerings cannot in those cases be attached or sold. For instance, *Ganesh Ramchandra Date* v. *Shankar Ramchandra* (5) is a case of an ordinary outside creditor of a particular priest attempting to attach the latter's right of worship and of a share in particular offerings.

In our judgment, that is very far from the case we have to deal with. Consequently we do not agree with the argument presented to us that if execution were allowed in the present case there is no saying where it would stop and it would open a door which might lead to great injury being caused in the future. In the present case the only practical result will be this. The sale is to be confined to the Utpats themselves, and consequently the mortgagor may either buy in his share at the auction and pay off his mortgagee, in which case no harm is done. Or, alternatively, if he does not do so, he loses henceforth his share in these particular net offerings, and all that will happen will be that there will be one priest less to share in this particular fund.

It was next argued that even if the saleable property fell within the meaning of s. 60, then, under the provisions of the Code dealing with the execution of decrees, Court sales can only be by public auction, and it is not within the power of the Court to limit the bidders to any particular class of persons. In particular O. XXI, rr. 65 and 76, and form 29 in Appendix (E) were relied upon. In our opinion, that contention also is not well-founded. Speaking for myself, I see no objection to the bidders being restricted for good reasons to a particular class or classes. We know, for instance, that the Court has power to prevent the judgment-creditor or a mortgagee from bidding. So, too, supposing the attached property consisted of shares in a public Company to be sold by public auction and not through a broker under O. XXI, r. 76, and supposing the Articles of Association of that Company provided that the transferees should only be members of a particular family, I see no reason why the Court should not validly limit the bidders to people, who could validly buy the shares. Otherwise, the result is that no sales can be held at all, and consequently although the main provisions, *viz.*, s. 60, direct a sale, the machinery provided in the rest of the Code is insufficient to carry out the main direction. To my mind, that is giving a construction to the Code which is neither in accordance with common sense nor with common equity.

Accordingly, we think that the lower Appellate Court was right in holding that sale could be held and that the bidders should be confined to those who were actually Utpats. No damage can then possibly be done to the worship, and there can be no question then of any outsider being invited to perform the worship of the idol, or even to take a share in the offerings. Nor will the past custom of this particular temple be infringed. On the contrary, it will only, in my opinion, be carrying out what this particular class of people have been doing for a long series of years. Whether these financial transactions are compatible with the highest notions of divine worship is a matter, which we had to comment on in the Pandharpur

(1) 23 B. 131; 12 Ind. Dec. (N. S.) 87.
(2) 23 C. 645; 12 Ind Dec. (N. S.) 429.
(3) 29 C. 470; 6 C. W. N. 728.
(4) 28 Ind. Cas. 675; 43 C. 28; 19 C. W. N. 580.
(5) 10 B. 395; 5 Ind. Dec. (N. S.) 651.

case, and I do not wish to repeat some of the observations which were made by the Court in that case. We are only concerned here with the bare questions of law. Accordingly I would dismiss the appeal with costs.

Patkar, J.—I agree.

A. N. A. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 509 OF 1926.

December 8, 1926.

Present:—Mr. Justice Jai Lal.

THE MUNICIPAL COMMITTEE, LAHORE—DEFENDANT—APPELLANT

versus

Musammat ALLAH RAKHI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Municipal Act (III of 1911), s. 152—Evidence Act (I of 1872), s. 106—Suit for injunction by alleged public prostitute against Municipality for restraining it from taking action against plaintiff—Burden of proof—Jurisdiction of Civil Courts to restrain action of Municipal bodies.

In a suit by alleged public prostitutes for a perpetual injunction restraining a Municipal Committee from taking any action against the plaintiffs under s. 152, Municipal Act, on the ground that they are not public prostitutes, the burden of proving that the plaintiffs are not public prostitutes lies on them. [p. 1011, col. 1.]

Moti Jan v. *Municipal Committee, Delhi* (1), followed.

In such a suit a Civil Court has jurisdiction to decide the question whether or not the plaintiffs are public prostitutes and, if this issue is found in their favour, to issue the injunction prayed for. [p. 1011, col. 2.]

In re Tarabai (2), *Kerr* v. *Preston Corporation* (3) and *Corporation of Calcutta* v. *Bijoy Kumar Addy* (4), distinguished.

When a Municipal Committee acts *bona fide*, reasonably and in conformity with and strictly within the powers conferred by the law then it can escape the exercise of the restraining powers of the Civil Courts. But if its requisitions go beyond the powers conferred upon it, the Civil Courts have jurisdiction to restrain it from enforcing them. Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised but they are competent to restrain such bodies if they act *ultra vires*. [p. 1013, col. 2.]

Where a Municipal Committee takes action against certain persons under s. 152, Municipal Act on the ground that they are public prostitutes while in fact they are not, the action of the Committee is *ultra vires*. [*ibid.*]

Second appeal from the decree of the District Judge, Lahore, dated the 30th October, 1925, varying that of the Subordinate Judge, Fourth Class, Lahore, dated the 3rd December, 1924.

Mr. *Hari Chand*, for the Appellant.

Mr. *C. H. Oertal*, for the Respondents.

JUDGMENT.—The Municipal Committee, Lahore, purporting to act under the provisions of s. 152 of the Punjab Municipal Act, which authorises a Committee to prohibit the residence of a public prostitute in a specified area, served a notice on the respondents *Musammat* Allah Rakhi and *Musammat* Khurshaid prohibiting their residence as public prostitutes in a specified area within the Municipality of Lahore. In the notice the respondents were described as public prostitutes, and on non-compliance with it they were prosecuted and convicted. Their defence that they were not public prostitutes was not accepted by the Magistrate.

A suit was consequently instituted by the alleged public prostitutes for grant of a perpetual injunction against the Municipal Committee to the effect that the Committee be restrained from taking any action against the plaintiffs under the notice aforesaid on the ground that they were not public prostitutes. On behalf of the Municipal Committee several pleas were taken including a denial that the plaintiffs were not public prostitutes and an assertion that the Civil Courts had no jurisdiction to interfere with the exercise of the Municipal Committee's powers under s. 152 of the Municipal Act. The learned Subordinate Judge who heard the case placed the burden of proving that they were not public prostitutes on the plaintiffs and came to the conclusion that it had been discharged. On the question of jurisdiction also he held against the Municipal Committee and consequently decreed the suit.

On appeal by the Municipal Committee the District Judge of Lahore concurred with the views of the trial Court and maintained the decree with a slight modification as to the terms of the injunction granted by the Subordinate Judge. The learned Judge, however, was of opinion that the burden of proving that the plaintiffs were public prostitutes lay on the Municipal Committee and that the same had not been discharged. On the other point involved he came to rather contradictory findings, as in one place he held that "After careful consideration I have come to the conclusion that the Municipal Committee has acted within its powers reasonably and without oppression." Still after finding that the plaint-

iffs were not public prostitutes he decided the appeal against the Municipal Committee on the ground that he was entitled to interfere with its action if he was satisfied that the "Committee was acting oppressively to any individual such as the one of these alleged public prostitutes."

The Municipal Committee has presented a second appeal to this Court and the judgment of the District Judge is attacked on two grounds:

(*a*) that the burden of proving that they were not public prostitutes lay on the plaintiffs; and

(*b*) that the Civil Courts had no jurisdiction to entertain the suit.

Cross-objections were also filed on behalf of the respondent that the appeal by the Municipal Committee to the District Judge was barred by time. The learned Judge has discussed this matter in his judgment and has found that the appeal would be within limitation if three days are allowed to the Committee as the time requisite for obtaining copies of the judgment and the decree of the trial Court: Owing to the date of the preparation of the copy of the judgment as entered thereon being blurred he came to the conclusion by a reference to the endorsement on the copy of the decree sheet that both the copies were ready on the 8th of January and, therefore, that the appellant was entitled to an allowance of three days. As this finding was attacked in the cross-objections I inspected the original registers kept by the Copying Department of the trial Court and found that the copies were, as a matter of fact, prepared even later than the 9th. There is consequently no force in the cross-objections which are dismissed.

Now, as regards the first ground of the appeal by the Municipal Committee I held in *Moti Jan* v. *Municipal Committee, Delhi* (1) that the initial burden in such cases lies on the plaintiffs and I am still of the same opinion. One of the tests in the matter of burden of proof is who would fail if no evidence is given by either side; and applying this test it is obvious that if no evidence is given on either side the plaintiffs' suit would have to be dismissed. In my opinion, it is the duty of the plaintiffs who attack the finding of a public body and seek relief from the Civil Courts to establish the ground on which the relief is claimed. I hold that the burden of proof lay on the plaintiffs. The learned Counsel for the appellant expressly stated before me that he merely wanted a decision on the question of burden of proof and that he did not desire a remand to the District Judge for a fresh finding if I held that it lay on the plaintiffs. I, therefore, refrain from remanding the case and proceed to discuss the second ground of appeal on the assumption that the plaintiffs are not public prostitutes.

I am of opinion that the Civil Courts had jurisdiction to decide the question whether or not the plaintiffs were public prostitutes and on a finding of this issue in their favour to issue an injunction restraining the Municipal Committee from enforcing their notice prohibiting them from residing within the specified limits of the Municipality. In the case already referred to by me I arrived at the same conclusion and nothing that has now been urged before me has induced me to change that view. Counsel for the appellant relied upon *In re Tarabai* (2), *Kerr* v. *Preston Corporation* (3) and *Corporation of Calcutta* v. *Bijoy Kumar Addy* (4).

The first of these cases related to a prayer for an order under s. 45 of the Specific Relief Act, under circumstances similar to those of the present case. Now s. 45 expressly provides that no relief under it is to be granted unless, *inter alia*, the applicant has no other specific and adequate legal remedy and, therefore, the learned Judge who decided that case held that as it was open to the applicant to raise the question of her status as a public prostitute in her defence before the Magistrate on her prosecution for disobedience of the order of the Municipal Corporation, no relief under s. 45 of the Specific Relief Act could be granted to her. It is thus to be observed that the reported case was under a special provision of the law which precluded the Court from granting the relief prayed for under specified circumstances and has, therefore, no bearing on facts of the case before me which has been instituted under the provisions of s. 9 of the Civil Procedure Code.

(1) 93 Ind. Cas. 827; A. I. R. 1926 Lah. 461.

(2) 7 Bom. L. R. 161.

(3) (1876) 6 Ch. D. 463; 46 L. J. Ch. 409; 25 W. R. 264.

(4) 77 Ind. Cas. 529; 50 C. 813; 27 C. W. N. 787; 38 C. L. J. 360; A. I. R. 1924 Cal. 334.

That section provides that "the Court shall have jurisdiction to try all suits of civil nature excepting suits of which their cognizance is either expressly or impliedly barred." Admittedly there is no express provision of the law which bars the jurisdiction of the Civil Courts in the present case and it is for the appellant to show that such jurisdiction is barred by implication.

In *Kerr* v. *Preston Corporation* (3) the plaintiff had built on his own area some bay-windows which projected on a street. This was done after notice to the Municipal body but without its sanction. A notice to demolish the building having been issued by the local body the plaintiff instituted a suit praying for an injunction to restrain the former from enforcing the notice on the grounds *inter alia* that he built on his own land and that the defendant had by not replying to this notice acquiesced in the building of the windows. It was held that under the circumstances the Civil Courts had no jurisdiction to entertain the suit because the Municipal body in issuing the notice did not act beyond the powers conferred on it by the statutes. That case was, therefore, decided on its peculiar facts and though the judgment contains certain remarks which might be held to support the contention of the appellant, still it has no application to the present case, as here it is contended that the Municipal Committee was not legally empowered by law to issue the notice to the plaintiffs, in other words, that the plaintiffs were not amenable to the law which has been applied to them and, therefore, that the requisition of the Committee was *ultra vires*.

In *Corporation of Calcutta* v. *Bijoy Kumar Addy* (4) it was held that "though the extreme position cannot be maintained that there is absolutely no jurisdiction in a Court of Equity to restrain proceedings before a Magistrate, the Court will not interfere, unless in very special circumstances, by way of injunction or declaration of right where the Legislature has pointed out a mode of procedure before a Magistrate," and that it is not the practice to interfere with corporate bodies unless they are manifestly abusing their powers. In that case the Municipal Corporation of Calcutta called upon the owners of some *basti* land occupied by tenants to carry out certain improvements in the *basti* and on their failure to comply with the requisition prosecuted them and had them convicted several times under the Calcutta Municipal Act. A suit by the owners for a decree to restrain the Corporation from taking any action or proceedings for non-compliance with the requisition was finally dismissed by the High Court as, in the opinion of the learned Judges, the alleged ground for non-compliance that the tenants prevented them from carrying out the improvements, was not a sufficient ground for the exercise of the discretionary powers of the Court to interfere with the actions of the corporate bodies. After reviewing the previous authorities both English, including *Kerr* v. *Preston Corporation* (3), and Indian the learned Judges remarked as follows:—

"There has been much discussion at the Bar as to whether a Court of Equity has jurisdiction to restrain criminal proceedings for the recovery of a penalty imposed by a Statute for breach of its enactments. An authority for an affirmative answer has been traced to the decision of *Mayor and Corporation of York* v. *Pilkington* (5), though a contrary view had been indicated by Holt, C. J., in *Holderstaff* v. *Saunders* (6), see also the decision of Lord Hardwick in *Montague* v. *Dudman* (7). But the tendency of modern decisions is that even if the Court has such jurisdiction, it will not interfere as a general rule: *Saull* v. *Browne* (8), *Kerr* v. *Preston Corporation* (3), *Hedley* v. *Bates* (9), *Stannard* v. *Vestry of Saint Giles* (10), *In re Briton Medical and General Life Assurance Association* (11), *Grand Junction Waterworks* v. *Hampton Urban District Council* (12), *Devonport Corporation* v. *Tozer* (13) and *Merrick* v. *Liverpool Corporation* (14). The principle deducible from these decisions is that though the ex-

(5) (1742) 2 Atk. 302; 9 Mod. 273; 26 E. R. 584.
(6) (1694) 6 Mod. 16; 87 E. R. 780.
(7) (1751) 2 Ves. Sen. 396; 28 E. R. 253.
(8) (1875) 10 Ch. 64; 44 L. J. Ch. 1; 31 L. T. 493; 23 W. R. 50; 13 Cox C. C. 30.
(9) (1880) 13 Ch. D. 498; 49 L. J. Ch. 170; 42 L. T. 41; 28 W. R. 365.
(10) (1882) 20 Ch. D. 190; 51 L. J. Ch. 629; 46 L. T. 243; 30 W. R. 695.
(11) (1886) 32 Ch. D. 503; 55 L. J. Ch 416; 54 L. T. 152; 34 W. R. 390.
(12) (1898) 2 Ch. 331; 67 L. J. Ch. 603; 62 J. P. 566; 78 L. T. 673; 14 T. L. R. 467; 46 W. R. 644.
(13) (1902) 2 Ch. 182 at p. 195; 71 L. J. Ch. 754; 86 L. T. 612; 18 T. L. R. 489.
(14) (1910) 2 Ch. 449; 79 L. J. Ch. 751; 104 L. T. 399; 74 J. P. 445; 8 L. G. R. 966.

treme position cannot be maintained that there is absolutely no jurisdiction in the Court to restrain proceedings before a Magistrate, the Court will not interfere, unless in very special circumstances, by way of injunction or declaration of right, where the Legislature has pointed out a mode of procedure before a Magistrate; see also *Emperor of Austria* v. *Day* (15). A similar view has been adopted in the Courts of the United States, and relief has been frequently denied on the ground that the proceedings for enforcement were of a criminal or *quasi* criminal nature and that equity declines to interfere with the administration of the criminal laws. It has been maintained, however, that a Court of Equity may in a proper case interfere by injunction to restrain an act or proceeding, criminal, or *quasi*-criminal in form, which tends to the impairment of property rights and proceedings for the enforcement of Municipal ordinances, such as the one before us, have been treated as *quasi*-criminal (Pomeroy on Equity Jurisprudence, s. 1777). We need not pursue this point further, but it should not be overlooked that the judicial decisions on the subject in other jurisdictions were largely rendered necessary by the system of classification of Courts prevalent there. Apart from this, we have the well-settled rule that it is not the practice of the Court to interfere with corporate bodies unless they are manifestly abusing their powers."

This case, in my opinion, instead of being an authority in favour of the appellants rather goes against them and is distinguishable by the fact that there was no question as to the power of the Corporation to require the plaintiffs to carry out the improvements, the main ground of the suit being that the plaintiffs had a good excuse for not complying with the requisition.

It was held in *Brindabun Chunder Roy* v. *Chairman and Vice-Chairman of the Municipal Commissioners of the Town of Serampore* (16) that Municipal as well as other Public Boards are within the restraining jurisdiction of the Civil Courts which are competent to enquire into and control the action of the public bodies where they have acted in excess or contradiction of the powers conferred upon them.

In *Chairman of Giridhi Municipality* v. *Suresh Chandra Mazumdar* (17) it was held that it is only when the action of the Municipal Committee has been exercised in conformity with the powers conferred upon it by the Act that the Civil Court has no authority to interfere. It would appear that it is only when the Municipal Committee acts *bona fide*, reasonably, and in conformity with and strictly within the powers conferred by the law that it can escape the exercise of the restraining powers of the Civil Courts; and that if its requisitions go beyond the powers conferred upon it then the Civil Courts have jurisdiction to restrain it from enforcing them. The Courts have no jurisdiction to inferfere with the mode in which the powers of Municipal bodies are exercised but they are competent to restrain such bodies if they act *ultra vires*.

In the case before me it has been found both by the Subordinate Judge and the District Judge that the plaintiffs are not public prostitutes, and this finding must be held to be conclusive for the purposes of this appeal in view of the express request made before me by the Counsel for the appellant that the case be not remanded for a fresh finding owing to the wrong allocation of the burden of proof by the District Judge. That being so, they were not amenable to the law which has been applied to them by the Municipal Committee of Lahore and, therefore, in issuing a notice under s. 152 of the Municipal Act to them the Committee has acted beyond the powers conferred upon it by the Legislature and its action in issuing the notice was *ultra vires*. The Civil Courts were, therefore, competent to grant a relief to the plaintiffs by way of injunction. No cause has been shown, in fact no attempt was made to show one, why if the Civil Courts had jurisdiction, an injunction should not be granted in this case.

I, therefore, dismiss this appeal with costs.

This judgment will also dispose of Civil Appeals Nos. 510, 511 and 512 of 1926 in which the same legal points are involved and though the facts are slightly different, the decision on the legal points concludes them. These appeals are also dismissed with costs.

R. K. *Appeals dismissed.*

(15) (1861) 3 De G. F. & J. 217 at p. 253; 130 R. R. 101 at p. 121; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. (N. S.) 639; 9 W. R. 712; 45 E. R. 861; 2 Giff. 628.

(16) 19 W. R. 309.

(17) 12 C. W. N. 709; 7 C. L. J. 631; 35 C. 859.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 127 OF 1926.

December. 1, 1926.

Present:—Mr. Justice Henry Sheldon Pratt, Acting Chief Justice, and Mr. Justice Cunliffe.

S. R. M M. R. M. CHETTYAR FIRM —APPELLANT

versus

U BA LON—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 96 —Purchaser of property subject to lease—No right to be put in actual possession.

A purchaser in execution sale of property subject to a lease is entitled only to be put in constructive or symbolical possession of the property.

Civil miscellaneous appeal from the Original Side, High Court, Rangoon, in Insolvency Case No. 146 of 1924.

Mr. *B. B. Sen*, for the Appellant.

Mr. *Halker*, for the Respondent.

JUDGMENT.—Appellant purchased a mill at a Court-auction.

In the proclamation of sale it was distinctly set forth that the sale was subject to tenancy of Mg. Ba Lon. The appellant, therefore, purchased subject to the tenancy with full knowledge. No doubt, he made inquiries as to the term of the lease, since it was not stated in the proclamation of sale.

After the purchase appellant applied to be put in possession. In his application he denied the *bona fides* of Ba Lon's tenancy and filed an affidavit.

Ba Lon filed an affidavit that he was entitled to remain in possession under the terms of his lease for four years. The Court found that Ba Lon's objection of tenancy was not shown to be untrue and that the purchaser must wait till the expiry of the lease before he could be put in possession.

It is perfectly clear that the purchaser's object was to eject the respondent and not merely to obtain constructive possession He was not entitled to eject him on the pleadings and affidavits.

He was entitled as purchaser to constructive or symbolical possession as landlord, but not more and the application was rightly dismissed.

If the respondent has forfeited his lease by failure to pay rent or other contravention of its terms that is a matter, which does not arise at this stage of the proceedings.

The appeal will be dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2658 OF 1925.

February 1, 1927.

Present:—Mr. Justice Addison.

IMAM DIN—DEFENDANT—APPELAANT

versus

KHAMANDI AND OTHERS—PLAINTIFFS AND *Musammat* GOHRI AND OTHERS —DEFENDANTS—RESPONDENTS.

Custom (Punjab)—Succession—Muhammadan Gujars *of Kangra Tahsil—Daughter's right of succession—Female heir's right to contest alienation by another female—Widow's estate, nature of.*

Under the Customary Law of the Punjab a female heir is entitled to contest an alienation made by another female heir with a limited estate. [p. 1017, col. 2.]

(Case-law discussed.)

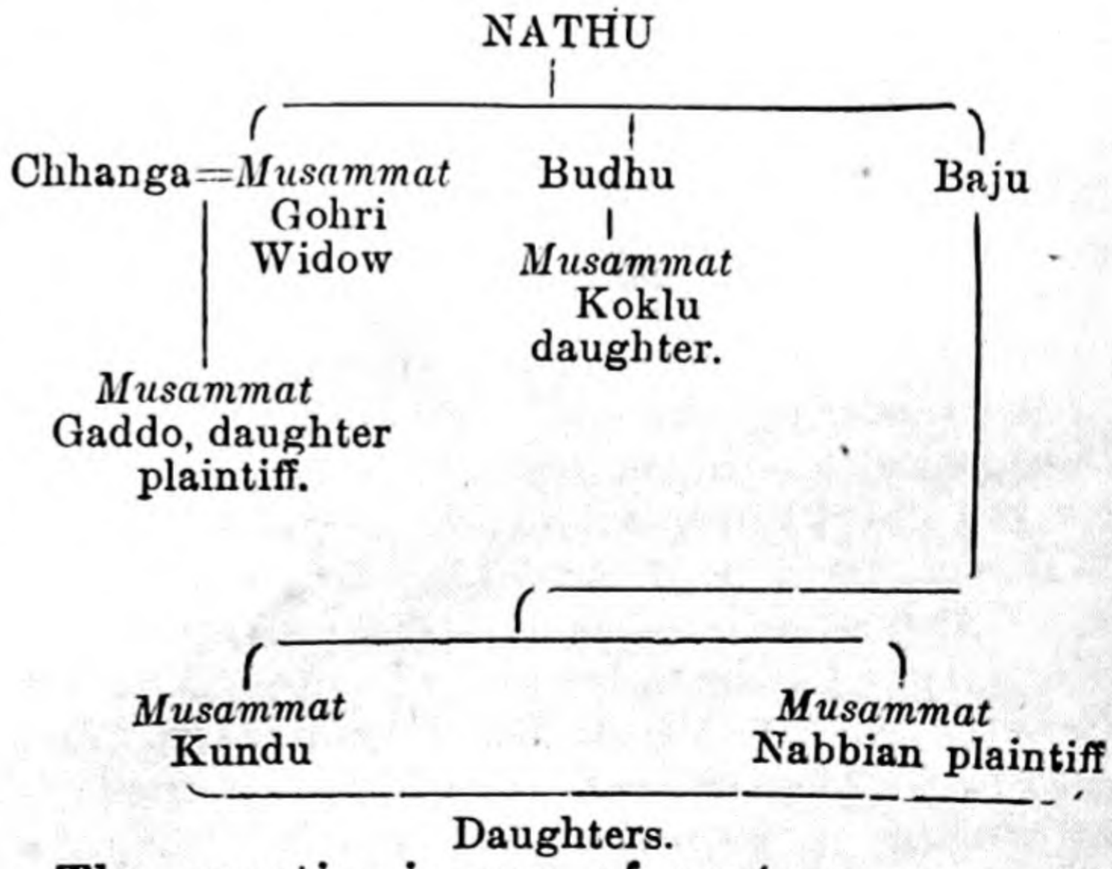
Amongst Muhammadan *Gujars* of Kangra Tahsil, a daughter succeeds to the ancestral property of her father after his son and widow in the absence of any male collateral up to the seventh generation and a widow succeeds only to a life-estate even in cases of collateral succession. [p. 1015, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 13th June, 1 25, reversing that of the Sub-Judge, Fourth Class, Kangra, dated the 21st July, 1924.

Mr. *Mehr Chand Mahajan*, for the Appellant.

Messrs. *Jagan Nath* and *Fakir Chand*, for the Respondents.

JUDGMENT.—For the proper understanding of this appeal the following pedigree-table in necessary:



The question is one of custom amongst Muhammadan *Gujars* of the Kangra District. Chhanga died before 1890 and was succeeded by his widow *Musammat* Gohri. Budhu died in 1904 and was succeeded by his brother Baju and by *Musammat* Gohri, widow of Chhanga. Baju died in 1910 and was succeeded by his widow *Musammat* Par-

dhani. The last named died in 1911 and her estate went to *Musammat* Gohri. In this way *Musammat* Gohri the widow of Chhanga became the life-owner of all the land held by the three brothers. They had all daughters who did not succeed upon the deaths of their respective fathers as widows were in existence.

On the 16th November, 1922, *Musammat* Gohri gifted the whole land, which came to her from the three brothers, namely, 93 *kanals* 9 *marlas* to one Imam Din, her own distant relative. She alleged that she was the absolute owner and that he had been serving her and thus she had the right to gift the land to him, there being no reversioners. The present suit was instituted by *Musammat* Gohri's daughter, *Musammat* Gaddo and by *Musammat* Nabian, a daughter of Baju, for a declaration that the gift in suit should not affect their rights of inheritance after the death of *Musammat* Gohri. *Musammat* Kundu another daughter of Baju and *Musammat* Koklu daughter of Budhu have not sued. The donee pleaded that the plaintiffs had no right to challenge the gift either under custom or Muhammadan Law as the daughters were not heirs and that if custom was the rule the plaintiffs should prove that they as heirs had the right to contest the gift under custom.

The trial Judge held that the gift in favour of stranger was invalid, that it had not been proved that the donee had served the donor and that custom was against gifts in favour of strangers by a widow, that the widow was not a full owner and that she held the usual limited estate under Customary Law, but he dismissed the suit on the ground that the plaintiffs had no *locus standi* to sue. Against this decision the plaintiffs appealed to the District Judge. The donee's Counsel there admitted the correctness of all the findings by the trial Judge against him and the only question before the District Judge was whether the plaintiffs had a *locus standi* to sue He held that the daughter of *Musammat* Gohri in any case was an heir and as such had the right to contest the gift by her mother, who only held the usual life-estate He, therefore, decreed the suit but granted a certificate under s. 41 of the Punjab Courts Act, as to whether among Muhammadan *Gujars* of Kangra Tahsil daughters had a right under custom to contest alienations by their widowed mothers. On this certificate this second appeal has been admitted,

Under the general Customary Law of the Province daughters succeed even to the ancestral landed property of their father in the absence of near male collaterals. This is the rule given in para. 23 of Rattigan's Customary Law, and the answer to question No. 49 of the Customary Law of the Kangra District is also to the effect that after sons and widows daughters are entitled even when married to succeed when, as in the present case, there is no collateral of the deceased up to seven generations. Further, it is commonly the case under custom that widows succeed collaterally: see remark 2 of para. 11 of Rattigan's Digest. Several instances of collateral succession of widows in the Kangra District are given at pages 108 and 109 of the Customary Law of that District. Further the answer to question No. 45 of the Customary Law of the Kangra District shows that widows succeed to the usual limited life-interest in the estate only. Under custom, therefore, the daughter in the present case is certainly an heir and the fact that the mother succeeded collaterally does not show that daughters are not heirs. It is also clear that *Musammat* Gohri had only a limited life-interest in the estate.

The only question remaining is whether the daughter of *Musammat* Gohri can contest the gift by her mother. Some attempt was made to argue on the authority of a *dictum* in *Allah Ditta* v. *Gauhra* (1) that a widow's estate is only limited for the benefit of reversioners and where there are none, she is to all intents and purposes an absolute owner. This *dictum*, however, was not followed in *Kundan* v. *Secretary of State for India* (2) and it is obvious that it was stated in too wide terms.

There is no evidence as to the custom either way and this was to be expected seeing that instances like the present must be very few in number. It was argued, however, that the right to inherit does not necessarily give the right to contest an alienation, such right of contest being usually vested in the agnatic body. It was further argued that the power to contest under custom must be proved in each case and that as there was no evidence the

(1) 23 Ind. Cas. 127; 3 P. R. 1914; 129 P. L. R. 1914.
(2) 96 Ind. Cas. 895; 7 Lah. 543 at p. 549; A. I. R. 1926 Lah. 673; 27 P. L. R. 859.

appeal should be accepted and the plaintiffs' suit dismissed.

The authorities relied upon on behalf of the appellants were the following:—

In *Nur-ul-nissa* v. *Gauhar-ul-nissa* (3) it was held that the plaintiffs, who were nieces of the last male owner had no *locus standi* to sue for a declaration that a gift by the last male owner's childless daughters should not affect their reversionary rights. It was further said that there being no presumption in favour of control by a female over such an owner, it was not open to the plaintiffs to contest the alienation unless they were in a position to establish a custom *ad hoc*. This view seems to have been approved in *Ali Muhammad* v. *Siraj-ud-din* (4). In *Partapi* v. *Hazara Singh* (5) it was held that among *Jat Sikhs* of the Jullundur District the onus of proving that a daughter had the right to contest an alienation by her mother of land, whereof the last male holder was her father, lay on the daughter and that on the record she failed to discharge it. A similar view was taken in *Dalipa* v. *Suraj Kaur* (6) where it was held that the rights and privileges of a female heir have to be decided on the evidence of each particular case and that plaintiff a married daughter who had succeeded to her father's estate had failed to prove that by custom among Dhillon *Jats* of the Ambala District she had a right to contest alienations effected by her mother or step-mother. *Ram Devi* v. *Hazara Singh* (7) was decided by a Full Bench which held that it was not the function of a Judge to enunciate general principles of law and custom irrespective of the facts of a case and that cases under Customary Law should be decided according to the facts established by the evidence produced in those cases and that the opinion of Judges in other cases, however, valuable by way of illustration, cannot safely be applied to parties in a different case. After the Full Bench gave that decision the Division Bench to whom the appeal went back, held that the power to control an alienation by a female whether a widow or not, was usually vested in the agnates, which the daughters were not and that the burden of proving the power to contest an alienation by the widow lay on the daughter. These exhaust the authorities in favour of the appellants.

On the other hand, there are numerous rulings of this Court which have taken the opposite view. It was held in *Chiragh Bibi* v. *Hassan* (8) that among Gehlna *Arains* of the Lahore District a daughter (assuming her to be the heir of her father) was by custom entitled to contest an alienation made by her step mother. This means that the daughter if she is heir is entitled by custom generally to contest an alienation by her mother, the daughter succeeding as full owner while her mother, as widow, has only a limited life-interest in the estate. It was held in *Lahori* v. *Radho* (9) that a widow who was entitled to succeed collaterally was as such competent to contest the validity of an alienation made by the widow of a collateral of her husband whom she was entitled to succeed. There are thus two other cases of the year 1906 at variance with *Nur-ul-nissa* v. *Gauhar-ul-nissa* (3).

Another authority which has often been discussed and followed is *Maqsud-ul-nisa* v. *Kaniz Zohra* (10) where it was held that a female with a right to succeed to an estate held by another female is competent to control the acts of the latter, provided she establishes that she is entitled to succeed and that the alienor is holding only a limited estate resembling that of a widow but she can in no case challenge an alienation by a male proprietor or by a female holding as full owner. In the case before me the alienor held only the limited estate of a widow and the daughter has established that she is, in fact, entitled to succeed on her death. Again, it was held in *Diyal Kaur* v. *Mehtab Kaur* (11) that where the owner for the time being has only a limited interest in the estate a prospective heir entitled to succeed to an absolute estate, can restrict the enjoyment of the limited interest within proper limits. This was a case similar to the present. In *Dalipa* v. *Dallu* (12) it was held that amongst *Rajputs* of Tahsil Nurpur of Kangra Dis-

(3) 61 P. R. 1906.
(4) 10 Ind. Cas. 236; 13 P. R. 1912; 162 P. L. R. 1911; 199 P. W. R. 1911.
(5) 31 Ind. Cas. 794; 33 P. R. 1916.
(6) 34 Ind. Cas. 581; 48 P. R. 1916; 142 P. W. R. 1916.
(7) 17 P. W. R. 1916.
(8) 19 P. R. 1906; 70 P. L. R 1906; 51 P. W. R. 1906.
(9) 72 P. R. 1906; 108 P. L. R. 1907; 125 P. W. R. 1906.
(10) 135 P. R. 1908; 194 P. W. R. 1908.
(11) 74 Ind. Cas. 639; 3 Lah. L. J. 458.
(12) 95 Ind. Cas. 413; 4 Lah. L. J. 336.

trict a widow who holds a life-interest under custom has the same restrictions on her power of alienation as a widow who holds a similar estate under Hindu Law and that the next heir has a right to protect his inheritance by challenging any unauthorised alienation. The authority followed in this case was *Maqsud ul nisa* v. *Kaniz Zohra* (10) it was held in *Nasib ul-nisa* v. *Ahmdi un nisa* (13) which was a case amongst *Sayads* of Kharkanda in the Rohtak District that as a daughter who succeeds by the right of representation had in every way the rights of a male, she had the right to contest alienations made by a widow. In this case again *Maqsud-ul-nisa* v. *Kaniz Zohra* (10) was approved generally (see pages 392* and 393* of the report). In *Mawaz Khan* v. *Zohra Jan* (14) the proposition is laid down in the broadest terms to the effect that when a female is entitled to succeed on the death of the alienor and when the alienor holds only a limited estate such female is competent to control the alienation of the alienor. That was a case amongst Khattar Muhammadans of the Attock District. In *Surjo* v. *Dalelo* (15) a case of *Brahmans* of Tahsil Dehra Gopipur in the Kangra District it was held that where under Customary Law a widow is entitled on the death of another widow to succeed to the estate held by the latter as a life-tenure, the former can restrain an alienation by the latter.

The extent to which the right to contest an alienation by a female with a limited estate is now recognised is shown by the fact that in *Ahmad* v. *Bano* (16) it was admitted that if the sisters of the last male owner were heirs they could contest an alienation made by the widow of the last male owner. In *Gobinda* v. *Nandu* (17) a case between Hindu *Ghirths* of the Kangra District the same view was taken as regards the rights of one female to challenge an alienation by another with a limited estate.

Lastly, it will be sufficient to refer to *Aisha* v. *Hasan Bano*, C. A. No. 475 of 1919. This was a case of *Mussalmans* of the Jullundur District and it was held that where it is a question of alienation by a widow holding a life-estate it was wholly immaterial whether the next heir be a male collateral or a female, the right to challenge arising out of the succession and not being derived from any common ancestor or any principle of agnatic succession.

The above discussion will show that apart from the authorities of the year 1916 and one authority of the year 1906, all the others are against the contention of the appellant and in favour of the view that a female heir is entitled to contest the alienation of another female with a limited estate. That being the case I dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(13) 66 Ind. Cas. 494; 2 Lah 383.
(14) 73 Ind. Cas. 583; A. I. R. 1924 Lah. 187; 6 Lah. L. J. 460.
(15) 87 Ind. Cas. 937; A. I. R. 1925 Lah. 573; 2 Lah. Cas 105; 7 Lah. L. J. 474.
(16) 67 Ind. Cas. 629; 3 Lah. 40; A. I. R. 1922 Lah. 114.
(17) 74 Ind. Cas. 644; 5 Lah. 450; A. I. R. 1922 Lah. 217.

*Pages of P. R. 1908—[*Ed.*]

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 160 OF 1926.

December 13, 1926.

Present:—Sir John Guy Rutledge, KT., Chief Justice, and Mr. Justice Brown.

THE OFFICIAL ASSIGNEE—APPELLANT

versus

ZOLLIKOFFER AND CO.—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1909), s. 52 (2)—Reputed ownership, doctrine of—Goods received as agent.

Certain goods in the possession of an insolvent were claimed by the Official Assignee under the doctrine of reputed ownership. There was evidence to show that the insolvent had received the goods as an agent and not as an owner. The insolvent had further held himself out, in his note-paper, merely as a commission agent.

Held, that the Official Assignee was not entitled to claim the goods under s. 52 (2) of the Presidency Towns Insolvency Act. [p. 1018, col. 1.]

Civil miscellaneous appeal from the order of the Original Side, in Insolvency Case No. 25 of 1926

Mr. *Po Han*, for the Appellant

Mr. *Clifton*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the learned Judge on the Original Side in his Insolvency Jurisdiction in which he allowed the respondents' claim as owners of certain goods in the possession of the insolvent firm A. K. Ahmed and Company. We are of opinion that the learned Judge, in a carefully drawn order, has accurately stated the

law on the subject of reputed ownership, and, indeed, the Advocate for the appellant does not dispute the accuracy of the law as stated and applied in the order, but contends that, in fact, the learned Judge erred in holding that there was any evidence to show that the insolvent firm held themselves out to be commission agents. The evidence, undoubtedly, is meagre, and we agree with the learned Judge in saying that this case came very near the border line, but, in our opinion, he was right in holding that meagre though the evidence was, it was sufficient. The record of the transaction appearing in the consignment slip makes it clear that, in fact, the insolvent firm received those goods not as purchasers but as agents for sale on a commission basis, and it also appears from Ex. A, a letter subsequent to the transaction, that the insolvent firm, on their printed note paper, represented themselves to the world or, at any rate, to their co-respondents, to be commission agents. It is unfortunate that the partner of the respondent firm who gave evidence did not state what must have been within his knowledge that nearly, all the mercantile firms in Rangoon, *inter alia*, dispose of goods on a commission basis. But he has not done so and, in spite of the remarks of the learned Judge in *Whitfield* v. *Brand* (1) we do not consider that under the guise of judicial notice we can dispense with proof of this fact.

There is on the record these facts:—(*a*) that the insolvent firm, in fact, had possession of those goods as agents and not as owners; and (*b*) that, on their note-paper, they represented themselves as commission agents; and we have also the fact that, if the Official Assignee disputed the accuracy of either of these statements, he could have called, as evidence, the insolvents themselves and put in any book or document which would have helped him. But he has not done so.

In these circumstances we agree with the finding of the learned Judge, and must dismiss this appeal with costs.

A. *Appeal dismissed.*

(1) (1847) 153 E. R. 1195; 16 M. & W. 282; 16 L. J. Ex. 103; 73 R. R. 502.

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1269 OF 1923.

November 12, 1926.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice, Krishnan. and Mr. Justice Curgenven.

KODURU VENKUREDDI AND ANOTHER—DEFENDANTS Nos. 5 AND 6—APPELLANTS

versus

MAGUNTA VENKUREDDI AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1 TO 3—RESPONDENTS.

Hindu Law—Suit for partition against father, brother and alienees from brother—Debt incurred by father prior to suit—Decree against family property exonerating alienees, effect of—Liability of family property for decree debt—Institution of partition suit, effect of, on antecedent debts of father.

The purchaser of an undivided share of a Hindu co-parcener gets only an equity to enforce partition and takes the share when partitioned subject to all the liabilities on it in the hands of his vendor. [p. 1019, col. 2.]

What is decided in a partition suit is the rights and liabilities of parties on the date of the plaint. The decree refers back to the date of suit, unless the partition suit is based on an antecedent severance of status when the Court will have to decide the rights and liabilities as on that date and pass a decree accordingly. In either case the date to which the decree refers will be the date when the severance took place. [p. 1020, col. 1.]

For purposes of partition in a joint Hindu family an account has to be taken of the debts and liabilities binding on the estate. In the case of a managing member of a joint family, all debts which he has incurred for proper legal necessity of the family he is entitled to have paid out of the joint property before the shares are allotted to the several co-parceners; and in the case of a father he can ask all his debts which are neither immoral nor illegal to be so paid out of the joint estate of himself and his sons before partition, whether such debts be shown to be for legal necessity or not. [*ibid.*]

During the pendency of a suit by a Hindu son for partition against his brother and father and alienees from the brother a creditor filed a suit against all of them on a promissory note executed by the father and obtained a decree against the father personally and against the family property, the alienees being, however, exonerated:

Held, (1) that in the partition suit, the alienees could get their alienor's share only subject to the liability of the debt, notwithstanding that they were exonerated in the creditor's suit; [p. 1019, col. 2.]

(2) that inasmuch as on the date of suit for partition the family was joint and the father's power to sell the joint property for his just debts was subsisting, the Court was bound to recognise in the decree the existence of such debts as were payable out of the joint estate and make the necessary provision for their liquidation before directing partition by metes and bounds. [p. 1020, col. 1.]

Second appeal against the decree of the Court of the Additional Subordinate Judge, Nellore, in A. S. No. 12 of 1922 (A. S. No. 257 of 1921, District Court, Nellore)

preferred against that of the Court of the Principal District Munsif, Nellore, in O. S. No. 1431 of 1916.

Messrs. *A. Krishnaswami Iyer* and *B. Somayya*, for the Appellants.

Mr. *K. Krishnaswami Iyengar*, for the Respondents.

JUDGMENT.

Coutts Trotter, C. J.—I have had the advantage of perusing the judgments about to be delivered by my learned brothers. I agree with them and have nothing to add.

Krishnan, J.—The question referred in this case to the Full Bench is "Where a father or a managing member of a joint Hindu family contracts a simple debt and then there is a partition among the members of the family, can the creditor proceed against the property allotted to the other members for such a debt?" When the appellant opened his case in the Full Bench it was found that the question formulated did not properly arise and it was decided that it need not be considered but that the whole second appeal should be treated as before the Full Bench for disposal. We have thus heard arguments in the second appeal.

The second appeal arises in a suit brought by a Hindu son against his father and his two younger brothers, defendants Nos. 1 to 3, for a partition of their joint family property and the delivery over to him of his share. The 4th defendant was joined as an *illatom* son-in-law but his claim was disallowed by the trial Court and he is not before us. Fifth and sixth defendants are the purchasers of the 2nd defendant's share in the family property when this suit was pending before the District Munsif and they were added as parties by an order of Court. They are the appellants before us.

The only point argued in the second appeal relates to a debt incurred by the father, the 1st defendant, on a promissory note executed by him on a date prior to the suit to a third party. That creditor had brought a suit on his note while this suit was pending and had obtained a decree against the father personally and against the joint family property; the father and all the sons were parties to that suit as also defendants Nos. 5 and 6. The latter were exonerated as they could not be made liable on the promissory note which they had nothing to do with.

In ascertaining the net assets available for partition, the lower Courts have held the debt above-mentioned to be a debt payable out of the family property and have made the 2nd defendant's share liable for a proportionate share of the debt and declared the 5th and 6th defendants entitled as purchasers only to such a reduced share. They contend in second appeal that they should get the whole share without the liability for the debt.

It is not denied that the debt was a proper debt of the father, being neither immoral nor illegal. It is a debt which on account of the law of the pious obligation of the Hindu son to pay his father's just debts out of the joint family estate, was payable from the estate. The debt had become a decree-debt during the pendency of this suit, by which the joint family estate was expressly made liable. It is first argued in second appeal that as in the suit on the promissory note in which defendants Nos. 5 and 6 were parties they were exonerated, the debt should be held to be not chargeable on the 2nd defendant's share in their hands. As pointed out by the learned Subordinate Judge they were exonerated because they could not be made liable on the note as they had nothing to do with it. Nevertheless, a decree was passed against the joint family estate. These defendants are not, therefore, entitled to rely on the decree to say that that estate should not be charged in their hands with the liability for the debt. The purchaser of an undivided share of a Hindu co-parcener, it has been held, gets only an equity to enforce partition and takes the share when partitioned subject to all the liabilities on it in the hands of his vendor. Clearly, therefore, the 5th and 6th defendants can get the 2nd defendant's share only subject to the liability for the debt, if it is subject to that liability in 2nd defendant's hands. Furthermore, the parties here were co-defendants in the suit on the note and there was no contest and no decision between them on any point and consequently no question of *res judicata* arises and defendants Nos. 5 and 6 cannot rely on the judgment against the plaintiff.

The learned Vakil then raised a novel point and argued that in a partition suit between a Hindu father and sons the father must be left to pay all the debts incurred by him even if they are just debts, out of his own share and that the shares of the sons are not liable for them. He contends

that as soon as the partition suit is brought there is a severance of status between the father and the sons and the shares of the sons are not liable for the father's debts thereafter. This argument may be sound with reference to the debts incurred by the father after the partition suit has been brought; but as regards debts previously incurred, it is clearly erroneous. The fallacy is in failing to note that what is decided in a partition suit is the rights and liabilities of parties on the date of the plaint. The decree refers back to the date of suit; unless indeed the partition suit is based on an antecedent severance of status when the Court will have to decide the rights and liabilities as on that date and pass a decree accordingly. In either case the date to which the decree refers will be the date when the severance took place. As on that day the father's power to sell the joint property for his just debts is subsisting the Courts have to recognise in their decree the existence of such debts as are payable out of the joint estate and make the necessary provision for their liquidation before directing partition by metes and bounds. For purposes of partition, an account has to be taken of the debts and liabilities binding on the estate. In the case of a managing member of a joint family, all debts which he has incurred for proper legal necessity of the family he is entitled to have paid out of the joint property before the shares are allotted to the several co-parceners; and in the case of a father he can ask all his debts which are neither immoral nor illegal to be so paid out of the joint estate of himself and his sons before partition whether such debts be shown to be for legal necessity or not. That view has been long recognised and the practice of our Courts has been in conformity with it. No authority has been cited to the contrary by the learned Vakil for the appellant and I see no reason to depart from it.

The only two points urged in second appeal failing, it must be dismissed with costs of respondents Nos. 1 and 4.

Curgenven, J.—I agree that this second appeal must be dismissed with costs. It is immaterial that the appellants were exonerated in the suit upon the promissory note. We have to consider the family assets and liabilities as they stood on 21st November, 1926, when the plaintiff filed his suit for partition. At that date, among the debts was this debt of the father's not contracted for any illegal or immoral purpose. No authority has been produced for the position that, upon a partition, the sons do not share liability with the father for such a debt. Such a doctrine would be in conflict with the indisputable principle that the family property is liable for a father's untainted debts. In the partition, therefore, the share of the 2nd defendant would have to be ascertained with reference to this debt as well as to other debts binding upon the family members; and it follows that the share of the appellants, who have succeeded by purchase to his rights and liabilities, must be ascertained in the same manner.

V. N. V. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 107 OF 1926.

November 29, 1926.

Present:—Mr. Justice Henry Sheldon Pratt, Acting Chief Justice, and Mr. Justice Cunliffe.

S. A. K. EMANJAN—DEFENDANT—APPELLANT

versus

M. A. EMANJAN—PLAINTIFF—RESPONDENT.

Receiver—Appointment of Receiver—Discretion—Appellate Court, when interferes—Administration of estate of Muhammadan.

The law allows the Court wide discretion in the appointment of Receivers and it is settled law that the Appellate Court will not interfere lightly with such appointment.

There is not the same reason why the appointment by a Muhammadan testator of an executor should receive the same consideration as the appointment of an executor by an English testator in England.

Civil miscellaneous appeal from the Original Side High Court, Rangoon, in Civil Regular No. 112 of 1926.

Mr. *Janab Ali*, for the Appellant.

Mr *Ankhsaria*, for the Respondent.

JUDGMENT.—This is an appeal against the order of a Judge of this Court in the Original Side appointing a Receiver in an administration suit between Muhammadans.

The appellant-defendant was the executor under the Will.

The learned Judge held that on the affidavits there was no doubt that the de-

fendant had failed to administer the estate properly. He had failed to file the inventory of the property and the accounts within the time prescribed by law. He had also repudiated an agreement with the other heirs under which he was to purchase the estate.

The Judge was apparently of opinion that the estate was in danger, although he has not recorded a definite finding to this effect, but was content with recording his view that it was just and convenient that a Receiver should be appointed. The defendant has not accounted for four years' income from the estate.

The fact that defendant was executor under the Will was a good reason for not appointing a Receiver except it was necessary in the interests of the estate.

It appears to be generally accepted that there is not the same reason why the appointment by a Muhammadan testator of an executor should receive the same consideration as the appointment of an executor by an English testator does in England.

The law allows the Court wide discretion in the appointment of Receivers and it is settled law that the Appellate Court will not interfere lightly with such appointment.

We are not prepared to say that the learned Judge was wrong in his view that it was just and convenient that a Receiver should be appointed or that his discretion has been exercised arbitrarily.

The appeal is dismissed with costs.

A. *Appeal dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 648 OF 1926.
July 23, 1926.
Present:—Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Patkar.

USMANBHAI SAMADBHAI—PLAINTIFF—APPELLANT
versus
BAI SAKINA AND OTHERS—DEFENDANTS RESPONDENT.

Muhammadan Law—Divorce—Iddat—*Residence of wife during period of* iddat *in father's house, effect of.*

Muhammadan Law does not require that a divorced woman should observe her *iddat* entirely in the house of her husband. She may observe the same in the place where she was residing at the time of divorce.

Second appeal from the decision of the District Judge, Ahmedabad, in Appeal No. 92 of 1925, confirming the decree passed by the Joint Subordinate Judge, at Ahmadabad, in Civil Suit No. 214 of 1924.

Mr. *H. V. Divatia*, for the Appellant.

Mr. *R. J. Thakor*, for Respondents Nos. 1 to 3 and 5.

JUDGMENT.—The only point raised in this appeal is that the wife did not observe her period of *iddat* as required by Muhammadan Law, and that, therefore, there is no valid divorce. This is founded on the suggestion that Muhammadan Law requires the wife to observe her *iddat* entirely in the house of her husband. For that proposition a passage was cited from a work on Mussalman Law by Abdur Rahman at page 180.

But, on looking at the authorities to which the author refers, and in particular to Hamilton's Hedaya at pages 133 and 134, it is perfectly clear that the proposition of law contended for by the appellant is entirely erroneous. On the contrary, it is stated at page 133 :—

"It is incumbent upon a woman under *iddat* that she observe and accomplish the same in the place where she was resident at the period of divorce taking place..... whether that be her own accustomed dwelling, or a house where she may be upon a visit (that of her parents, for instance), because this is so ordered in the *Koran*; and it also appears in the traditionary precepts of the Prophet that he said to a woman whose husband was slain, 'stay in your own house until your *iddat* be accomplished'."

In the present case when the *Talaq* (Ex. 35) was pronounced by the husband, the wife was staying in the house of her father, where she remained to perform her *iddat*. Accordingly, the requirements of Muhammadan Law were satisfied.

This appeal will, therefore, be dismissed with costs.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1709 OF 1924.
February 28, 1927.
Present:—Mr. Justice Boys and Mr. Justice Kendall.

MOHAMMAD YUSUF—PLAINTIFF—APPELLANT

versus

MOHAMMAD ISMAIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Gift to minor in donor's custody—Delivery of possession, whether necessary—Lawful custody, meaning of.

Under Muhammadan Law delivery of possession is not necessary to render a gift valid, where the donee is a minor in the lawful custody of the donor. Lawful custody for the purposes of this rule includes the custody of a person who has actual control of the minor with the consent of the legal guardian and is not limited to the custody of such persons as come first in the line of succession of those entitled to claim guardianship.

Second appeal from the decree of the District Judge, Allahabad, dated the 26th May, 1924.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Syed Mohammad Husain*, for the Respondents.

JUDGMENT.—Kallu had a brother-in-law Rahim Bukhsh, who had a daughter, *Musammat* Fatima. *Musammat* Fatima's parents died while she was an infant, and she was brought up wholly by her uncle Kallu. Kallu owned a shop, and of this shop he made a gift to *Musammat* Fatima, the minor who was living with him. *Musammat* Fatima, Kallu's niece, married Kallu's son, Mohammad Ismail. After her death the question of the validity of this gift has been disputed. *Musammat* Fatima's brother Muhammad Yusuf (plaintiff) has sued Mohammad Ismail, his brother-in-law for a declaration of his right to half the shop which was the subject of the gift, as heir of *Musammat* Fatima. Mohammad Ismail contended that the deed of gift was invalid and that he was entitled to the whole shop as a son of Kallu. The deed of gift is said to have been invalid, because it was not accompanied by any delivery of possession by Kallu to the "legal" guardians of *Musammat* Fatima. There is nothing showing that there are any female relatives of *Musammat* Fatima alive, and it is admitted on both sides that the legal guardians of her property and also, as it happens in the absence of female relatives, of her person are her paternal uncles. Kallu was only a maternal uncle of *Musammat* Fatima. The lower Appellate Court held that, as there were paternal uncles of *Musammat* Fatima alive, "The formal transfer was necessary, that this formality was not observed, and that the failure to observe the formality invalidates the gift." It, therefore, dismissed the plaintiff's suit.

The plaintiff has appealed, and relies on the proposition that whereas the donor was the *de facto* guardian of the minor's person with the consent or, at any rate, without any opposition from the legal guardians, the paternal uncles, no delivery of possession was necessary to make the gift valid. We are of opinion that he has established this plea. It is unnecessary to refer more than briefly to the authorities which, in effect, have not been challenged. The facts as we have stated them, are very simple. Guardians who had right to be described as the legal guardians under the Muhammadan Law permitted the minor girl to be brought up in the family of and, as far as the findings of fact go, under the sole control of, her maternal uncle, Kallu, the man who made the gift in dispute. For the plaintiff's reliance is placed on a passage in Wilson's Muhammadan Law, 5th Edition, page 323, para. 303. It is there laid down that "No transfer is necessary in the case of a gift by a father to his infant son.....and the law is the same in every other case where a donee is a minor in lawful custody of the donor." Similar passages have been quoted for the plaintiff from Sarcar, Tyabji and Ameer Ali. We think that there is nothing to limit the words "lawful custody" to meaning the custody of only such persons as among those who are alive, come first in the line of succession of those entitled to claim guardianship. The whole spirit underlying the authorities is clearly that full effect may be given to the fact that a person is in actual custody of the minor with the express consent of the legal guardian or, at any rate, with a consent to be implied from the absence of any opposition. We hold, therefore, that in the present case no delivery of possession was necessary to validate the gift. In that view the plaintiff was entitled to succeed, and allowing the appeal we set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The plaintiff-appellant will have his costs in this Court and in the lower Appellate Court.

A. N. A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1671 OF 1924.
February 28, 1927.
Present:—Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

GADDAR MAL—PLAINTIFF—APPELLANT
versus
THE TATA INDUSTRIAL BANK, LIMITED, BOMBAY, THROUGH THE MANAGER OF THE SAID BANK—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 7, 8, 9—Offer and acceptance—Acceptance by conduct—Mere silence, effect of—Bank giving intimation that higher interest will be charged—Taking further loan—Acceptance.

It was agreed between the plaintiff and the defendant Bank that the plaintiff should deposit bales of cotton and obtain loans re-payable on demand from the Bank. The loans were to bear a particular rate of interest. Provision was also made for variation of the rate of interest by agreement between the parties. The Bank subsequently informed the plaintiff that they intended to charge a higher rate of interest. The plaintiff did not reply, but obtained a further loan from the Bank :

Held, that though the plaintiff's failure to reply did not amount to an acceptance of the proposal of the Bank to continue the loan only on higher interest, his taking a further loan subsequent to that offer amounted to an acceptance of the offer and the plaintiff was liable to pay the higher rate of interest. [p. 1024, cols. 1 & 2.]

Per *Ashworth, J.*—A correct interpretation of ss. 7, 8 and 9 of the Contract Act does not import into Indian Law the English Law as to acceptance by conduct. On a proper interpretation of these sections there are only three cases in which acceptance can be made otherwise than in words. One is when the promisor has specified a manner in which his proposal is to be accepted and that manner is not acceptance in words but acceptance otherwise than in words. A second is when acceptance is by performance of a condition of the proposal and the third is when acceptance of proposal is by the acceptance of any consideration offered for a reciprocal promise invited from the promisee. There is, however, one further case in which there may be acceptance by conduct which is not covered by ss. 7, 8 and 9. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly. [p. 1024, col. 2.]

No duty is cast by the law upon a person to whom an offer is made to reply to that offer. [p. 1025, col. 2.]

Second appeal from the decree of the Third Additional Subordinate Judge, Aligarh, dated the 4th September, 1924.

Mr. *Panna Lal*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondent.

JUDGMENT.

Ashworth, J.—This second appeal by the plaintiff arises out of a suit brought by the plaintiff against the Tata Industrial Bank, Limited, Bombay, defendant, for recovery of a balance alleged to be due under a contract arising out of overdrafts allowed by the Bank to the plaintiff from time to time, on security of a deposit with the Bank of 182 bales of cotton. The contract governing the suit was expressed in a letter of lien of the 5th December, 1912, by the plaintiff in which it was agreed that the plaintiff on his part should deposit bales of cotton and obtain loans re-payable upon demand from the defendant Bank. The loans were to bear interest at Rs. 8-8-0 per cent. per annum and the Bank was to hold the cotton as security until directed by the plaintiff to sell them, in which case the Bank was entitled at time of settlement to recover the loans made, along with the interest and certain charges for insurance and storage. Provision was made for variation of the rate of interest by agreement between the parties. On the 18th March, 1922, the Bank informed the plaintiff by letter that they intended to charge Rs. 9 instead of Rs. 8 8-0 from that date, and again on the 21st April, 1922, they intimated their intention to raise the interest to Rs. 10. To these two intimations the plaintiff made no reply. It is to be noted that in all, the plaintiff obtained Rs. 24,900. Out of this sum, one advance of Rs 3,400 made on the 8th February, 1923, was subsequent to both the letters of the 18th March and 21st April, 1922, raising the interest from Rs. 8 8-0 to Rs. 9 and Rs. 10. The cotton was ultimately sold by the Bank under directions by the plaintiff and the plaintiff claimed that on the 18th February, 1922, when the sale was complete there was a sum of Rs. 528-5-0 due to him out of the sale price after deduction of insurance and storage costs, and after allowing interest to the Bank at Rs. 8-8-0. In his suit he ignored the fact of the Bank having raised the interest. The suit was resisted on the grounds that (*a*) the plaintiff had underestimated the costs of storage and insurance and (*b*) that he was bound to allow the defendant the higher rate of interest from the dates of the letters of the Bank intimating their intention to charge the higher rates. With ground (*a*) we have no concern in this second appeal, as the decision on this issue was one of fact.

Both the lower Courts have held that the plaintiff was bound to pay the higher rates of interest and have given the same reasons for so holding. These reasons are set forth in the judgment of the trial Court in a manner approved by the lower Appellate Court as follows:—

"*Issue No. 2.*—It is next contended by the plaintiff that the defendant is not entitled to claim the increased rate of interest at Rs. 9 per cent and 10 per cent. per annum, for there was no subsequent agreement by the plaintiff to pay interest at the enhanced rate. The stipulation contained in the agreement is that interest shall be charged at the rate of 8½ per cent. per annum or at such other rate as may be from time to time agreed upon. This shows that the Bank had reserved to itself the right to increase the rate of interest from time to time. No customer would willingly and expressly agree to an enhancement of the rate that has once been stipulated and we have, therefore, to look to the circumstances and see whether the plaintiff had accepted the increased rates. Letters, dated the 18th March 1922, and the 21st April, 1922, demanding the increased rates of 9 and 10 per cent. per annum respectively were duly sent and delivered to the plaintiff who did not take any objection. If he was not prepared to accept the increased rates he ought to have protested and cleared his accounts with the Bank. But the silence on the part of the plaintiff shows that there was an implied acceptance of the rate which the Bank had the power to increase. It is well-established law that acceptance can be made without express communication and the issue is, therefore, decided accordingly."

It does not seem to us to be correct to say that "the Bank had reserved to itself the right to increase the rate of interest from time to time." The loans by the Bank were payable on demand, but the Bank were entitled to retain the cotton as security, and in the event of refusal of the plaintiff to pay on demand to sell and to repay themselves out of the purchase-money. If the plaintiff had refused to agree to the higher rates of interest the Bank would have had no right to charge them. All that it could have done would have been to close the account and, if the plaintiff failed to re-pay the balance due to the Bank, to realise on the bales. Indeed, that this was the meaning of the agreement seems to be accepted by both the lower Courts, because they do not argue that from the date of the intimation of the higher rate the Bank was *ipso facto* entitled to the higher rates, but they both take up the position that the plaintiff's failure to intimate that he did not accept the offer to continue the loan under the higher rates in the circumstances amounted to conduct expressing acceptance of the offer of the Bank to continue the loan and make further loans, at the higher rates of interest.

The law on the subject of acceptance of an offer is indicated in ss. 7, 8 and 9 of the Contract Act and these sections must be read without reference to the English Law on the subject. According to s. 7, before a proposal becomes a promise rendering the promisee liable to the conditions contained in the promise, there must be an absolute and unqualified acceptance. This acceptance must be expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes the manner and acceptance is not made in that manner the promisor may require acceptance in the manner prescribed, but if he does not do so, he will be held to have accepted the acceptance in the manner that it was made. In s. 8 provision is made for an implied acceptance by performance on the part of the promisee of the conditions of a proposal or by the acceptance of any consideration offered for a reciprocal promise invited from the promisee. In s. 9 it is stated that the acceptance of any promise made in words is said to be "express" and made otherwise than in words is said to be "implied."

In my opinion, a correct interpretation of these sections does not import into Indian Law the English Law as to acceptance by conduct. On a proper interpretation of these sections there are only three cases in which acceptance can be made otherwise than in words. One is when the promisor has specified a manner in which his proposal is to be accepted and that manner is not acceptance in words but acceptance otherwise than in words. A second is when acceptance is by performance of a condition of the proposal and the third is when acceptance of proposal is by the acceptance of any consideration offered for a reciprocal promise invited from the promisee. There is, however, one further case in which there may be acceptance by conduct which is not covered by ss. 7, 8 and 9. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made

either expressly or impliedly. For instance, there may be a recognised trade usage according to which a person borrowing from a Bank or overdrawing is taken to contract to pay the Bank rate of interest. It does not appear to me that English decisions as to acceptance by conduct can be invoked to extend the restrictions thus obtaining in India on the method of acceptance. Applying this law to the present case I may state that no mercantile or trade usage has been invoked by the Bank in this case.

We find that the Bank on the two dates when they proposed a higher rate of interest, in effect offered to continue the loans and to make further loans (up to the value of the deposited cotton) on condition that the higher rates of interest were paid at the time of settlement. There was clearly no express acceptance of this offer by the plaintiff. The Bank did not propose any method of acceptance otherwise than in words. Nor again did the Bank specify any condition of the proposal to be performed by the plaintiff and consequently there was no performance of the conditions of the proposal. The sole question then is whether the plaintiff accepted any consideration offered for a reciprocal promise invited from him. The proposal as to raising the interest was in effect a proposal by the defendant Bank not to demand at once the money loaned and to loan further money (up to the value of the security) if the plaintiff agreed to pay the higher rates of interest at the time of settlement. The proposal invited from the plaintiff a reciprocal promise to re-pay with the higher rate of interest at time of settlement, and a further loan was offered as consideration for this reciprocal promise. The plaintiff did take a further loan. The plaintiff, therefore, did accept a consideration offered by the Bank. This offer of the Bank to lend a further sum cannot be separated off from its offer to continue (*i. e.*, not to make immediate demand for) sums already advanced. It, therefore, appears to me that the Bank's offer to continue the loans and to make further loans on the basis of higher interest at the date of settlement was accepted by the plaintiff by reason of his taking a further sum subsequent to that offer.

If it had not been for this acceptance of a further loan I should have held that there was no acceptance by the plaintiff of the higher rates of interest. Even if the Bank had intimated in the said letters that in the event of their not hearing from the plaintiff they would presume acceptance by the plaintiff of the higher rates of interest, this would not have justified the Bank in claiming that their offer had been accepted in the manner prescribed, for it is well-established in law that the manner prescribed cannot be mere silence. Assent must be by express words or positive conduct. No duty is cast by the law upon the person to whom an offer is made to reply to that offer. Consequently, an omission to reply will not constitute an illegal omission and, therefore, cannot fall within the definition of Act as contained in the General Clauses Act, s. 3 (2), Act X of 1897.

The consequence is that I would uphold the finding of the lower Courts but on a different ground to that expressed by them.

Iqbal Ahmad, J.—I agree.

By the Court.—The order of the Court is that the appeal shall stand dismissed with costs.

A. N. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 118 OF 1925.

August 11, 1926.

Present :—Sir Amberson Marten, KT., Chief Justice and Mr. Justice Kemp.

RAGHUNANDAN NANU KOTHARE—PLAINTIFF—APPELLANT

versus

HORMASJI BEZONJI BAMJI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 239—Partnership, essentials of—Agreement to give fixed salary in lieu of profits and non-liability for losses, effect of—Solicitors not trading firm.

The legal existence of a partnership has to be determined from all the facts. A statement in a document that nothing therein contained is to constitute the relationship of partners, will not necessarily prevent the parties from being partners in the eyes of the law. So, too, a mere statement that the parties are to be partners will not necessarily constitute them partners in law. Further, although two persons may hold themselves out to be partners and be liable to third parties accordingly, yet it does not necessarily follow that they would be partners *inter se*. [p. 1026, col. 2; p. 1027, col. 1.]

It is perfectly open to partner *A* to say that as between himself and his partner *B*, the partner *A* shall bear all the losses of the business. In other

words, it is not essential to constitute a partnership that the partners should agree to share the losses. [p. 1027, col. 2.]

Partners may agree that on the determination of their partnership, the assets are to be dealt with in a particular way, for instance, that all the assets are then to belong to a particular partner. [*ibid.*]

It is open to partners to agree that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned. [*ibid.*]

Solicitors are not a trading firm. [*ibid.*]

The plaintiff and the defendant, two Solicitors, entered into an agreement that they should be partners of the firm of N. H. and Co., and should practise as attorneys under the said name and firm. The partnership was to be for one year and on its determination the defendant was to have no claim or interest whatever in the firm and its outstandings or in the property name or good-will thereof. The defendant was to receive a fixed amount monthly in lieu of profits and was not liable for any losses of the firm. Notice of the agreement was also issued to the clients of the partnership. In a suit between the parties to the agreement, the trial Court held that the defendant was not really a partner but a mere agent. On appeal:

Held, that the agreement amounted to a partnership. [p. 1027, cols. 1 & 2.]

Appeal against the judgment of Mr. Justice Shah.

Mr. *Munshi* (with him Mr. *M. C. Setalvad*), for the Appellant.

Mr. *Kanga*, Advocate-General (with him Messrs. *B. J. Desai* and *Puttigara*), for the Respondent.

JUDGMENT.

Marten, C. J.—Before we hear the main appeal it is convenient first to determine issue No. 1 in the trial Court, *viz*, whether the defendant was a partner in the firm of Messrs. Nanu, Hormasjee & Co. This is cross-objection No. 1.

Now here we have the circumstance that the plaintiff and defendant, who are two experienced Solicitors of the High Court of Bombay, deliberately enter into an agreement of July 31, 1915, Ex. A, under which they expressly agree that "they shall be partners in the said firm of Nanu, Hormasjee & Co, and shall practise as attorneys under the said name and firm." The partnership is to be for one year, and on its determination the defendant is to "cease to have any claim or interest in the firm and its outstandings, the property, name and good-will thereof."

Further, the plaintiff and defendant gave a general notice as follows:

"We beg to inform you that we have admitted Mr. Hormasjee Bezonji Bamji the defendant) into partnership with us from this date. We shall continue to carry on our business under the same style as before. Mr. Bamji will sign as below."

This was on July 1, 1915, Ex. 34. After that for several years the defendant was left in sole conduct of business, namely, because it appears that the plaintiff was ill. The plaintiff admits in his evidence at page 129 of part I that the defendant "after he became a partner could sign for the firm, could pass receipts for the firm, operate on the banking accounts, and could give an undertaking on behalf of the firm in all matters attended to by him. He could give an undertaking in my absence on behalf of the firm. These are all matters which a partner alone can do. This does not constitute the management of the firm and of the firm's business."

In 1920 it appears that the plaintiff took a more active part in the business. But troubles arose, and about August, 1921, the parties dissolved partnership. Accordingly in his letter of July 28, 1921, the plaintiff wrote to the defendant:—

"I propose sending out notices to the profession and others about our dissolution as from the 1st proximo. I am really very sorry the dissolution which could have been arranged smoothly, peacefully, quietly, and in the interests of both of us has to be done in this way."

Then follows, on August 1, 1921, a notice of dissolution which runs:—

"The undersigned Hormasjee Bezonji Bamji having as from this day ceased to be a partner of the firm of Nanu Hormasjee & Co., Mr. Raghunandan N. Kothare will continue the business under the old name of Nanu, Hormasjee & Co., at the above address (our old office premises]."

That notice is signed by both the alleged partners.

Now, I am not necessarily going to interpret the document of July 31, 1915, in the light of subsequent events. But it must be borne in mind that that original document was for one year only; that no further document was executed: and presumably, therefore, the parties afterwards continued at will on the terms of Ex. A. If then it was originally a partnership, it became a partnership-at-will as from August 1916. So, too, I quite appreciate that the legal existence of a partnership has to be determined from all the facts. A statement in a document that nothing therein contained is to constitute the re

lationship of partners, will not necessarily prevent the parties from being partners in the eyes of the law. So, too, a mere statement that the parties are to be partners will not necessarily constitute them partners in law. Further, although two persons may, as here, hold themselves out to be partners and be liable to third parties, accordingly, yet it does not necessarily follow that they would be partners *inter se*.

Accordingly, the real point of the plaintiff's argument is that no matter what these Solicitors thought they were doing and no matter whether they became liable as partners to third parties under the doctrine of holding out, yet in fact this agreement did not constitute a partnership in law, because they did not agree to share the profits of the business between them, and consequently they did not satisfy the definition of partnership in s. 239 of the Indian Contract Act. It is further said that this definition is different to that which prevails in English Law where the usual definition of partnership is somewhat to this effect, *viz.*, "The relationship which exists between persons carrying on business in common with a view to profit."

Bearing that argument in mind, it is pointed out that under cl. 3 of Ex. A the defendant in lieu of his share of profits in the business was to be paid Rs. 500 a month. In other words, this Rs. 500 per month was to be irrespective of whether profits were earned or not. Similarly, the defendant was not to be responsible for any losses. Then as regards the furniture, library, stock-in-trade (I do not like the expression "stock-in-trade" for a Solicitors' firm, but that has slipped in by some mischance), all that is to remain the property of the plaintiff. Further, upon the determination of the partnership the defendant was to cease to have any claim or interest in the firm and the outstandings, the property, name and good-will thereof. That clause would seem to imply that up to that date he had an interest, although on the dissolution all those assets would pass to his partner. The final clause contains a provision for arbitration "if during this partnership any dispute shall arise with reference to this agreement or partnership hereby created." The word "or" is in the original. Probably the sentence should run "or the." But it is clear from this clause alone that the parties thought they were creating a partnership.

Now, as regards the question of losses in a business, I think it is perfectly open to partner *A* to say that as between himself and his partner *B*, the partner *A* shall bear all the losses of the business. In other words, it is not essential to constitute a partnership that the partners should agree to share the losses. In any event this only applies as between themselves, for whatever their agreement may be, they would both be liable to outside parties. So, too, partners may agree that on the determination of their partnership, the assets are to be dealt with in a particular way and that for instance all the assets are then to belong to a particular partner *A*. In this connection it must be borne in mind that Solicitors are not a trading firm. Their capital, normally speaking, is only small, apart, of course, from the good-will which in many cases no doubt has a substantial value. But there is nothing whatever to prevent partners agreeing that on a dissolution, partner *A* shall be entitled to the entire good-will of the business and shall not be called upon to account for it on the final winding up.

Next, we come to the main point, *viz.*, the question about sharing the profits. My personal view is that partners can agree to share those profits in any way they like. They may agree to share them equally. They may also agree, in my opinion, that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned. Take this case for instance. Would not the difficulties pointed out by the plaintiff disappear here, if the agreement had been drafted in this form, that out of the profits of the partnership the defendant should be paid a preferential Rs. 500 a month, but that if and in so far as the profits of the business should be insufficient to pay that sum, then the plaintiff would pay the deficiency to the defendant out of his own pocket. I do not think any objection could have been taken to such an agreement, if it had been entered into, as not coming within the express words in s. 239. But, in my opinion, that is what the parties have substantially agreed on here when they said that "in lieu of his share of profits" the defendant was to get a particular fixed sum. In other words, the defendant thus became a salaried partner which is an expression we are quite familiar with not only in England but also in Bombay

Another instance may be given. Suppose you had an agreement one day between two alleged partners by which they were to share the profits equally. And then the next day they met and said that to avoid the trouble of elaborate accounts and so on partner *B* would agree to take for better or for worse, Rs. 500 per mensem from *A* whether or no profits were actually earned. In other words, partner *B* agreed to compound his rights under the agreement of the day before in this particular respect. Would they then cease to be partners? In answer to that illustration Counsel for the plaintiff contended—and he had to contend—that on the day of the variation the parties would thenceforth cease to be partners. Personally I do not think that the wording of s. 239 obliges us to put that limited construction on the essentials for the relationship of partners. We have been referred to no authorities on the point, and the only reference to any text book which we have been given is to Pollock and Mulla's Indian Contract Act, at pages 752 and 753, where the authors very properly point out the difference of language in the formal definitions of partnership in the English and Indian Acts respectively.

Looking at the matter as one of common sense, it is to my mind almost absurd to think that two experienced Solicitors of our High Court should enter into a formal agreement to become partners, and then so far as the outside world goes and so far as the correspondence between them goes, act as partners for some six years and give the usual notices of dissolution and yet be told at the end that they were entirely mistaken as to their true legal position, and that they did not know the elementary principles which go to constitute a partnership, although that was a matter on which they would be presumably advising their clients frequently. I am glad to think that I am not driven by s. 239 to adopt that conclusion, and, therefore, with great respect to the contrary opinion of the learned trial Judge, I would hold that issue No. 1 was wrongly answered in the Court below, and that it should be answered instead in the affirmative.

Kemp, J.—I have reached the same conclusion and for the same reasons. I would like to observe, further, that the practice, as is well-known here with reference to attorneys who are employed on a salary and are not partners in Solicitors' firms, is that any letter written by any such salaried attorney is signed in the name of the firm with the superscription of that attorney. It is admitted in this case that the signatures were not in that form. That clearly suggests that the parties to this suit intended that the defendant should be considered as a partner.

Then there are other acts which suggest that they were partners, and amongst these are the following:—On one occasion the defendant raised the salary of the staff. If the defendant were a manager no doubt he might have the power of dismissing or appointing members of the staff, but I consider that when you came to the question of raising salary that would be a matter which he would have to refer to one of the partners.

Again the defendant brought moneys into the firm. It is true most of the moneys were brought into the firm as loans prior to his becoming a partner but it appears that subsequent to his becoming a partner he lent moneys to the firm but without interest. That to my mind is not what a servant of the firm would do.

Then there is the fact that this agreement is drawn by attorneys who are presumably legal experts. To this fact the Chief Justice has already referred.

There is also the evidence which shows how the salary of the defendant was arrived at. It appears that in 1913-1914 the estimate of the amount drawn by the plaintiff was Rs. 1,000 a month, and on that estimate the defendant's salary was fixed at Rs. 500. Under the circumstances, that would be a very proper reason why the share of the profits of the firm should be compounded by appropriating under the agreement to the defendant Rs. 500 a month. The obvious advantage of any such arrangement would be that there would be no necessity for accounts of the partners being taken either at the end of the year, or when the partnership was dissolved. The trouble of drawing up a balance sheet would be avoided by compounding his share of the profits by a salary to the partner.

Then there is the fact that the stamp on this document is the stamp for a partnership agreement, and that suggests that the intention of the parties was that the defendant should be regarded as a partner. On this point I think the principle

laid down in the case of *Mollwo* v. *Court of Wards* (1) is applicable. There it was stated that the question whether the relation of a partnership does or does not exist must depend on the real intention and contract of the parties. Now that was a case which was decided in July, 1872. It is true that the Indian Contract Act came into force in September, 1872. I am of opinion that the principle there laid down is equally applicable in determining whether in the case of an agreement subsequent to the coming into force of the Indian Contract Act the question arises as to whether it is a partnership or not.

Under these circumstances I agree with the answer proposed by the Chief Justice to issue No. 1 in the case.

[Their Lordships then heard the main appeal and disposed of the case on the merits—*Ed.*]

A. N. A. *Answer accordingly.*

(1) (1872) 4 P. C. 419.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 78 OF 1924.

February 28, 1927.

Present:—Mr. Justice Mukerji and Mr. Justice Ashworth.

LACHMAN DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM PRASAD—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92, proviso (3)—Oral evidence to prove that a deed was not intended to take effect, admissibility of—Registration Act (XVI of 1908), s. 28—Sale of item for purposes of evading proper registry office—Sale and registration, validity of.

Parties to a sale-deed cannot be allowed to adduce oral evidence to show that they never intended that ownership should pass and that consequently there was no sale notwithstanding the execution of a sale-deed. [p. 1031, col. 1.]

Harris v. *Rickett* (2) and *Pym* v. *Campbell* (3), distinguished.

There is nothing in law to render invalid a sale of property by one person to another for the sole reason that the object of the sale was to give that other person a right to register a mortgage-deed in respect of other property in a particular registry office [*ibid.*]

Mathura Prasad v. *Chandra Narayan Chowdhury* (1), distinguished.

First appeal from the decree of the Subordinate Judge, Budaun, dated the 6th of November, 1923.

Messrs. *Shiva Prasad Sinha, S. B. Johari* and *Hanuman Prasad Agarwala*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.

Mukerji, J.—This is an appeal by two defendants in a mortgage suit, brought by the respondent No 1 under the following circumstances Three persons, *viz.*, Ram Prasad son of Dhuma Mal, his wife *Musammat* Barfi Kunwar and the appellant Lachman Das executed the bond in suit for a consideration of Rs. 5,200 in favour of the respondent Ram Prasad son of Gulzari Lal. The plaintiff sought to enforce the mortgage and made parties to it not only the mortgagors but also the transferees from them and one Radhe Shiam, a minor son of Ram Prasad son of Dhuma Mal and his wife *Musammat* Barfi.

The defence of Lachman Das was threefold, so far as we are concerned in this appeal. He said that the mortgage was not properly registered and was, therefore, not enforceable, that he received no consideration for the mortgage and that he executed it under an undue influence. He further added that he had no interest in the property at the date of the mortgage and, therefore, the mortgage was not enforceable against the property mortgaged. The appellant No. 2, *Musammat* Nanhi, appears to be a transferee from *Musammat* Barfi and her appeal before us repeats the same arguments which we shall presently notice, on behalf of Lachman Das.

It appears that one Kalyan Chand was the owner of a considerable amount of cash and moveable property. He made a Will in 1907 in favour of his wife *Musammat* Champa Kunwar and his daughter's son Lachman Das. He gave by this document a life-interest to *Musammat* Champa Kunwar and the remainder to Lachman Das. Kalyan Chand and *Musammat* Champa Kunwar had a daughter *Musammat* Barfi besides *Musammat* Kotori, the mother of Lachman Das. *Musammat* Kotori predeceased her father. *Musammat* Barfi married Ram Prasad and this Ram Prasad is one of the mortgagors along with *Musammat* Barfi. By an agreement of 1910 entered into a date when Lachman Das was still a minor, *Musammat* Champa Kunwar, Lachman Das and *Musammat* Barfi agreed that the property in question should go to *Musammat* Barfi and Lachman Das and

Musammat Champa Kunwar should each receive an annuity. We need not consider this agreement as I have already stated it is not binding on Lachman Das. I may add that the property mortgaged was purchased by *Musammat* Champa Kunwar with the money she received from her husband under the Will and that, therefore, this property partakes of the same character as the cash and moveables bequeathed by Kalyan Chand.

The learned Subordinate Judge decreed the suit and we have to consider the several points raised in appeal.

The first point urged is that the mortgage is invalid on the ground that its registration is invalid. It appears that *Musammat* Champa Kunwar purchased by a deed a certain *kothri* or room belonging to one Radhe Lal. In executing the mortgage-deed in favour of the respondent No. 1 this *kothri* or room was included as a property mortgaged. The room is situated in Bareilly, while the mortgaged property, which is a certain entire village of Launda Baheri is situated in the District of Budaun. The argument for the appellants is that the room at Bareilly was purchased with the sole object of including it in the agreement of 1910 and the object was to give jurisdiction to the Sub-Registrar of Bareilly to register the deed. It being granted that the owner Radhe Lal transferred it by a registered deed in favour of *Musammat* Champa Kunwar, the title to the room did pass to *Musammat* Champa Kunwar, notwithstanding anything that might have been in the mind of Radhe Lal as to the passing of title. The property in the eye of law belonged to *Musammat* Champa Kunwar and, therefore, Lachman Das had the same interest in the property as he had in the cash and moveables bequeathed by his grandfather. Assuming, therefore, that Lachman Das had a title to the village of Launda Baheri he had also a title to the room mortgaged. It follows that the Sub-Registrar of Bareilly had jurisdiction to register the deed. In the case of *Mathura Prasad* v. *Chandra Narayan Chowdhury* (1) the property described did exist but the mortgagor had no interest in the property and, therefere, the parties to the transaction never wanted that the mortgage should attach to such property. That case is clearly distinguishable from the case before us. I hold that the registration is without any flaw.

The next point urged is that Lachman Das had no interest in the property at the date of the mortgage. Lachman Das had a vested right in the property subject to the life-interest of his maternal grandmother. This vested interest was a transferable property and the mortgage attached to this property. Further, on the death of the grandmother, Lachman Das would be the absolute owner of the property and the grandmother having already died the mortgage attaches to the property, *vide*, s 43 of the Transfer of Property Act.

The third and last point is that Lachman Das executed the mortgage-deed under undue influence. Not a word has been said to show that the mortgagee Ram Prasad had any influence over Lachman Das. The statement of Lachman Das has been read out to us. All that he does say is this. Ram Prasad the mortgagor was the husband of his mother's sister, that he, Ram Prasad, was an elderly man and that, therefore, he acted under his uncle's direction. At the date of the mortgage Lachman Das was a man of 25. He has admitted that there was a shop styled Ram Prasad-Lachman Das at Bareilly and he used to visit that shop daily although only for an hour or two. That shop carried on a cloth business. It appears that the plaintiff's case was that he was a commission agent and the firm of Ram Prasad-Lachman Das purchased cloth through him from time to time and that for the balance due to him Ram Prasad, Lachman Das and *Musammat* Barfi executed the mortgage. In this state of affairs it is difficult to see whence the undue influence comes.

There is nothing in the appeal and it must fail.

A cross-objection has been filed on behalf of the plaintiff-respondent. It appears that the learned Subordinate Judge has, perhaps through inadvertence, omitted to allow interest after the period of two months allowed by him for payment of the mortgage money. There is no reason why the mortgagee should not have the usual 6 per cent. interest on the total amount of the principal sum and the interest due up to the date fixed for payment. I would allow interest at 6 per cent. per

(1) 60 Ind. Cas. 833; 19 A. L. J. 385; 40 M. L. J. 489; 33 C. L. J. 440; 23 Bom. L. R. 629; (1921) M. W. N. 370; 14 L. W. 1; 29 M. L. T. 413; 25 C. W. N. 985; 2 P. L. T. 397 (P. C.).

annum. I would dismiss the appeal and allow the cross-objection both with costs.

Ashworth, J.—I concur in all three findings. I would like to add, however, in respect of the first point that there is nothing in law to render invalid a sale of property by one person to another for the sole reason of giving that other person a right to register a mortgage-deed in respect of other property in a particular place. The motive of purchase is immaterial and the only question is whether there was a valid sale. It is urged in this case that there is evidence to prove that the parties to the sale deed of the room had no intention that ownership in the room should pass and in the absence of such intention, there was no sale notwithstanding the execution of the sale-deed. Assuming, but not admitting, that there is such evidence, it is, in my opinion, inadmissible. The appellant's Counsel has referred to the following *dictum* in Woodroffe and Ameer Ali's well-known commentary on the Indian Evidence Act:

"Though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible."

In support of this *dictum* two English decisions are relied upon, namely, *Harris* v. *Rickett* (2) and *Pym* v. *Campbell* (3). *Harris* v. *Rickett* (2) is no authority for the *dictum* as stated. It is authority for the rule that where the whole of a contract is not contained in a written document, it may be *supplemented* by parol evidence of a *collateral* agreement. Collateral means in effect not inconsistent with the terms of the agreement in question Proviso (1) of s. 92 gives effect to this rule, or at least to so much of it as the Indian Legislature desired to incorporate in the Indian Evidence Act. *Pym* v. *Campbell* (3) is authority for the rule that parol evidence is admissible to prove any collateral verbal agreement to the effect that a document apparently complete and operative on its face, should be conditional upon, and not operate, *until the happening of a certain event*, which has not occurred. This rule is reproduced in proviso (3) of s. 92 of the Evidence Act. They are no authority for holding that evidence in any shape can be admitted for the purpose of showing that there was no agreement at all, or, in other words, that a deed was meant to be inoperative. The *dictum* criticized, occurring as it does in a well known commentary, has so often misled the Courts that I have thought it desirable to show that it needs the qualifications expressed in provisos 1, 2 and 3 to s. 92 of the Indian Evidence Act. These provisions are to be read independently of English decisions.

I hold, therefore, that the lower Appellate Court was right in holding that the fact of the sale of the room being only effected in order to render the mortgage-deed in suit registrable at a certain place does not affect the fact that the room was sold or the consequent legality of the registration of the mortgage-deed.

By the Court.—The appeal is dismissed with costs and the cross objection is allowed also with costs. The respondent No. 1 will have interest on the total sum of the principal and interest up to the date of payment at 6 per cent. per annum.

A. N. A. *Appeal dismissed: Cross-objection allowed.*

(2) (1859) 28 L. J. Ex. 197; 4 H. & N. 1; 157 E. R. 734; 118 R. R. 291.

(3) (1856) 6 El. & Bl. 370; 25 L. J. Q. B. 277; 2 Jur. N. S.) 641; 4 W. R. 528; 119 E. R. 903; 106 E. R. 32.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL NO. 2 OF 1926.

August 13, 1926.

Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Kemp.

HAJI MIRZA MASHAM ISPAHANI—PLAINTIFF—APPELLANT

versus

MIRZA AHMED ISPAHANI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Practice—Appointment of Receivers—Motion to be made in open Court.

Application for the appointment of Receivers should be made in the ordinary way by notice of motion in open Court and not in Chambers.

Appeal from the order of Mr. Justice Taraporewala.

JUDGMENT.—In dismissing this appeal in the absence of any parties, we only wish to add that we must not necessarily be taken to approve of what Mr. Justice Taraporewala has said as to the propriety of hearing applications for the ap-

pointment of Receivers in Chambers. As at present advised, we think that these applications should be made in the ordinary way by notice of motion in open Court and not in Chambers. But, of course, as regards the present case we have heard no arguments as to whether there was anything exceptional to justify the course actually taken.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION CASE NO. 148 OF 1926.
January 19, 1927.
Present:—Mr. Justice Lindsay.
THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE AGENTS E. I. RAILWAY AND G. I. P. RAILWAY—DEFENDANTS—APPLICANTS
versus
FIRM MANAK CHAND & SONS, THROUGH BHAGWATI PRASAD—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Perverse finding of fact—Interference.

Although it is not the practice of the High Court in cases under s. 25 of the Provincial Small Cause Courts Act, to interfere with findings of fact, it will interfere where they are absolutely perverse. [p. 1032, col. 1.]

Civil revision from an order of the Small Causes Court Judge, Agra, dated the 4th of August. 1926.

Mr. *G. W. Dillon*, for the Applicants.

Mr. *S. K. Dar*, for the Opposite Party.

JUDGMENT.—This is an application under s 25 of the Small Cause Courts Act. The application is made by the Secretary of State for India through the Agents, East Indian Railway and Great Indian Peninsula Railway. The opposite party is a firm, Manak Chand & Sons, carrying on business at Agra.

It is not the practice of this Court to interfere in cases under the Small Cause Courts Act with findings of fact, but in the present case I am satisfied after a perusal of the record and hearing Counsel that the judgment here is absolutely perverse and ought not to be maintained. It would be a gross injustice to the applicant here to allow this judgment to stand. The facts are very simple. A Bombay firm sent a large parcel of goods to this firm of Manak Chand & Sons, and apparently, when the parcel arrived at Agra it was found that it had been tempered with. The plaintiff firm, as they were entitled to do, applied to the Railway for open delivery, and it is common ground that the parcel consigned to this plaintiff firm was opened on the Railway premises in the presence of the Head Goods Clerk, Balwant Singh. It was found at the time the contents of the parcel were examined that two items of goods had been extracted, namely, 10 yards of tweed at Rs. 9 a yard and 12 yards of white cashmere at Rs. 10 a yard.

It is to be remembered that at the time this open delivery was made the plaintiff firm brought the invoice of the goods to the Railway premises. Balwant Singh, the Head Goods Clerk, states in his evidence that an invoice in English was produced before him of which he made a copy. This copy is on the record and has been sworn by Balwant Singh to be an exact copy of the invoice which the plaintiff's agent produced to him. It was found on an examination of this invoice that the consignment of goods which was sent to this firm of Manak Chand at Agra contained a large number of silk articles. From the invoice which is on the record I find that the following articles were mentioned in it:—

	Rs. A.		Rs.
2 pieces of silk at	48-0 each	value ...	96
2 silk reels at	15-0 each	„ ...	30
2 „ „ „	12-8 „	„ ...	25
½ doz. handkerchiefs	58 0 a doz.	„ ...	29
½ „ „ „	60 0 „	„ ...	30
1 piece of silk	..	... ...	55
1 „ „	...	... ...	52
1 „ „	...	... ...	58

On this invoice, therefore, it is clear that this parcel sent to the plaintiff firm contained silk goods of the value of over Rs. 100. When the present claim was brought against the Railway for compensation for the loss of the two items described above, the Secretary of State pleaded s. 75 of the Railways Act and refused to allow compensation. Section 75 of the Act lays down that "when any articles mentioned in the second schedule (including silk articles) are contained in any parcel or package delivered to a Railway Administration for carriage by Railway, and the value of such articles...exceeds Rs. 100, the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person send-

ing or delivering the parcel or package to the administration caused its value and contents to be declared...at the time of the delivery of the parcel or package for carriage by Railway."

I have already mentioned that the Head Goods Clerk was examined and deposed to having made the copy of the invoice with his own hand. Not a single word was put to this Head Clerk in cross-examination for the purpose of showing that the invoice as put in by him was erroneous in any respect. On the other hand, a servant of the plaintiffs' went into the witness-box and produced, what is called, an invoice in *Hindi*. This it was said had been prepared by a *Munib* who was dead. The plaintiffs' witness stated in examination-in-chief that the consignment of goods sent to Agra contained no silk. He modified this in cross-examination by saying that there were silk goods in the consignment but that they were imitation.

It further appears that a commission was issued to Bombay for the examination of the firm which had sent the goods to these people at Agra. The record of the answers which were given to the interrogatories proves to my mind conclusively that the statements made by the Bombay firm were altogether false and were made with the object of assisting the plaintiff firm at Agra in prosecuting a false claim. It is not to be believed for one moment that this Bombay firm could not produce their books or a list of their invoice. They admit that they deal in silk and that silk goods were despatched by them from time to time to the plaintiff firm. They tried to make out that they could not produce their books of account as they had been sent to a Court at Indore, and their answer, therefore, was that they were unable to say whether or not this particular consignment which was sent to the plaintiffs contained silk goods. I have no hesitation in saying that these answers were absolutely dishonest and ought not to be believed for one moment. They were cross-examined apparently by the plaintiff firm for the purpose of showing that the silk articles supplied were China or Japan silk articles. It may be the case that the silk articles mentioned in the invoice were China or Japan silk but China or Japan silk is not necessarily artificial silk, which is the case the plaintiffs were trying to put up.

The Judge of the Small Cause Court in his judgment says that the burden of proof in this case lay on the defendant, as it undoubtedly did, but he is altogether wrong in saying that the defendant did not prove his case. It is inconceivable to me that the Judge should have arrived at a finding of this kind without discussing at all the question of the invoice which has been put in by the Head Goods Clerk. There is not a word in the judgment about this invoice. The Judge does not say that he disbelieves the Head Goods Clerk, and, as I have pointed out already, the Goods Clerk was never cross-examined regarding one single item. On the evidence as produced in the Court below, this judgment of the Small Cause Court is a perverse judgment which I have no hesitation in setting aside. The claim made by the plaintiffs was a fraudulent claim and ought to have been dismissed. I allow this application, therefore, set aside the decree of the Court below and direct that the plaintiffs' claim do stand dismissed with costs. Costs in this Court will include fees on the higher scale.

A. N. A. *Application allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 750 OF 1925.

August 2, 1926.

Present:—Justice Sir Lallubhai Shah, KT. and Mr. Justice Fawcett.

BARJORJI SHAPURJI—DEFENDANT—APPELLANT

versus

SHRIPATPRASADJI VIHARILALJI ACHARYA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Landlord and tenant—Suit by landlord for possession and damages for cutting trees—Plea of permanent tenancy found against—Possession disallowed but damages decreed—Decision on permanent tenancy whether* res judicata—*Permanent tenant's right to cut trees—Mortgage—Mortgagee's right to eject tenants of mortgagor.*

A landlord sued his tenant for possession of land and also to recover a certain amount as damages for trees cut. The tenant pleaded that the trees belonged to him as he was a permanent tenant and also on other grounds The plea of permanent tenancy was found against and the claim for damages was decreed, but possession was disallowed on the ground that notice had not been given to the tenant to terminate his tenancy. The landlord gave notice to quit and sued for possession. The tenant set up permanent tenancy:

Held, that the decision in the previous suit that the tenant had no permanent tenancy operated as

res judicata inasmuch as, although the prayer for possession was disallowed in the previous suit, the decision on the question of permanent tenancy was necessary for deciding the question of damages. [p. 1035, col. 2.]

Midnapur Zemindari Co. v. *Naresh Narayan Roy* (1), *Daudbhai Allibhai* v. *Daya Rama* (2) and *Ramaswami Goundan* v. *Klaivasal Marudai Reddi* (3), distinguished.

A permanent tenant is the owner of the trees growing on the land. [p. 1036, col. 1.]

A mortgagee who is entitled to the possession of the mortgaged property can determine the tenancy of an annual tenant of land forming part of such property without the consent of the mortgagor. [p. 1036, col. 2.]

Second appeal from the decision of the District Judge at Surat, in Appeal No. 44 of 1923, confirming the decree of the Joint Subordinate Judge at Bulsar, in Civil Suit No. 534 of 1921.

Mr. *G. N. Thakor*, (with him Mr. *R. J. Thakor*), for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.

Shah, J.—The plaintiff in this case gave notice to the defendant to vacate the lands in suit in November, 1920. According to that notice, he was required to give up the lands on March 31, 1921. The plaintiff claimed to be a mortgagee from the original *Inamdars*. The defendant was on the land as a tenant of the mortgagors. The defendant pleaded that he was a permanent tenant; that the mortgagors were necessary parties; and that the plaintiff was neither entitled to possession nor to enhance the rent. The first issue raised was whether the plea that the defendant was a permanent tenant was *res judicata* in consequence of the finding in the previous litigation between the same parties in Suit No. 48 of 1915.

The trial Court came to the conclusion that the plea of permanent tenancy was not now open to the defendant as that question was heard and finally decided in the previous suit between the same parties. The further question raised in the issues was whether it was not open to the mortgagee, contrary to the wishes of the mortgagor, to determine the tenancy of the defendant. That issue also was decided against the defendant. In the result a decree was passed against the defendant directing him to deliver possession of the plaint lands to the plaintiff, and to pay Rs. 306-9-0 for mesne profits prior to the date of the suit. This sum was arrived at on the basis of the annual profits having been determined at Rs. 225, out of which the defendant had already paid Rs. 121-14-0 a year as rent to the plaintiff. The sum represented the difference between the full rent payable for three years and the amount paid at the old rate. There was also a decree for future mesne profits from the date of suit until delivery of possession, to be determined under O. XX, r. 12, Civil Procedure Code.

The defendant appealed to the District Court, and the same points were raised before the learned District Judge, who, on a consideration of the pleadings and the findings in the previous suit, came to the conclusion that the plea of permanent tenancy was not open to the defendant, as that question was heard and finally decided in the previous suit between the same parties. On the other points also he affirmed the view taken by the trial Court, with the result that the appeal was dismissed and the decree was confirmed.

The defendant had preferred this second appeal, and the principal point argued in support of this appeal is that the lower Courts are wrong in their view that the plea of permanent tenancy is not open to him in this suit.

In order to test this point, it is necessary to refer to the previous suit between the same parties. In that suit (No. 48 of 1915) the plaintiff-mortgagee sued the present defendant and also joined the original mortgagor as a party to the suit. The claim was for possession of the land, and also to recover a certain amount as damages from the defendant for having cut certain *babul* trees on the land. The plaintiff's case was that the trees belonged to him and not to the tenant, and he asked for an injunction restraining the defendant No. 1, that is, the tenant, from cutting or dealing in any way with the trees situated on the land. The defendant's answer, so far as it is material to the present point, was that he was a permanent tenant, and secondly, that he was the owner of the trees. Though it is not stated in terms in the written statement in that form, the issue framed shows that at least one of the grounds upon which he claimed the ownership of the trees was that he was a permanent tenant. Accordingly, Issue No. 8 was framed in this way:

"Is the defendant in possession of the lands as a permanent tenant? Has he any right to the trees in the land?"

The learned Judge dealt with this issue at considerable length in a companion suit in which the same points had arisen and which was filed on the same basis against another tenant. He came to the conclusion that defendant No. 1 was not a permanent tenant, and he also found that he was not the owner of the trees. It may be mentioned that in the judgment in dealing with Issues Nos. 7 and 8 the learned Judge, who decided the suit, observed as follows:

"The defendants resist the claim by asserting their own title to the trees. They say that they are permanent tenants of the land and as such entitled to the trees growing therein."

In the end on a consideration of the evidence in the case, he found that the defendant did not hold the lands as a permanent tenant and had no right to the trees in the land. When defendant No. 1 appealed to the District Court, no doubt, he made a point in his memorandum of appeal that the question of permanent tenancy should not have been gone into at all, and that, even apart from his being a permanent tenant, he was owner of the trees. But when the matter came before the learned District Judge, that position does not seem to have been adhered to or maintained; and again the following issues were raised:—*Issue No. 3*—"Whether defendant is a permanent tenant?" *Issue No. 4*—"Is he entitled to the *babul* trees in the land?" The learned District Judge observes in his judgment that "Closely connected with the question of permanent tenancy is the right of the tenants to the *babul* trees." He agreed with the findings of the trial Court on both these issues and confirmed the decree of the trial Court. I may add here that the decree passed by the trial Court on the findings was that the claim for possession was disallowed, but a decree for the price of the *babul* trees found to have been cut by the defendant was passed, and also an injunction restraining the defendant from interfering with the trees was granted against the defendant. The defendant preferred a second appeal, and in second appeal the principal point argued appears to have been whether he was a permanent tenant or not. In the judgment of this Court in S. A. No. 459 of 1919, it was held that defendant No. 1 failed to prove that he was a permanent tenant. The question whether a mortgagee had a right to evict the tenants of the mortgagor was left open in view of the fact that there was no decree for possession passed by the lower Court, and in other respects the decree already passed against the defendant was confirmed and the appeal was dismissed with costs.

This was the result of the previous litigation between the parties. It is urged on behalf of the appellant now that the view taken by all the three Courts with regard to his plea as to permanent tenancy is not *res judicata*, because, though the question was heard, it could not be said to have been finally decided within the meaning of s. 11, Civil Procedure Code, as there was no decree for possession against him, and as the plaintiff's claim in that suit for possession was disallowed. Though the finding was recorded against the defendant, it cannot be said to have been finally decided. In support of this contention reliance has been placed upon *Midnapur Zemindari Co.* v. *Naresh Narayan Roy* (1), *Daudbhai Allibhai* v. *Daya Rama* (2) and *Ramaswami Goundan* v. *Kalaivasal Marudai Reddi* (3). It may be mentioned here that the claim for possession was disallowed in the suit on the ground that, under s. 84 of the Bombay Land Revenue Code, a notice to determine the annual tenancy of the defendant was necessary. The position is plain that if the decision as to the plea of permanent tenancy was on any ground unnecessary in the previous suit, even though a finding be recorded, it could not be said to have been finally decided. But the pleadings in the previous litigation, so far as the present case is concerned, are perfectly clear, and leave no doubt that the finding was necessary. There was, undoubtedly, the plaintiff's claim with regard to the trees which were said to have been cut by the defendant, and the defendant pleaded that he was the owner of the trees because he was a permanent tenant, though, as I have said, he did not say so in the written statement. But that is the view which I take of the grounds as disclosed in the judgment upon which he really proceeded in that litigation.

(1) 64 Ind. Cas. 231; 48 I. A. 49; 48 C. 460; 14 L. W. 265; 30 M. L. T. 279; A. I. R. 1922 P. C. 241 (P. C.).

(2) 51 Ind. Cas. 109; 43 B. 568; 21 Bom. L. R. 363.

(3) 84 Ind. Cas. 622; 47 M. 453; 46 M. L. J. 198; 19 L. W. 377; (1924) M. W. N. 241; A. I. R. 1924 Mad 469; 34 M. L. T. 62.

Though I recognize that he based his claim to the trees on grounds other than that of permanent tenancy, it is clear that he also claimed to be the owner of the trees on the ground that he was a permanent tenant. It is clear, according to the decisions in *Harbans Lal* v. *Maharaja of Benares* (4) and *Sitabai Raghunath Karmakar* v. *Shambhu Gajana* (5) that a permanent tenant is the owner of the trees growing on the land. It seems to have been so understood, as both the Courts observed that closely connected with the question of the ownership of the trees was the question of the permanent tenancy of the defendant. Therefore, in the present case, it cannot be said that the finding as to permanent tenancy was unnecessary. Further, the present case is distinguishable from the other decisions which have been relied upon by the learned Counsel for the appellant. In the present case there was a decree passed against the defendant from which it was possible for him to prefer an appeal and to raise the question of permanent tenancy, which was negatived by the trial Court, if he was minded to do so, and in fact he did so. It was not a case where, after the finding was recorded against the defendant, the suit was dismissed as against him, with the result that he could not appeal from the decree and could not question the correctness of the finding against him. Therefore, it seems to me that, on the facts of this case, the cases relied upon by the learned Counsel are quite distinguishable, and do not help him in any way.

It is not necessary for the purposes of this case to examine further the position whether, if the plaintiff's suit had been dismissed, and if it was merely a case where relief by way of possession was claimed, and if it had been definitely found that in consequence of the defendant not being a permanent tenant but an annual tenant, a notice, as required by s. 84 of the Bombay Land Revenue Code, was necessary, the finding that he was an annual tenant, as distinguished from a permanent tenant, could be said to be necessary for the decision of the suit or not. That point does not arise in the present case.

Thus, I am satisfied that both the lower Courts are right in holding that the plea of permanent tenancy is not open to the defendant in the present suit, as that question has been heard and finally decided between the parties in the previous suit.

As regards the second question that a mortgagee cannot determine the tenancy of an annual tenant in respect of land which forms part of the mortgaged property without the consent of the mortgagor, no authority has been cited. On principle the contention seems to be untenable. A mortgagee in possession has his own right of managing the lands; and he is not in any sense dependent upon the consent of the mortgagor in determining as to what rent he should reasonably seek from an annual tenant in respect of a particular land and what tenant he should keep. Though that question was left open in the previous litigation, it seems to me that that contention of the defendant must be disallowed.

As regards the question of mesne profits for three years prior to the date of the suit, the position is that in the previous litigation the plaintiff's claim for possession was disallowed, and the second appeal to this Court was decided on July 15, 1920. Thereafter in November, 1920, he gave a notice calling upon him to pay Rs. 300 as enhanced rent. It seems to us, under the circumstances, that, up to March 31, 1921, possession of the defendant cannot be said to be wrongful in any way. The previous notice, such as it was, was not considered good notice, according to the provisions of the Bombay Land Revenue Code, and under the circumstances the plaintiff is not entitled to anything by way of mesne profits prior to the date of this notice, that is, prior to the date on which, if he was not prepared to comply with the notice, he would be expected to vacate, that is, before March 31, 1921. The suit was filed in August, 1921. Therefore, the plaintiff is really entitled to the extra profits as found by the lower Courts at the rate of Rs. 225 a year from April 1, 1921, and deducting therefrom the amount which the defendant has admittedly paid, namely, Rs. 121-14-0 a year, he would be entitled to about Rs. 104 for one year. We think that, having regard to the short period between that date and the date of the suit, we would roughly fix the mesne profits at Rs. 40, having regard to the amount which would be due for one whole year.

(4) 23 A. 126; A. W. N. (1901) 15.
(5) 28 Ind. Cas. 140; 38 B. 716; 16 Bom. L. R. 595.

Accordingly, we vary the decree under appeal by substituting Rs. 40 for the sum of Rs. 396 9-0 in the decree of the trial Court. In other respects we confirm the decree of the lower Appellate Court with costs.

Fawcett, J.—I agree on all the three points discussed in the judgment just delivered by my learned brother. As to the point of *res judicata*, the case is certainly different from that of *Daudbhai Allibhai* v. *Daya Rama* (2). In Pratt, J.'s judgment in that case, he puts his conclusion mainly on the view that the contention about the plaintiff's right to enhancement of rent was consistent with the defendant in that suit being a permanent tenant. The same cannot be said here, because the finding that the defendant was a permanent tenant would certainly not be consistent with that part of the decree which allows the plaintiff damages for cutting *babul* trees. The decision of this Court in *Sitabai Raghunath Karmakar* v. *Shambhu Gajana* (5) that a permanent tenant has rights of ownership over trees on land, of which he is a permanent tenant, shows that, if the defendant was a permanent tenant, he would have rights over the trees such as he asserted. That was a decision in 1914, prior to Suit No. 48 of 1915, and obviously, therefore, the claim of the defendant to ownership over the trees could not be disposed of without a finding whether he was or was not a permanent tenant. The same distinction applies to the remarks of Heaton, J., in *Daudbhai Allibhai* v. *Daya Rama* (2) that the decree passed "is precisely the decree which would follow if the Court had held that the tenant was a permanent tenant and not a yearly tenant," etc. Here the same decree would *not* have been passed, if the defendant had been held to be a permanent tenant.

Then, in regard to the Privy Council decision in *Midnapur Zemindari Co.* v. *Naresh Narayan Roy* (1) and the Madras decision in *Ramasami Goundan* v. *Kalaivasal Marudai Reddi* (3) the test there laid down is whether it is necessary or not to come to a finding such as this one whether the defendant is or is not a permanent tenant. In those two cases it was not necessary to come to a finding upon that question. In the present case, as my learned brother has clearly shown, it was necessary to have such a finding.

As regards the question of mesne profits, those can only be recovered from the time that the defendant was "in wrongful possession" of the land. I do not think it can fairly be said that he was in wrongful possession, until he was given notice to quit according to s. 81 of the Bombay Land Revenue Code.

A. N. A. *Decree varied.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 161 OF 1924.

March 10, 1927.

Present:—Mr. Justice Mukerji and Mr. Justice Ashworth.

BAZ BAHADUR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAGHUBIR PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 17, 115—Estoppel—Admission of receipt in deed, whether creates estoppel—Admissions, evidential value of.

A recital of receipt of consideration in a deed does not operate as an estoppel. [p. 1038, col. 2.]

Per *Ashworth, J.*—An admission must be read as it stands and it is not permissible to take one part of an admission and reject another part. [*ibid.*]

Admissions are of no evidential value once they are proved untrue. [*ibid.*]

First appeal from the decree of the Subordinate Judge, Mirzapur, dated the 15th of December, 1923.

Mr. *S. D. Sinha*, for the Appellants.

Dr. *S. N. Sen*, and Mr. *Ajudhia Nath*, for the Respondents.

JUDGMENT.

Mukerji, J.—This is a plaintiffs' appeal arising out of a redemption suit. There was a mortgage executed by one Durga Singh in favour of three persons Gaya Prasad and two others, for a sum of Rs. 5,700 on the 11th of January, 1877. The mortgage was a usufructuary one. The plaintiffs who claimed to have received the property, on foot of a Will executed by Durga Singh, seek to redeem it on payment of a certain sum of money. The defendants are transferees of the original mortgagees. The question is what is the amount that has to be paid in order to effect redemption. On behalf of the appellants, it has been contended that the lower Court should not have allowed the mortgagees a sum of Rs. 122 and the interest thereon, a sum of Rs. 20-12 0, on certain grounds. We have to see whether the appellants are right.

It appears that one of the items that make up the sum of Rs. 5,700 the total mortgage money, was a sum of Rs. 1,011 agreed to be paid by the mortgagees and to be received by the mortgagor, at the registration. Accordingly in the mortgage deed the mortgagor said as follows:—

"To-day I received a further sum of Rs. 1,011 in cash at the time of registration." The appellants' case was that out of this sum only Rs. 889 was paid before the Sub-Registrar and they contend that the balance of Rs. 122 should have been deducted from the mortgage-money along with interest. On the one hand we have the statement of the mortgagor in the deed that he expected to receive a sum of money at the registration. On the other hand, we have got the certificate of the Sub-Registrar that only Rs. 889 was paid before him. In the circumstances the Sub-Registrar's certificate should have, in my opinion, prevailed as against the statement of the mortgagor in the deed, which does not amount to even an admission, which is usually rebuttable.

As regards interest, the mortgagees claimed it at the rate of 1 per cent. per mensem up to the date on which the mortgagor could redeem a prior mortgage and obtain possession of the mortgaged property. Interest at that rate has been allowed by the Court below, and it is agreed by the learned Counsel for the appellants that this interest ought to be allowed. It follows, therefore, that if we deduct the sum of Rs. 122 we must deduct the interest also which comes to Rs. 20-12-0. I would, therefore, allow the appeal to the extent of Rs. 142-12-0. The amount payable to the mortgagee on redemption should be reduced by this sum.

There is a cross-objection that the Court below should have allowed to the respondents a sum of Rs. 740-3-9 over and above what it has allowed. No evidence was laid before us to substantiate this cross-objection. No evidence has been printed. The cross-objection, therefore, fails. I would dismiss it also with costs.

Ashworth, J.—I concur, but it appears to me desirable in view of the remarks of the District Judge in his judgment, to consider, in somewhat more detail, the question of the conclusiveness in a mortgage or sale-deed of an averment of receipt of consideration. In this case the mortgagor stated in the mortgage-deed: "To-day, I received a further sum of Rs. 1,011 in cash at the time of registration." The Sub-Registrar's endorsement, however, states: "The executant received Rs. 889 in cash at the time of registration." The District Judge has rightly considered that the recital by the mortgagor does not operate under the law of estoppel. It may be mentioned that in English Law the general rule appears to be that a person who is a party to a deed is estopped from denying its contents, but that to this general rule there is the exception that a receipt in a deed does not amount to an estoppel generally, either at law or in equity. See pages 49 and 50 of Cockle's Cases and Statutes on Evidence, 4th Edition. In India the law on the subject is contained in the Evidence Act, of which Act ss. 17 to 21 treat of admissions and s. 115 of estoppel. It has been declared, in decisions of the Privy Council that s. 115 is not exhaustive of the law of estoppel applicable to India. But it may safely be said that a recital of a receipt in a deed will not operate as an estoppel, under any application of the principle embodied in s. 115 (as opposed to the actual terms of that section) because as stated above, such recitals do not operate by way of estoppel in English Law. We have, therefore, to view the recital merely in the light of an admission, and from this point of view, the sections in the Evidence Act as to admissions must be deemed to be exhaustive. Now, an admission must be read as it stands and it is not permissible to take one part of an admission (as to a single fact or occurrence) and reject another part. In this case, the recital in the deed says that the mortgagee received a certain sum at the time of registration. It is not permissible to cut down this admission into a mere statement that he received it. Admissions are of no evidential value once they are proved untrue. This admission is proved untrue by the Sub-Registrar's endorsement that a lesser sum was paid at time of registration. The admission must, therefore, be rejected entirely and the District Judge was not correct in treating it as an admission that the money had been received though at some other time than at the time of registration.

By the Court.—The appeal is allowed in part and the decree of the Court below is modified to this extent that the amoun payable by the plaintiffs will be reduce

by the sum of Rs. 142-12-0. A fresh redemption decree will be prepared in this Court. Six months' time is allowed from this date for payment. The appellants will have their costs in proportion to their success and will pay costs in proportion to their failure. The cross-objection is dismissed with costs.

A. N. A. *Decree varied.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 782 OF 1925.
August 3, 1926.
Present:—Sir Amberson Marten, KT., Chief Justice, and Mr. Justice Patkar.

CHATUR BAWA MULJI—DEFENDANT—APPELLANT
versus
POPATLAL NARANDAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Preliminary decree—Deposit of money after six months but before steps are taken by mortgagee—Order absolute for redemption, legality of—Power of Court to extend time.

Although the money due under a preliminary decree is not deposited by a mortgagor within the period of 6 months provided in the decree, a Court will not order the mortgaged property to be sold or foreclosed, where the money is deposited in Court before any application is made by the mortgagee to enforce his rights under the preliminary decree.

Second appeal from the decision of the Joint Judge at Ahmedabad, in Appeal No. 462 of 1924, confirming the decree passed by the Subordinate Judge at Viramgan, in Civil Suit No. 699 of 1921.

Mr. *G. S. Rao*, for the Appellant.
Mr. *H. V. Divatia*, for the Respondents.

JUDGMENT.—In this case there was a preliminary decree for redemption passed in January, 1923, in favour of the respondent-mortgagors. They had to pay the money within six months. The order provided that if they did not do so, the mortgagee was to be entitled to recover the same by sale of the property in suit. In fact they did not pay the money within six months, and they only paid it into Court in September, 1924. On the other hand, the mortgagee in the meanwhile had not taken any steps to ask either for sale or foreclosure by reason of the default in payment by the mortgagors. The conduct of both parties may to some degree be accounted for by the fact that there was a second appeal by the mortgagee to the High Court against the preliminary decree for redemption, but eventually he was unsuccessful.

Now it appears that the money was accepted by the Court in error as to the true facts, that is to say, the Clerk of the Court was not told that the payment was out of time. The same day the payment was made, the mortgagors applied for the preliminary decree to be made absolute. Then, on October 6, 1924, they applied for the delay to be excused: and on November 8, "a decree absolute for redemption" was passed. This decree does not appear to have been drawn up, but we understand it to mean that in fact the Court accepted the payment and directed the mortgagee to convey the property to the mortgagors.

There was an appeal by the mortgagee to the Joint Judge, who rejected it on the ground that no appeal lay from an order extending time for payment. Now, we do not propose to decide whether in that particular respect the learned Joint Judge was correct or not. But assuming for the sake of argument that an appeal did lie to him, still, in our opinion, the trial Court was clearly right in extending in effect the time for payment of the money. The position was this. Both parties had been guilty of laches—the mortgagors in not paying the money, and the mortgagee in not applying for an order for sale or foreclosure. What then were the remedies for the mortgagee? He could apply for a decree absolute for sale. But I take it that no Court would order the mortgaged property to be sold, when the money was already deposited in Court and was available for the mortgagee. If, on the other hand, he applied for foreclosure, we do not think that any Court of Equity would, in a case like the present, pass a decree for foreclosure when the money was there in Court ready for the mortgagee to take it out, and where the mortgagee himself had waited for at least a year before making any application to enforce his rights under his preliminary decree. If, on the other hand, he relied on his second appeal to the High Court as justifying his delay, then the delay of his opponent in paying the money ought also to be excused.

Therefore, on the merits of this case it seems to us that the decree passed by the trial Court was correct, and that, accordingly, this appeal should be dismissed

with costs. We do not think this is a case where we should send it back to the lower Appellate Court for any further consideration.

A. N. A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1910 OF 1924.

March 9, 1927.

Present:—Mr. Justice Boys and Mr. Justice Kendall.

Pandit Soti BHAGWAN DAT SHASTRI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAJA RAM—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 23—Agreement to perform 'puja' *for success in litigation, whether against public policy—Unrighteous object.*

The plaintiff and the defendant entered into a contract under which the plaintiff undertook to perform a kind of '*puja*' or '*anushthan*' in order to bring about the defendant's success in a pending litigation, and the defendant agreed to give the plaintiff in return one-tenth of the amount recovered by means of the litigation. It was found that the intention of the parties was that the plaintiff should exercise some influence unauthorised by law, whether righteous or the reverse, and whether through any particular deity or not with the object of bringing about the success of the defendant. The plaintiff carried out his part of the contract and the defendant was successful. The plaintiff sued to enforce payment of the one-tenth:

Held, that the contract was against public policy and, therefore, void and unenforceable.

Second appeal against the decree of the Additional District Judge, Moradabad, dated the 23rd of September, 1924.

Dr. *M. L. Agarwala*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—This second appeal arises from a somewhat peculiar suit. The plaintiff and the defendant had entered into a contract by which the plaintiff undertook to perform some kind of "*puja*" which is referred to as "*anushthan*" in order to cause the defendant to be succcessful in a suit which he had before the Courts. In the event of his success the plaintiff was to get one-tenth of the decree money. The plaintiff partially, at any rate, carried out his part of the contract and the defendant was successful in his suit. The plaintiff, therefore, brought the present suit to enforce the payment of one-tenth of the decree money. The trial Court decreed the plaintiff's claim in part, but the lower Appellate Court dismissed the plaintiff's suit on the ground that the agreement entered into between the parties was contrary to public policy.

The question of whether this agreement was contrary to public policy is the only one that has been argued before us in second appeal. It has been argued on behalf of the plaintiff-appellant that the grounds on which a suit is barred by public policy have been very strictly limited, and that it is unsafe to make any addition to the class of suits that can be so barred. It is urged that it cannot be against public policy to pray for success in a suit and that in effect this was what the plaintiff undertook to do on behalf of the defendant. The finding of the Court below is that the plaintiff undertook by prayer ("*prarthana*") to bring extraneous influence on the mind of the Court trying the defendant's suit. We think that the circumstances of this case distinguish it from one in which one person should merely have undertaken to pray to a righteous deity for the success of another's suit for in such a case the deity being righteous would be understood only to exercise an influence in a just cause. In the present case the intention of the parties evidently was that the plaintiff should exercise some influence unauthorised by law on the mind of the Court, whether righteous or the reverse, and whether through any paticular deity or not, at any rate with the object of bringing about the success of the defendant in those proceedings. We think that such an agreement must be held to be contrary to public policy. It is true that no similar case has been quoted to us from the Indian or English Courts to fortify our decision, but such a case as the present could not now occur in England and it may be doubted whether such a case has ever come before an English Court; nor have been referred to a similar Indian case.

The appeal is dismissed with costs.

A. N. A. *Appeal dismissed.*

BOMBAY HIGH COURT.

CRIMINAL REFERENCE.

October 11, 1926.

Present:—Justice Sir Lallubhai Shah, KT., and Mr. Justice Fawcett.

In re UMAR SOBANI.

Coroners' Act (IV of 1871), s. 29—Inquisition—Verdict of Jury against weight of evidence—Coroner, whether can refer to High Court—Amendment of inquisition—Quashing of inquisition—High Court, powers of.

The Coroners' Act does not contemplate a reference by a Coroner to the High Court where he disagrees with the verdict of the Jury, but it is open to the High Court to interfere on application by parties affected by the inquisition. [p. 1042, col. 2.]

An inquisition under the Coroners' Act cannot be quashed by the High Court on the ground that the findings of the Jury are against the evidence in the case. [p. 1044, col. 1.]

The power to amend an inquisition is restricted to technical defects. [p. 1042, col. 1.]

Reference by the Coroner of Bombay.

Mr. *Velani*, for the deceased's widow.

Mr. *Kanga*, Advocate-General for the Police Commissioner.

JUDGMENT.

Shah, J.—The papers relating to the inquisition touching the death of Umar Haji Yusuf Sobani have been submitted to this Court by the Coroner. In his letter of reference the Coroner has stated that the Jury have returned a verdict which, in his opinion, is "antagonistic with the evidence given by well-known medical men and with the circumstantial evidence in the case." Notices were ordered to be issued by this Court to the parties who appeared on the record to be interested in the inquisition, namely, the Police Commissioner, the widow of the deceased, and the brother of the deceased. Before us now there is no appearance on behalf of the brother of the deceased, but the learned Advocate General has appeared on behalf of the Police Commissioner, and Mr. Velani has appeared on behalf of the widow of the deceased.

As apparently this is the first case of its kind in which the Coroner has submitted the papers in order that the inquisition may be either amended or quashed, it is desirable to refer briefly to the nature of the powers which this Court has with reference to the inquisitions of the Coroner and to the procedure to be followed.

In the main we are regulated by the provisions of the Coroners' Act (IV of 1871). In this Act there is no provision enabling the Coroner to refer the matter to this Court. Section 29 provides that:—

"No inquisition found upon or by any inquest shall be quashed for any technical defect.

"In any case of technical defect, a Judge of the High Court may, if he thinks fit, order the inquisition to be amended, and the same shall forthwith be amended accordingly."

In saying that there is no provision in the Act enabing the Coroner to refer the papers to this Court, I do not wish to be understood as laying down that in no case can he do so. But the normal procedure, to my mind, would be that any party interested in, or affected by, the inquisition may apply to this Court for either amending or quashing the verdict of the Jury. In the present case, as I have already indicated, no such application was made before this day. It may have been due to the understanding of the parties that as the Coroner had submitted the papers to this Court, it was not necessary to do so. But ordinarily I should say that cognizance of such proceedings could be properly taken on the application of any party affected by the inquisition.

The extent of our powers is indicated primarily by the provisions of s. 29 of the Coroners' Act of 1871. I may point out that under "the Letters Patent of 1823 Establishing the Supreme Court of Judicature at Bombay" it was provided as follows (page 10):—

"That the said Chief Justice and the said Puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of *Bombay*, and the Town and Island of *Bombay*, and the Limits thereof,...and to have such Jurisdiction and Authority as our Justices of our Court of King's Bench have and may lawfully exercise, within that part of *Great Britain* called *England*, as far as Circumstances will admit."

When the Indian High Courts Act was passed in 1861, under s. 9 of that Act (24 & 25 Vic. c. 104), all the power and authority vested in the Supreme Court and in the Sudder Adawlut were reserved to the High Court, subject to the provisions of the Letters Patent and subject and without prejudice to the legislative powers of the Governor-General of India in Council. Under the present Government of India Act, s. 106, sub-s. (1), the same powers are

continued, subject, of course, to the provisions of any Letters Patent or to any statutory provision. Thus, this Court has, subject to the provisions of the Coroners' Act, all the powers which the Court of King's Bench had with reference to such inquisitions when this High Court was constituted. It is not necessary for the purposes of this case to attempt to define exactly the extent of those powers. But it is clear from s. 29 of the Act that the power to amend the inquisition is restricted to cases of technical defects and as regards quashing the inquisition it is definitely provided that it shall not be quashed for any technical defect. But there is no provision as to when and on what grounds it may be quashed. We have, therefore, to be guided by the powers which were exercised by the Court of King's Bench in England when the High Court was constituted.

The learned Advocate-General in this case has not made any application with reference to this inquisition on behalf of the Police Commissioner. Mr. Velani, however, has made an application on behalf of the widow of the deceased to amend or quash the inquisition on two grounds. First, it is contended that the inquisition should be amended on the ground that the verdict of the Jury is opposed to the weight of the evidence, in so far as it does not definitely find that the opium was self-administered and not administered by any other agency to the deceased. Secondly, it is urged that the inquisition should be quashed on the ground that some of the jurors were friends of the brother of the deceased, and that has vitiated the verdict of the Jury. This application is not opposed by the Advocate-General.

As regards the first ground I may state that it does not constitute a technical defect in the inquisition: and it is not a ground for amending it. The question is whether we should quash the inquisition on this ground. I am of opinion that we should not. It involves appreciation of evidence. I doubt whether in England the Court of King's Bench would quash it on such a ground. The statement of the law in para. 650 at p. 285 of Halsbury's Laws of England, Vol. VIII, and the report of *Reg.* v. *Ingham* (1), at p. 261* appear to support this view: nor is the present case like the case of *Reg.* v. *Carter* (2), where evidence as to how poison was administered was excluded, though it was available. Taking the provisions of 50 & 51 Vic. c. 71, s. 6 (1) (*b*), on this point as a guide, and not as defining the powers of this Court or as conferring them, I am not satisfied that it is necessary to interfere in this case. The said provisions are as follows.—

"6.—(1). Where Her Majesty's High Court of Justice, upon application made by or under the authority of the Attorney General, is satisfied either...(*b*) where an inquest has been held by a Coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the Court may...quash the inquisition on that inquest..."

There is no such express provision in the Coroners' Act with reference to the powers of this Court to quash the inquests of the Coroner. Having regard to the ground upon which we are asked to interfere, it seems to us to be sufficient to say that it is neither necessary nor desirable in the interests of justice to order a fresh inquest. The main ground upon which the application is based is that the verdict of the Jury is unfair to the widow in so far as it leaves the question as to whether she administered the opium to the deceased at large contrary to the weight of the evidence. The verdict of the Jury is in these terms:—

"I. Death was due to opium poisoning;

II. In the absence of direct evidence we cannot determine whether opium was self-administered, administered by a foreign hand or taken accidentally."

In terms it does not purport to find anything against the widow. The Jury affirm their inability to come to a definite conclusion as to how opium came to be administered. That inability may or may not be justified on the evidence. We do not consider it necessary in this case to examine the evidence nor to determine that question. But there is no suggestion, either in the verdict or on the record, so far as we have seen, that this dose of opium was administered by the widow; and there is no reason why this verdict should be interpreted by the widow or by any one as really

(1) (1864) 5 B. & S. 257; 33 L. J. Q. B. 183; 10 Jur. (N. S.) 968; 10 L. T. 456; 12 W. R. 793; 9 Cox C. C. 508; 122 E. R. 827.

*Page of (1864) 5 B. & S.—[*Ed.*]

(2) (1876) 45 L. J. Q. B. 711; 34 L. T. 849; 24 W. R. 882; 13 Cox C. C. 220.

affecting the widow. No doubt, the question is left open so far as this inquisition is concerned. But that by itself is not a sufficient ground to justify our going into the evidence, nor do we think that in the interests of justice it is necessary in this case to do so. It may be that in a given case, where on substantial grounds an interference is needed, it may be necessary to quash the inquisition. But in this case, if we would yield to the application of the widow to go into the evidence, we would not be in a position to amend the inquest but would have to order a fresh inquest which, in my opinion, is wholly uncalled for and unnecessary under the circumstances of this case. Therefore, the first ground of the application fails.

As regards the second ground, it is clear that there is no suggestion on this record that any of the jurors were friends of the brother of the deceased. In fact, the Coroner has observed in his charge to the Jury that he took particular care to set aside those who were known to be the friends of the deceased. Even now when this ground is stated before us by the learned Counsel for the widow, there is no statement on oath that any particular juror was a friend of the deceased or of his brother. I do not wish to be understood as accepting the position that, even if that had been made out, it would necessarily be sufficient to justify the quashing of the inquisition. But assuming that it may be a possible ground for the application there is no basis on the materials before us for putting forward such a ground.

I would, therefore, decline to interfere and direct the papers to be returned to the Coroner.

Fawcett, J.—This is practically a case before us in the form of a reference by the Coroner in a letter to the Clerk of the Crown. The Coroner is of opinion that the proper verdict should have been one of death by self-administered poison, namely, opium, and that the verdict of the Jury was insensate and against the weight of the evidence. Our powers in a matter of this kind have been clearly stated in my learned brother's judgment, and I do not propose to travel over the same ground again. In my opinion, it is difficult to say that a reference of this kind can properly come from a Coroner. It is rather analogous to the case where a Sessions Judge disagrees with the verdict of the Jury, but express provision is made in s. 307 of the Criminal Procedure Code for his referring the case to this Court for decision. There is no corresponding provision of this kind in the Coroners' Act, nor does the English Law on the subject afford any precedent for such a procedure. The nearest reported case that I have been able to find to the present one is that mentioned in Halsbury's Laws of England, Vol. VIII, at page 285, namely, *Rex* v. *Wood* (3). In that case it was held that "an inquisition may be quashed upon the application of the Police Authorities made with the acquiescence of the Coroner, on the suggestion of the Coroner's Jury that they are dissatisfied with the verdict returned by them". But that is a very different case to the present one. First of all there is no application by the Police Authorities to quash the inquisition, although they support the Coroner's view. But a more important difference is that the Jury in this case are not questioning their own verdict. There is, of course, the provision in cl. 27 of the Letters Patent of this Court, by which this High Court is created a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction, but that cannot apply here, for the Coroner's Court cannot be said to be a Criminal Court within the meaning of that clause. Nor does the further provision in that clause about the Sudder Foujdari Adawlut apply, for there was no provision under which there was an appeal from the Coroner's Court to the Sudder Foujdari Adawlut. Accordingly, I think, we could only interfere not upon any reference by the Coroner himself, but upon an application by a party affected by the inquisition. In the present case, the widow of the deceased has through her Counsel, asked to be allowed to make such an application, and we have heard the learned Counsel who appears for her as to the grounds for such an application and the law applicable to it. I have not much to add to what my learned brother has said on this question.

As regards the proposal that we should amend the inquisition by inserting some expression of opinion that the widow is not affected by the Jury's verdict, it is, in my opinion, impossible for us to accede to such a request. First of all, we must be guided

(3) (1909) 73 J. P. 40.

by what has been laid down in England in regard to the exercise of this special jurisdiction. It is quite clear that amendments of inquisitions are ordinarily limited to correcting technical defect in the inquisition. Originally inquisitions used to be quashed because of technical defects, and this naturally gave rise to considerable inconvenience, which was remedied by s. 2 of the Coroners' Act, 1843 (6 & 7 Vic. c. 83). That section is reproduced in Halsbury's Laws of England, Vol. VIII, foot-note at page 282. In 1848 a similar provision was enacted for India in s. 3 of Act IV of 1848, and this Act recites in the preamble:—

"Whereas it is expedient to make provisions for supporting Coroner's Inquisitions, and for preventing the same from being quashed on account of techincal defects:"

Then follow provisions which are substantially reproduced in s. 29 of the present Coroners' Act. That supports the view that amendment should only be made in cases where there is some technical defect such as is referred to in the second paragraph of s. 29. To exercise this power of amendment, or express an opinion of our own in this conflict between the Coroner and the Jury would, in my opinion, be travelling outside the proper limits in such a matter.

I now come to the question whether the King's Bench in England would quash an inquisition on such a ground as is put before us. So far as regards its common law jurisdiction, I agree with my learned brother that authority seems clearly against quashing an inquisition on the ground that the findings of the Jury are against the evidence in the case. This is referred to in the beginning of paragraph 650 at page 285 of Vol. VIII of Halsbury's Laws of England. The King's Bench in England has wider jurisdiction than we have, because the Common Law jurisdiction has been supplemented by statutory powers of interference given in the Coroners' Act, 1887 (50 & 51 Vic c. 71). Section 6 of that Act empowers the High Court in England, on an application made by or under the authority of the Attorney-General, to quash an inquisition in certain circumstances, which include the Court being satisfied that it is necessary or desirable in the interests of justice that another inquest should be held. Even assuming that, in the exercise of the discretion vested in us under the ordinary Common Law jurisdiction, we have similar powers, I agree with my learned brother that the present is not a case where it can be said that to have been established that it is necessary or desirable that another inquest should be held. I can quite understand the grievance of the widow in this case, but on the other hand, we have the fact that the inquisition itself does not refer to her and does not make any allegation against her. The record also shows that no one went into the witness-box to give evidence even suggesting that she had administered opium to the deceased. The mere fact that the Jury did not express an opinion on the question how the opium got into the deceased's body is not in itself sufficient ground for saying that the whole of this inquiry of the Coroner, which occupied several days, should be quashed and that we should order another inquest in the matter. As I have already stated, the authorities for holding that the King's Bench will not interfere where the ground alleged is the verdict being against the weight of the evidence, show that the same view would probably be taken by that Court under s. 6 of the Act of 1887.

As regards the suggestion that there was misconduct on the part of the Jury or members of the Jury, I agree with my learned brother. In England the King's Bench have quashed inquisitions where there has been misconduct on the part of the Jury, but in the present case no adequate ground has been shown for holding that there was any such misconduct as would justify our interference.

I, therefore, agree with the order proposed by my learned brother.

A. N. A. *Order accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 419 OF 1926.

December 15, 1926.

Present:—Mr. Kinkhede, A. J. C.

TULARAM MARWADI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195 (c), 476, 537—Proceedings under Guardians and Wards

Act—Production of forged Will—Complaint for prosecution, necessity of—'Proceeding'—'Production'—Proceeding whether should be pending on production of document—Want of complaint—Illegality.

A proceeding within the meaning of s. 476 of the Criminal Procedure Code need not necessarily be one between two parties actually cited before the Court but includes a proceeding under the Guardians and Wards Act for the appointment of a guardian. [p. 1048, col. 1.]

Proceedings initiated by an application under the Guardians and Wards Act for appointment or declaration of a guardian last or continue throughout the minority of the minor concerned. [*ibid.*]

The mere filing of a forged document as an annexure to a petition to a Court is a sufficient 'production' of the document in Court for the purposes of s. 195 (c), Criminal Procedure Code. [p. 1049, col. 2.]

In order to bring such a case within the purview of s. 476, Criminal Procedure Code, it is not necessary that proceedings should have been pending from before the time of the production of the document. [p. 1049, col. 1].

The absence of a complaint in writing as required by the provisions of s. 476, Criminal Procedure Code, is an illegality which vitiates the trial. [p. 1050, col. 1.]

Appeal against an order of the First Class Magistrate, Bhandara, dated the 25th August, 1926, in Criminal Case No. 56 of 1926.

Messrs. *M. R. Bobde* and *V. K. Kelkar*, for the Appellant.

Mr. *G. P. Dick*, for the Crown.

ORDER.—This revision petition is filed against an order dated 25th August, 1926, passed by the First Class Magistrate, Bhandara, in Criminal Case No. 56 of 1926 which was instituted under the following circumstances.

One Vithoba Koshti of Pouni in the Bhandara District died on 16th October, 1923, leaving behind widows and a posthumous son. *Musammat* Zibli one of the widows presented an application dated 4th February, 1925 (Exhibit P-1) to the District Court, Bhandara, under the Guardians and Wards Act for the appointment of a guardian for the minor's property. Acting on information elicited in the proceedings thus initiated the District Judge added certain persons who were said to be in possession of the minor's property as parties non-applicants and the present applicant is one of them.

After recording pleadings and making an order for the appointment of an *ad interim* Receiver and holding the necessary enquiry and after the receipt of the report of the Commissioner or Receiver as to the large sums said to be misappropriated by the non-applicant and other persons the District Judge proceeded to appoint one Mahadeo as guardian for the minor's property by a conditional order dated 18th June, 1925.

On the 18th of September, 1925, the guardian submitted his report regarding the minor's Pouni shop and filed along with it a Will, dated 16th October, 1923 (Ex. P-5) handed over to him by the applicant as an authority to him and some others to deal with the minor's estate as trustees appointed by Vithoba. This Will remained on the record till 11th December, 1925, when on the Sub-Inspector's requisition through the District Superintendent of Police it was handed over to him. In the course of the Police investigation it was discovered that the alleged Will was forgery. The Sub-Inspector, therefore, lodged a complaint under s. 467 of the Indian Penal Code against the applicant and some others in the First Class Magistrate's Court on 22nd March, 1926. An objection was taken to the tenability of the prosecution except upon a complaint by the Court in which the Will was produced. The objection was summarily overruled by the Magistrate by an order dated 8th June, 1926, which, however, was set aside by this Court in Criminal Revision No. 272 of 1926 as per order dated 14th July, 1926, and the Magistrate was directed to dispose of the objection by passing a proper judicial order according to law. The Magistrate has now passed order dated 25th August, 1926, overruling the objection. The petitioner moves this Court to set aside and quash the proceedings on the ground that none but the District Court could legally start the prosecution in respect of the offence. The sole question to be considered, therefore, is whether in the particular circumstances of this case the prosecution could not be started except upon a complaint by the District Court Bhandara, under s. 476 read with s. 195 (*c*), Criminal Procedure Code.

A brief account of the circumstances gathered from the record of the guardian and ward's case is necessary for understanding the real point of contest in the case. The evident intention of *Musammat* Zibli in bringing the several persons before the Court as non-applicants was to apprize the Court of the real situation as to the persons who were to be brought under the Court's jurisdiction for the purposes of securing such reliefs as against them as might be obtainable by recourse to the several provisions of the Guardians and Wards Act,

The instructions given by the Court in the order-sheet, dated 18th June, 1925, are also drawn up on lines consistent with this intention. The Court gave directions as to the manner in which the guardian was to proceed in the matter of the collection of the minor's assets and gave 1½ months' time for that purpose and also warned him to obtain its "sanction for taking legal steps against any person and for meeting the expenses thereof." On taking the necessary security the order of appointment was confirmed and made final on 26th June, 1925. The guardian was ordered to submit accounts annually on 1st July and the first account was ordered to be submitted on 1st July, 1926. The guardianship certificate which was ordered to be prepared was issued to the guardian on 30th June, 1925, and the District Judge passed the following order that day:

"30-6-1925. Applicant in person. Guardian also in person. Certificate prepared and signed and issued. Proceedings be filed now.

J. C. CHATTERJEE,
D. J."

Pursuant to the instructions given on 18th June, 1925, the guardian made different applications for sanctions, etc., at different times; amongst them was an application accompanied by a report dated 21st August, 1925, for permission to take legal steps in Criminal and Civil Court against Hagru one of the non-applicants for misappropriation of Rs. 5,177-12-6. The District Judge granted the necessary permission as per his order dated 22nd August, 1925. His next move was to request the Court to forward his petition dated 3rd September, 1925, to the District Superintendent of Police through the District Magistrate, Bhandara, for making investigation in regard to the amounts alleged to have been misappopriated by Hagru. The Court on 5th September, 1925, ordered the same to be forwarded with a covering letter for investigation; the guardian was directed to file within 10 days certain inventories he was ordered to submit. This was done as per District Judge's letter dated 8th September, 1925, to the District Superintendent of Police through the District Magistrate. In para. 2 of this letter the District Judge has requested the District Superintendent of Police to make an investigation "in the matter of the alleged removal by one or more Marwadi and other money-lenders of Pouni of the shop articles, books and other papers and cash appertaining to the minor's another cloth shop at Pouni" regarding which the guardian's report was yet to come.

On 18th September, 1925, the guardian filed another petition submitting his report about Pouni shop praying that his petition addressed to the District Superintendent of Police be forwarded to him for making enquiry in regard to the taking of the possession of the minor's Pouni shop by the creditors Tahlu (*alias* Tularam applicant), Kashinath and Ganesh Ram. The order passed thereon on 18th September, 1925, is "Let it be forwarded for investigation.

J. C. CHATTERJEE,
D. J."

It contains the following further instructions:—

"The guardian has attached a registered Will to his report without making mention of it either in his petition to me or in the report. He shall file a petition as to where and how he got it and why he filed it in this Court.

J. C. CHATTERJEE,
D. J."

The District Judge was somewhat mistaken in thinking that the report made no reference to the Will. A reading of the report dated 18th September, 1925, clearly discloses that its para. 5 expressly refers to the Will handed over to the guardian by Tahlu as a document of authority empowering him and others to administer the estate of the minor as trustees. Of course, there is no mention of its date. But as to the identity of the Will produced there is no question. Thus the custody of the Will was transferred from the applicant to the Court through the medium of the guardian who was the Officer of the District Court in the matter of the administration of the minor's estate. The document thus came into the custody of the Court and formed part of the record from the date of its production on 18th September, 1925, when it was filed in the course of the proceedings commenced by the guardian, subsequent to his appointment, on the strength of the Court's orders and instructions dated 18th June, 1925, and 26th June, 1925, with the object of obtaining the Court's sanction for starting legal proceedings against Tularam and others for misappropriation, etc. of minor's

property belonging to the Pouni shop, until it was handed over to the Sub Inspector Bhagwandass on 11th December, 1925. During this interval it remained under the custody of the Court and as a document 'produced' in a proceeding in Court.

The combined effect of ss. 476 and 195 (c) of the Criminal Procedure Code as amended by Act XVIII of 1923 is to substitute the complaint of a Court for its sanction in respect of prosecution for offences indicated by the latter section. The recent decided cases are in favour of the view that it makes no difference whether the offender is a party to a proceeding or not. In relation to documents alleged to be forged which may be produced or given in evidence in any proceedings before a Court the law requires that unless the Court lodges the complaint in the proper Criminal Court the latter is incompetent to take cognizance of it. Admittedly such a complaint by the Court was not filed against the applicant. The Sub-Inspector's application dated 6th April, 1926, to the District Court to file one under s. 476, Criminal Procedure Code, was rejected by the presiding officer as per his order dated 7th April, 1926 (Ex. P-43). The Magistrate has given the following reasons for holding that there is no need for a complaint by the Court:—

(1) That the proceedings in the case under the Guardians and Wards Act terminated on 30th June, 1925, when they were ordered to be filed, at least so far as the two accused Tularam and one more were concerned, and that they had no concern with the subsequent proceedings.

(2) That the Will could not be said to have been produced or given in evidence within the meaning of the provisions of s. 195 (c), Criminal Procedure Code, when the guardian produced it with his report dated 18th September, 1925, without alleging that any offence of forgery was committed by anybody in relation to that document.

(3) That it could not be said to have been produced in the course of the proceedings since no matter was pending before the learned District Judge in which the Will was required to be produced. That the proceedings were not judicial but of an administrative or executive character and no judicial decision was asked for in that report.

(4) That the District Judge did not at any stage of the judicial proceeding consider it as evidence, nor was it alleged before him that it was a forgery.

Unfortunately for the minor, the District Judge Mr. Chatterjee, who started the proceedings upon the guardian's application and report dated 18th September, 1925, did not remain attached to the Bhandara District Court, to know the result of the investigation, which he had, on the guardian's application, ordered to be made, through the agency of the Police Department with the concurrence of the District Magistrate, as, he went on leave on 2nd January, 1926. To me it appears that he thought it inexpedient to authorise the guardian to initiate criminal proceedings all at once, without satisfying himself as to the certainty of the conviction of the person concerned, and, therefore, selected the agency of the Police Investigation Department to get out the truth, before commencing any prosecution against any individual person. He was right in proceeding cautiously in this manner. The aforesaid District Judge who is an officer of long standing and experience could reasonably be credited with sufficient knowledge of the provisions of ss. 195 (c) and 476 and the requirements of the Criminal Law which prescribe a complaint by Court for initiation of a prosecution in such case. I can, therefore, confidently presume that he was awaiting the report of the Police in order to issue notices to the applicant and others to show cause why they should not be prosecuted, and after making such formal enquiry before himself as might enable him to lodge the necessary complaint, he would certainly have sent the complaint to the First Class Magistrate as required by law; the investigation not having been completed in his time he could not do so and in the meantime he went on leave.

There was thus a failure to observe the necessary procedure and this gave the accused person an opportunity to raise an objection to the legality of the prosecution lodged directly by the Sub-Inspector on 22nd March 1926. He, no doubt, tried to mend matters and moved the successor of Mr. Chatterjee on 6th April, 1926, to lodge the complaint, but the latter officer summarily rejected the petition by his order dated 7th April, 1926 (Exhibit P. 43). The reasoning on which the Magistrate based his orders dated 8th June, 1926, and 25th June, 1926, is practically the one used by the District Judge in his

aforesaid order. I am constrained to say that the reasoning is faulty and cannot be upheld. The decision of this question depends upon the right construction of s. 195 (c), Criminal Procedure Code. It must, therefore, be ascertained whether the offence of the alleged forgery of the Will dated 16th October, 1923, could be said to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, so as to necessitate a complaint by the Court as required by s. 195 (c), Criminal Procedure Code. The offence being one under s. 467, Indian Penal Code, comes within the purview of s. 195 (c), Criminal Procedure Code, but in order to apply its provisions strictly to a document alleged to be forged the said document must be 'produced' or 'given in evidence' in a 'proceeding' in a 'Court'.

The learned Magistrate was entirely wrong in thinking that the proceedings in the case under the Guardians and Wards Act terminated on 30th June, 1925, so far as the applicant Tularam and another were concerned, and that they had no concern with the subsequent proceedings. If he meant to say that a proceeding in order to be a 'proceeding' must be between two parties actually appearing or cited before the Court, then certainly the proceedings after 30th June, 1925, could not be called *inter partes* proceedings. It seems he has misconceived the whole scheme underlying the Guardians and Wards Act. The proceedings once initiated by an application either for appointment or for a declaration of a guardian last or continue throughout the minority of the minor concerned. The Crown is the guardian general of all minors but the Statute has delegated the authority of the Crown to the District Court. The application for appointment or declaration is only the initial stage which the Statute Law prescribes as a condition for invoking this special jurisdiction of the District Court. Once it is invoked it becomes fastened on the estate of the minor and vests the powers of management, etc., in the Court and it is only by a process of delegation of powers that some of those powers and functions of the District Court in the matter of the administration of the particular minor's estate become transferred, as it were, to the particular individual whom the Court selects to act on its behalf as its delegate subject to its own general superintendence and control. The Court does not cease to exercise its jurisdiction by merely handing over the certificate of guardianship to the person appointed or declared by it as the guardian of the property of the minor. The jurisdiction once invoked must, therefore, continue to be exercisable by the Court ordinarily, until the minor attains majority, in respect of every matter relating to the management or administration, etc., of the property of the ward. The main responsibility in all matters concerning the minor's estate rests on the Court and it is, therefore, provided in s. 33 of the Act that the guardian should apply to it for its opinion, advice or direction on any present question respecting such management or administration. It was with advertence to such provisions that the District Judge gave directions, in his order dated 18th June, 1925, and endorsed on the certificate, that his permission and sanction should be obtained by the guardian, 'for taking legal steps' against any individual, or, in respect of his subsequent dealings with the minor's estate. Even a cursory perusal of ss. 33, 34, 40 and 42 of the Act could have made the thing clearer to the Magistrate. This Court's Civil Circular No. II-10 distinctly ordains that the filing of the papers of a case under the Guardians and Wards Act is only 'for statistical purposes.' It could never have been the intention, of such a provision for filing the papers, to put an end to the proceedings. He was, therefore, wrong in assuming that the proceedings had terminated on 30th June, 1925. Nor is it correct to urge that, simply because the applicant was not cited to appear before the Court, after the date of appointment of the guardian, he ceased to be a party to the case, for purposes of any subsequent proceedings, which may bring to light, his concern with the estate, and which the Court, *suo motu*, or on the guardian's application, start, against him, or any other person having such a concern, if it conflicts with the due administration and management of the estate by the said guardian.

The learned Standing Counsel did not support the reasoning of the Magistrate that the proceedings must be 'pending,' but only tried to maintain that the proceeding must be *inter partes* and not be of an administrative or executive character, and, therefore, contended that the docu-

ment in question could not be said to have been 'produced' in 'Court' as it was admittedly filed merely as an annexure to the guardian's report dated 18th September, 1925, and consequently there was no need of a complaint by the District Court. Reliance is placed by him on *Munuswamy Mudaliar* v. *Rajaratnam Pillai* (1) in support of his contention. On behalf of the applicant reliance is, however, placed on *Nalini Kanta* v. *Anukul Chandra* (2), *In re Bhau Vyankatesh* (3) and *Gulabchand Rupji* v. *Emperor* (4). I have gone through the cases cited before me as also several other cases bearing on the point. After having given my best thought to these questions and also to the question whether the absence of a complaint in writing by a Court is an illegality not covered by s. 537, Criminal Procedure Code, I have come to the following conclusions:—

(*i*) that the document which is alleged to be forged was 'produced' in a proceeding in the District Court which still retained its *seisin* over the case instituted under the provisions of the Guardians and Wards Act, and

(*ii*) that the present prosecution started without a complaint in writing by that Court is illegal and void in view of the imperative provisions of s. 195 (*c*) read in conjunction with the express provisions of s. 476, and the important omission of cl. (*b*) of s. 537, Criminal Procedure Code.

The word 'produced' was introduced in the section by the Criminal Procedure Code of 1898 with a set purpose, to give the Courts a larger jurisdiction to regulate the institution of criminal proceedings, against parties, or, other persons, who may be concerned with the commission of offences, in connection with documents, not only 'given in evidence,' but 'produced' in the course of any proceedings before them. It is not at all necessary that the proceedings must be 'pending' before the Court from before. I go further and say that they may even be commenced by the very act of production of the forged document itself before it. In a case reported in *Akhil Chandra Sen* v. *Queen-Empress* (5) a certain document was filed as an annexure to a petition in a suit. The Munsif on suspecting that it was tampered with held an enquiry and committed the petitioner for trial in the Court of Session. It was held that it was a proper commitment. This shows that the mere filing of a forged document as an annexure to a petition is a sufficient production of the document in Court. I think that the case of *Munisamy Mudaliar* v. *Rajaratnam Pillai* (1) is easily distinguishable from and has no analogy to the present case. On the contrary cases relied on by the applicant support his contention as to the meaning of the word 'produced' as used in s. 195 (*c*), Criminal Procedure Code.

As pointed out above, the evident object, of the minor's mother, in getting the several persons including the applicant joined as non-applicants in the guardianship case and, of the guardian in submitting his own report, was to bring the several acts of misappropriation of the minor's property, to the notice of the District Court, with a view to its taking the necessary legal steps against them, or, such of them, as it thought fit. The first step, taken towards that end, was to secure the appointment of a fit and proper person to administer the estate who will act under the advice, orders and direction of the Court. The next step was to apprize the Court of what the guardian, according to his own lights, thought was the real situation of affairs, which he desired the Court to consider for itself, after getting the matter duly investigated through the Police Department. This was clearly a step preliminary to the further stage of taking legal steps and initiating prosecutions, and suits against the individual culprits, or persons liable to make good the loss to the minor's estate, as to whose guilt, conviction, or liability, the Court would have had to first satisfy itself, with the help of the report of the investigating officer. If what the guardian purported to allege, namely, that the document was produced and handed over by the applicant to him as evidence of an alleged authority given to him by the deceased Vithoba to administer the estate as one of the trustees, be true, and he in his term

(1) 72 Ind. Cas. 340; 45 M. 928; 16 L. W. 505; A. I. R. 1923 Mad. 136; 44 M. L. J. 774; 24 Cr. L. J. 340.

(2) 39 Ind. Cas. 490; 44 C. 1002; 25 C. L. J. 255; 21 C. W. N. 640; 18 Cr. L. J. 522.

(3) 91 Ind. Cas. 245; 49 B. 608; 27 Bom. L. R. 607; A. I. R. 1925 Bom. 433; 27 Cr. L. J. 69.

(4) 92 Ind. Cas. 427; 27 Bom. L. R. 1039; A. I. R. 1925 Bom. 467; 49 B. 799; 27 Cr. L. J. 251.

(5) 22 C. 1004; 11 Ind. Dec. (N. S.) 667.

'produced' it, in Court, with his report and petition, I venture to think that the process of production *in Court* became complete, and the document came into what is called *custodia legis* of the Court concerned. I have, therefore, no hesitation in holding it to be 'produced' in the course of a proceeding in the District Court, for purposes of s. 195 (*c*) of the Criminal Procedure Code.

For reasons already given, I am not prepared to hold that the District Court was only acting in an administrative or executive capacity, and not as a Court, when it received the petition and report to which the Will was annexed. I say the District Judge was then acting as a Court. This distinction is shown in *In re Gaddam Penchulu Reddi* (6), which commends itself to me. In *Beardsell & Co.* v. *Abdul Gunni Saheb* (7) the document was produced before an Official Receiver in an insolvency case, and it was then produced in Court by him. Even on such production it was held that the sanction of the Court and not of the Official Assignee was necessary. This furnishes a fitting analogy to the present case.

Lastly I may point that in view of the imperative requirements of the law as enacted in s. 195 (*c*) read in conjunction with s. 476 of the Criminal Procedure Code (as nearly amended), the absence of a complaint in writing by the District Court has ceased to be a mere irregularity covered by s. 537 of the said Code by reason of the deletion of cl. (*b*) of that section. That it is an illegality which vitiates the trial of the case by the Magistrate is clear from s. 530 (*p*) of the Code: *cf. Janki Prasad* v. *Emperor* (8)

I am, therefore, of opinion that without a complaint in writing by the District Court, Bhandara, the prosecution could not have been started. The proceedings are, therefore, quashed as illegal and void.

A. N. A. *Proceedings quashed.*

(6) 48 Ind. Cas. 890; 42 M. 96; 35 M. L. J. 686; 20 Cr. L. J. 90; (1918) M. W. N. 908; 9 L. W. 237.

(7) 14 Ind. Cas. 593; 37 M. 107; 11 M. L. T. 391; 13 Cr. L. J. 241; (1912) M. W. N. 536.

(8) 96 Ind. Cas. 213; A. I. R. 1926 All. 700; 27 Cr. L. J. 901.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 310 OF 1926.

December 1, 1926.

Present:—Mr. Justice Patkar and Mr. Justice Baker.

MALHARI LAXMAN—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Tribes Act (VI of 1924), ss. 16, 17, 18, 25 —Release on probation—Cancellation of order of release, validity of—Power of Settlement Officer to order return to settlement—Order of Local Government, whether necessary—Refusal to return—Procedure.

The Criminal Tribes Settlement Officer has power to cancel an order releasing on probation of good conduct a registered member of a criminal tribe. [p. 1051, col. 1.]

Where a Settlement Officer cancels such an order special sanction of the Local Government under s. 16 of the Criminal Tribes Act is not necessary for ordering such person to return to his settlement. [p. 1051, col. 2.]

A member of a criminal tribe whose release on probation has been cancelled and who has been ordered by the Settlement Officer to return to his settlement, is liable to be dealt with under s 25 of the Criminal Tribes Act if he is found in any part of British India beyond the area of his settlement. [*ibid.*]

Criminal application against an order passed by the Fourth Presidency Magistrate, Bombay.

Mr. *J. C. Tarapore*, for the Accused.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

JUDGMENT.

Patkar, J.—In this case the accused Malhari Laxman was registered at Deolali as a member of a criminal tribe, on March 25, 1920. By Government Resolution No. 5012, dated May 20, 1921, the Mang Garudis registered at Deolali were ordered to be placed in the Sholapur Settlement. It appears that the accused was in the Sholapur Settlement from July to October 12, 1921. On October 13, 1921, the accused was released on probation and allowed to go to Bombay and his roll-call was cancelled. There was no settlement at Bombay, at that time, but later on the Dharavi Settlement came into existence in 1925, and the accused got himself registered on December 3, 1925. The accused did not disclose to the Bombay Police that he was already settled at Sholapur and was in Bombay on probation. On December 22, 1925, the Criminal Tribes Settlement Officer ordered accused's probation to be cancelled for misconduct, and the accused was ordered to be returned to the Sholapur

Settlement. This order was communicated to the accused on June 24, 1926. On July 19, the accused was definitely informed that he had to return to Sholapur immediately, and as he refused to go to Sholapur he was arrested on July 21, 1926, at 5 P. M., and was placed before the Magistrate. The Acting Fourth Presidency Magistrate held that the accused's case fell under s. 25 (*a*) of the Act as he was found in Bombay after he was asked to go or restrict himself to Sholapur Settlement.

It is argued on behalf of the accused that the order, Ex. B, of December 22, 1925, is not a legal order, on the ground that the Criminal Tribes Settlement Officer had no power to cancel the order of probation; that s. 25 of the Criminal Tribes Act did not apply; and that the accused could only be ordered to return to the Settlement by the Local Government under s. 16 of the Act.

We cannot go into the merits of the order. Under r. 17 of the Rules framed by a Government Notification No. 1794-II dated July 22, 1924:—

"A registered member of a criminal tribe placed in a settlement under s. 16 of the Act and discharged from the operation of the Act shall, for such period from the date of such discharge (not being more than six years) as the Criminal Tribes Settlement Officer shall determine: (*a*) reside in such place as the Criminal Tribes Settlement Officer may from time to time determine..."

If the accused was released on probation from the Sholapur Settlement, the Settlement Officer had power to determine from time to time the place where the accused should reside, and if the Settlement Officer by his order, Ex. B, dated December 22, 1925, ordered him to be transferred to the Sholapur Settlement, his place of residence was, therefore, determined by Ex. B to be in the Sholapur Settlement, and if he was found outside Sholapur, that is in Bombay City, he was found in a part of British India beyond the area or place of residence to which his movements had been restricted or in which he had been settled within s. 25 (1) (*a*) of the Criminal Tribes Act VI of 1924. The accused was, therefore, liable to be arrested without warrant by any Police Officer and to be taken before the Magistrate who on proof of the facts is empowered to order him to be removed to such Settlement as the case may be. The Settlement Officer, in our opinion, had power under r. 17 (1) (*a*) to pass the order of December 22, 1925, and in the absence of any such rule we think that under s. 21 of the Bombay General Clauses Act I of 1904, where a power is given by any Act, then that power includes a power to amend, vary or rescind such order. The order, therefore, passed by the Criminal Tribes Settlement Officer is, in our opinion, legal, and, therefore, the accused was properly dealt with under s. 25 of the Criminal Tribes Act.

It is argued on behalf of the Crown that the breach of r. 17 (1) rendered the accused liable to be placed in a Settlement in accordance with the provisions of s. 16 of the Act. It is argued by the Pleader on behalf of the accused that the order of the Local Government was necessary before the accused could be placed in a Settlement under r. 17 (2). It is not, in my opinion, necessary to go into this question as I think the Settlement Officer had power under r. 17 (1) (*a*) to determine from time to time the place where the accused should reside. He had also power under s. 21 of the Bombay General Clauses Act, I of 1904, to vary or rescind his previous order. The accused being found beyond the area or place of residence in which he has been settled, he was liable to be arrested and dealt with under s. 25 of the Act.

We think, therefore, that the order passed by the lower Court is correct and the Rule will, therefore, be discharged.

Baker, J.—This is an application by the applicant Malhari Laxman for revision of an order made by the Acting Fourth Presidency Magistrate under s. 25 (*a*) of the Criminal Tribes Act, VI of 1924. The facts are that the applicant, who is a Mang Garudis by caste, was enrolled at Deolali as a member of a criminal tribe. By Government Notification No. 5012, dated May 20, 1921, published in the *Bombay Government Gazette* for 1921 at page 1312, he and other Nasik Mang Garudis were transferred to the Sholapur Settlement under s. 16 of the Act. On October 13, 1921, the Criminal Tribes Settlement Officer directed him to be sent to Bombay on probation under r. 17 (1) (*a*) of the Rules under the Criminal Tribes Act. That order was cancelled by the Criminal Tribes Settlement Officer, and the accused was directed to return to Sholapur. This order was served upon him, but he did not obey it, and he was, accordingly, brought before the

Magistrate, who under s. 25 of the Act directed him to be returned to Sholapur.

This order is attacked on several grounds. It is contended that the Criminal Tribes Settlement Officer had no power to cancel the order of probation; that s. 25 of the Act does not apply; and that the applicant can only be returned to the Settlement under orders of the Local Government under s. 16 of the Act. It is contended that under the rules no power is conferred on the Criminal Tribes Settlement Officer to cancel an order of probation. Release on probation is necessarily of a conditional character, and although there may be no express rule authorizing the cancellation of such an order, it would be strange to suppose that an order made subject to conditions could not be varied or rescinded, if the conditions were not complied with: *cf.* s. 21 of the Indian General Clauses Act, X of 1897 and the same section of the Bombay General Clauses Act, I of 1904. Further, under r. 17 (1) (*a*) of the Rules in force the Criminal Tribes Settlement Officer is empowered to prescribe the area in which a person so released should reside.

Under s. 25 (1) (*a*) when a registered member of a criminal tribe "is found in any part of British India, beyond the area or place of residence, if any, to which his movements have been restricted or in which he has been settled without the prescribed pass or in a place or at a time not permitted by the conditions of his pass," he "may be arrested without warrant by any Police-Officer, village-headman or village watchman, and may be taken before a Magistrate, who, on proof of the facts, shall order him to be removed to such area or place."

It is contended that this section did not give the Magistrate power to order the removal of the accused to the Sholapur Settlement, since it is only under sub-cl. (*b*) of s. 25, when a person has escaped from an industrial, agricultural or reformatory settlement, or school, that he may be taken back to the Settlement. I am unable to accept this reasoning. The present is not a case of escape, but the applicant was found living beyond the area prescribed for his residence, and the Magistrate, therefore, had power under this section to order him to be removed to the place in which he ought to have resided. It is unnecessary to go into the merits of the order of cancellation of the release on probation, which is not before us, and was not questioned on the merits.

It is again contended that r. 17 (2) which prescribes that a breach of the provisions of r. 17 (1) regarding residence in the area determined by the Criminal Tribes Settlement Officer renders the person discharged liable to be returned to a Settlement as defined in s. 16 of the Act, requires a special order of the Local Government. Section 16 of the Act says :—

"The Local Government may establish industrial, agricultural or reformatory settlements and may order to be placed in any such settlement any criminal tribe, or any part or member of a criminal tribe, in respect of which or of whom a notification has been issued under s. 11."

I am of opinion that the argument of the Government Pleader is correct, and the reference to s. 16 in r. 17 (2) is only descriptive as showing the meaning of the word settlement. The Act and the Rules thereunder must be construed in a reasonable manner. If the Criminal Tribes Settlement Officer has, under s. 18 of the Act and under the Rules, power to discharge a member of a criminal tribe on probation, it cannot be supposed that if he cancels the order of probation, special orders of the Local Government for his return to the settlement are necessary.

The order of the Criminal Tribes Settlemenl Officer is stated by the Magistrate in his judgment to be dated July 30, 1926. This, however, is a mistake. The order itself is dated December 22, 1925, as is mentioned in Ex. B, which is merely a statement by the Criminal Tribes Settlement Officer that such an order had been passed. The case will, therefore, be governed by the Rules which were in force in 1925, that is the Rules of July 22, 1924, in Government Resolution No. 1794-II published in the *Bombay Government Gazette* of August 7, 1924, and not by the rules published on January 23, 1926.

I am of opinion that the Magistrate's order is correct and the Rule should be, therefore, discharged.

A. N. A. *Rule discharged.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 654 OF 1925.
(TAKEN UP AS No. 36 OF 1925).
December 4, 1925
Present:—Mr. Justice Waller and Mr. Justice Madhavan Nair.
In re SUBBA CHUKLI—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439, cl. (4)—Revision—Finding of acquittal, whether can be converted to conviction—Acquittal, whether must be complete.

The High Court cannot in revision under s. 439 of the Criminal Procedure Code convert a finding of acquittal into one of conviction except on an appeal by the Local Government.

A finding of acquittal referred to in s. 439, Criminal Procedure Code, need not be a complete acquittal of the accused. It is sufficient if there has been an acquittal of a particular offence, although there has been a conviction for some other offence.

Emperor v. *Sheo Darshan Singh* (2), followed.

Kambain Bali Reddy v. *Emperor* (1), dissented from.

The Public Prosecutor, for the Crown.

Mr. *A. V. Narayanaswami Iyer*, for the Respondent.

ORDER.—The respondent in this case was charged with the murder of his sister-in-law. The evidence against him is this. He had quarrelled with his wife and was beating her. Her sister intervened, saying "You dog, why do you beat her in my sight?" At this respondent picked up a sickle, seized the sister by the hand and gave her two cuts on the neck which killed her on the spot. The Sessions Judge accepted the evidence, but, being of opinion that respondent had been gravely provoked, and did not intend to cause death, convicted him under the second part of s. 304, Indian Penal Code and sentenced him to undergo seven years' rigorous imprisonment.

Respondent has been called upon to show cause why he should not be convicted of murder and why the sentence passed on him should not be enhanced to one of death. We are satisfied that we have no power in revision to do what is tantamount to converting a finding of acquittal into one of conviction. The respondent has been acquitted by the Sessions Judge of murder and also under the first part of s. 304, Indian Penal Code, and we cannot convict him of either of these offences except on an appeal by the Local Government. No doubt, there is a ruling of the High Court to the contrary effect in *Kambain Bali Reddi* v. *Emperor* (1). It lays down that the finding of acquittal referred to in s. 439, Criminal Procedure Code, must be complete acquittal. With great respect, we think that the effect of that decision is to import into s. 439 something that is not there. The wording of the section is quite clear. It prohibits the converting of a finding of acquittal into one of conviction and says nothing about the acquittal being partial or complete. We think that the correct view has been enunciated in *Emperor* v. *Sheo Darshan Singh* (2). We must, therefore, decline to alter the finding or enhance the sentence. We desire to say as little as possible about the merits of the case in view of the action we propose to take. There has, we consider, been a miscarriage of justice. We set aside the conviction and order a re-trial on the charge of murder by the present Sessions Judge of Coimbatore.

V. N. V. *Conviction set aside.*

(1) 22 Ind. Cas. 756; 37 M. 119; 15 Cr. L. J. 180.

(2) 65 Ind. Cas. 878; 44 A. 332; 20 A. L. J. 190; 23 Cr. L. J. 202; A. I. R. 1922 All. 487.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 290 OF 1925.
December 1, 1926.
Present:—Mr. Justice Patkar and Mr. Justice Baker.
ABA APPA DHARWADE—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Motor Vehicles Act (VIII of 1914), s. 16—Motor car carrying mails, whether exempt from rules—Driving without permit—Offence—Motor car, whether 'public conveyance'—Bombay Public Conveyances Act (VI of 1863), s. 1.

A person driving a motor car for hire without a driver's permit as required by the rules is guilty of a breach of the rules and liable to be convicted under s. 16 of the Motor Vehicles Act. [p. 1054, col. 2.]

A car which carries passengers for hire is not exempt from the operation of the rules under the Motor Vehicles Act regulating the number of passengers merely because it carries mails also. [p. 1055, col. 1.]

Queen-Empress v. *Narayan* (1), distinguished.

Per *Patkar, J.*—The definition of a 'public conveyance' in s. 1 of Bombay Act VI of 1863 does not include a motor car [p. 1054, col. 1.]

Criminal application against an order of the Magistrate, First Class, at Ratnagiri.

Mr. *V. V. Bhadkamkar*, for the Accused.

Mr. *P. B. Shingne*, Acting Government Pleader, for the Crown.

JUDGMENT.

Patkar, J.—In this case the accused

Aba Appa Dharwade was convicted under s. 16 of the Motor Vehicles Act VIII of 1914 for committing a breach of r. 7 of the Rules applicable to the Ratnagiri District published in Government Resolution No. 6630, dated October 16, 1917, and also under r. 33 (*b*) published in Government Notification No. 2592, dated March, 16, 1920.

The facts found against the accused are, that, on August 30, 1925, the accused drove a motor car belonging to Messrs. Shirgaokar Brothers who had a contract for the transport of the mails between Ratnagiri and Kolhapur, as the regular driver of Messrs. Shirgaokar Brothers was ill on that day; that, according to the owner's permit, not more than eight passengers could be carried in the Ratnagiri District, and as a matter of fact the accused carried seventeen passengers including himself and the cleaner. The defence of the accused was that the same car was licensed to carry seventeen persons within Kolhapur limits and carried seventeen persons from Sakharpe to Kolhapur on that day, and that he did not know that in the Ratnagiri District the car was to carry eight persons only. It is argued on behalf of the accused that as this motor carried the mails, it was not plying for hire, and reliance was placed on *Queen-Empress* v. *Narayan* (1), in which it was held that a tonga, when used for carrying Her Majesty's mails, is not a public conveyance within the definition contained in s. 1 of Bombay Act VI of 1863. It does not appear from the facts of that case whether the tonga was licensed to carry passengers. Besides the definition of "public conveyance" would not include a motor car, and the present case will have to be decided by the provisions of the Motor Vehicles Act VIII of 1914 and the rules made thereunder.

Under s. 6 of the Act no owner or person in charge of a motor vehicle shall allow any person who is not so licensed, to drive it. Under s. 7 the holder of a license shall not allow it to be used by any other person. Section 8 says that the driver of a motor vehicle shall produce his license upon demand by any Police Officer.

Under the rules framed for the Ratnagiri District and published in the Government Notification No. 6630, dated October 16, 1917, at page 2390 of the *Bombay Government Gazette* for 1917, the owner is required to take a permit in form A of the Schedule under r. 3, and under r. 7, cl. (4), the public driver's permit has to be taken in accordance with form B of the Schedule. It is argued on behalf of the Crown that form B shows that the permit is restricted to a particular motor vehicle, as the permit is granted to a particular person to act as a driver of a motor vehicle bearing a certain number to be let or plied for hire and none other.

Having regard to the provisions of the Motor Vehicles Act and the rules thereunder, we think that the accused who had not a driver's license as required by r. 7 was guilty of a breach of the rule, and, therefore, liable to be punished under s. 16 of the Motor Vehicles Act. Besides the accused's master had taken out an owner's permit for this motor car for carrying eight passengers in the Ratnagiri District from the District Superintendent of Police. He admittedly carried more passengers, and he was, therefore, guilty of a breach of r. 34, cl. (*l*) of the Rules published in Government Notification No. 2592, dated March 16, 1920.

It is further argued that this motor car was not plying for hire within r. 1 of the Rules framed for the Ratnagiri District and reliance is placed on the case of *Emperor* v. *Nasarvanji Bomanji* (2). The facts of that case were quite different as the accused in that case had three private conveyances which he hired out to such persons as he wished. It was held in that case that the essential idea of a conveyance being used for the purpose of plying for hire is that it should be available at some public place or on some regular route for any one who wishes to hire it or travel by it. The motor car in this case was available on a regular route from Kolhapur to Ratnagiri, and, therefore, was clearly plying for hire. The contractor may use any car he likes for carrying mails, but if he wishes to carry in it at the same time passengers for hire he must have an owner's permit and also a driver holding a public driver's permit.

We think, therefore, that the accused was properly convicted and would, therefore, discharge the Rule.

Baker, J.—This is an application for revision of an order of the Sessions Judge of Ratnagiri dismissing the petitioner's application for revision of a conviction and sentence of Rs. 10 passed by the First Class

(1) Rat. Unrep. Cr. C. 521; Cr. Rg. on 46 of 1890.

(2) 72 Ind. Cas. 70; 25 Bom. L. R. 95; 24 Cr. L. J. 310; A. I. R. 1923 Bom. 248.

Magistrate of Ratnagiri under s. 16 of the Motor Vehicles Act VIII of 1914.

The facts are admitted. The accused was charged with driving a motor for hire without a driver's permit, and carrying passengers in the motor car in excess of the number entered on the owner's permit, under r. 7 published in Government Resolution No. 6630, dated October 16, 1917, and r. 34, cl. (*l*), of the Motor Rules for the Ratnagiri District, published in Government Notification No. 2592, J. D., dated March 16, 1920. The accused was driving without a driver's permit, and was carrying sixteen persons instead of eight which is the number permitted by the license of that particular car.

It is, however, contended that the car in question being used for the conveyance of His Majesty's mails is not subject to the rules in question. The learned Pleader for the applicant has been unable to show any authority for the proposition laid down by him that a car which carries mails, and also carries passengers is exempt from the operation of the ordinary rules. The case he has quoted, *viz.*, *Queen-Empress* v. *Narayan* (1), refers to a mail tonga which was not governed by the Rules of the Motor Vehicles Act. The owner of this car has actually taken out a license for it, and must abide by the conditions in the license.

There is no authority for holding that a car, because it carries mails, is exempt from the rules regarding the number of passengers in the permit. The regulations being made for the safety of passengers, it cannot be assumed, in the absence of clear evidence to the contrary, that the Legislature contemplated that passengers carried in motors carrying mails should be in a position of less safety than those travelling by an ordinary car. There is no law which makes an exception in the case of a car which carries mails as well as passengers, and I agree with the view taken by the learned Sessions Judge that the conviction is correct and there is no ground for interference. We dismiss the application.

A. N. A. *Application rejected.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 826 OF 1926.

January 18, 1927.

Present:—Mr. Justice Ashworth.

SUDAMAN AND OTHERS—APPLICANTS

versus

EMPEROR THROUGH KADIR—OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), ss. 342, 435—Examination of accused—Omission to examine at proper time—Mere irregularity—Reference to High Court on facts, when proper.

An accused should be questioned under s. 342, Criminal Procedure Code, just before he enters on to his defence and produces his witnesses, that is, after all the prosecution witnesses have been completely done with. But an omission to examine him at the proper time is a mere irregularity coming within the purview of s. 537 of the Code. [p. 1056, cols. 1 & 2.]

A case should not be reported to the High Court on the ground that the conviction is bad on the merits unless it is very clear that the conviction is wrong and that there can be no reasonable doubt of the matter. [p. 1056, col. 2.]

Criminal reference made by the Sessions Judge, Ghazipur, dated the 6th December, 1926.

Mr. *Ram Nama Prasad*, for the Applicant.

JUDGMENT.—This case has been reported by the Sessions Judge of Ghazipur under s. 38, Criminal Procedure Code, on the ground that the proceedings of the Magistrate in convicting the accused were illegal by reason of non-compliance with s. 342, Criminal Procedure Code. The Sessions Judge has further expressed the opinion that he was not justified in interfering with the Magistrate's finding of fact but that, if he had been so justified, there were reasons for holding that the conviction was improper. The illegality in procedure complained of is this. The case was a warrant case. The law permits the Court after the examination-in-chief of the prosecution witnesses or some of the prosecution witnesses to examine the accused. The examination of the accused at this stage is obviously, from the context, an examination intended to enble the Court to decide whether it should frame a charge (s. 253, Criminal Procedure Code). There may be cases where the Magistrate sees an easy answer to the prosecution evidence and desires that answer to be given by the accused before he discharges the accused. If the Magistrate frames a charge the accused is then given an opportunity of cross-examining the prosecution witnesses that have been heard. The remain-

ing witnesses, if any, for the prosecution are then examined and cross-examined and last of all the accused shall be called upon to enter upon his defence and produce the evidence (s. 256, Criminal Procedure Code). Section 342 adds something further to s. 256. It requires the Court to question the accused generally on the case just before the accused is called upon to enter upon his defence. In this case the Sessions Judge states that the Magistrate questioned the accused under s. 342 not just before he was called on for his defence but at the stage when the accused should have been questioned merely with a view to enable the Magistrate to decide if it was necessary to frame a charge. The Sessions Judge relying on a case reported in *Mitarjit Singh* v. *Emperor* (1) though the Sessions Judge has occasioned this Court considerable trouble by referring to the wrong case has held that this defective procedure was prejudicial to the accused because the prosecution witnesses were warned before their cross examination of the weak points in their prosecution evidence. He has also followed this ruling in holding that the defect was an illegality which could not be excused under s. 537, Criminal Procedure Code. On the other hand, the Magistrate has cited a decision reported in *In re Varisai Rowther*, (2) as taking a different view to that held by the Patna High Court. In this decision a Full Bench with one dissentient held that if the accused is examined as permitted by s. 253 he need not be examined again after the cross-examination and re-examination of the witnesses already heard, unless new witnesses are heard after the examination under s. 253. Even in this case it was held that any irregularity could be excused under s. 537, Criminal Procedure Code.

It appears to me that the intention of the law is that the accused should be examined just before he enters on to his defence and produces his witnesses, *i.e.*, after all the prosecution witnesses have been completely done with.

At the same time it seems to me clear that any irregularity in this direction will come within the purview of s. 537 and will only call for interference, if it has occasioned a failure of justice. In the present case there is no ground for holding that there was any failure of justice occasioned by reason of this irregularity.

I should, therefore, reject the reference of the Judge so far as it asks me to interfere on the ground of irregularity of proceedings by the Magistrate.

The Sessions Judge has stated that he is not justified in interfering with a conviction on the merits. This does not appear to me correct. Under s. 435 he may examine the record of an inferior Criminal Court for the purpose of satisfying himself as to the propriety of any finding and if satisfied that any finding is improper may report it to this Court. The power of this Court to interfere on the merits is undoubted, but this Court will not exercise its power so as virtually to give a right of appeal, and in reporting a case under s. 435 the Sessions Judge must bear in mind this limitation which exists in practice as regards the exercise of the High Court power of revision under s. 439, Criminal Procedure Code. A case should not be reported on the ground that a conviction is bad on the merits unless it is very clear that the conviction is wrong and that there can be no reasonable doubt of the matter.

In the present case, the Sessions Judge has impugned the conviction by the Magistrate on three grounds. The first ground is that prosecution witnesses had something in common with the complainant and had some reason to be on bad terms with the accused. Another ground is that the presence of the witnesses on the spot in time to see the accused causing damage to the crops (mischief being the offence charged) was not explained sufficiently. A third reason was that the evidence of a Commissioner who saw the crops a month after the event was insufficient for the purpose of holding that that damage had been caused by the accused.

I consider that the reasons given by the Sessions Judge for doubting the propriety of the conviction are not such as to justify interference by this Court in revision. To interfere on these grounds would, in my opinion be undistinguishable from allowing an appeal.

Accordingly I direct that the record be returned.

A. N. A. *Record returned.*

(1) 63 Ind. Cas. 825; 6 P. L. J. 644; 2 P. L. T. 520; (1922) Pat. 7; A. I. R. 1922 Pat. 158; 22 Cr. L. J. 697.

(2) 73 Ind. Cas. 163; 46 M. 449; 44 M. L. J. 567; 17 L. W. 722; 32 M. L. T. 385; (1923) M. W. N. 477; A. I. R. 1923 Mad. 609; 24 Cr. L. J. 547.

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Where a party to a suit admits that a balance which contains an acknowledgment that a certain sum of money as due from him was struck by him the burden is shifted on him to prove the circumstances in which he came to execute the balance and to establish the fact that it had been induced by fraud or without a comprehension of accounts or is the result of transactions which cannot be enforced in a Court of law. It is not necessary in such a case for the opposite party to prove each and every item of the account before the striking of the balance. L MUHAMMAD BAKHSH *v.* SHADI MUHAMMAD, 27 P. L. R. 768; 8 Lah. 123; A I. B. 1927 Lah. 272 60

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Admission of documents—*Duty to comply with O. XIII, r. 4.*

In admitting documents in evidence, a Court should strictly comply with the provisions of O. XIII, r. 4 of the Civil Procedure Code. **L** HARI SINGH *v* KARAM CHAND KANSHI RAM, 8 Lah. 1; A. I. R. 1927 Lah. 115 **721**

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Agra Pre-emption Act (XI of 1922), s. 12 (1)—*—Pre-emption—Plot becoming 'petty proprietary interest'—Right of pre-emption, whether lost—*Wajib-ul-arz—*Custom of pre-emption, whether extends to petty proprietary interests.*

A co-sharer in a *patti* is entitled to enforce his right of pre-emption regarding a plot forming part of the *patti* so long as it has not been execluded from the *patti* even though it has become a 'petty proprietary interest'.

If there is a record of custom in a *wajib-ul-arz* providing for pre-emption, whatever the extent of the custom may be and in whatever way it may be expressed there is a right of pre-emption under the Agra Pre-emption Act which can be exercised in respect of a petty proprietary interest. **A** YASRAB BANO *v.* ZAHUR HUSAIN, A. I. R. 1927 All. 320; 25 A. L. J. 487 **704**

Agra Tenancy Act (II of 1901), ss. 22—*Succession to tenancy—'Male lineal descendant, whether includes illegitimate son of* jat—Jats, *whether* Sudras.

An illegitimate son of one belonging to a *Sudra* caste by a kept woman is entitled to succeed to the holding of his father as a 'male lineal descendant' within the meaning of s. 22 of the Agra Tenancy Act. **A** MEWA RAM *v.* LAL SAHAI, A. I. R. 1927 All 410 **650**

——— **ss. 79, 196**—*Occupancy tenant—Forcible dispossession by stranger—Ejectment suit—Jurisdiction of Civil and Revenue Courts—Appeal—Objection to jurisdiction, whether can be taken—Procedure.*

Agra Tenancy Act—1901—concld.

Defendant took forcible possession of a certain occupancy holding without the consent of the occupancy tenant and the latter instituted a suit in the Revenue Court to eject the defendant on the allegation that he was his sub-tenant. The trial Court decreed the suit but on appeal the District Judge came to the conclusion that the defendant was not a sub-tenant but a trespasser and dismissed the suit. On second appeal:

Held, (1) that s. 79 of the Agra Tenancy Act was not applicable to the case but that it was open to the plaintiff to sue for the ejectment of the trespasser in the Civil Court;

(2) that having regard, however, to the provisions of s. 196 of the Agra Tenancy Act no objection with regard to the jurisdiction of the trial Court could be entertained in appeal and that the decree of the trial Court must, therefore, be restored. **A** GANGA *v.* JAI KUMAR **352**

——— **s. 164**—*Suit for profits—Failure to collect rents—Negligence of* Lambardar—*Presumption—Suit relating to several years—Accounts how to be taken.*

In a suit for profits instituted against a *Lambardar* the mere fact that a large proportion of the rents remains uncollected does not by itself necessarily lead to the inference that the *Lambardar* was negligent.

Where a suit is brought to recover profits for several years the accounts for all the years in suit must be gone into in order to decide whether or not any amount is due to the plaintiff. **A** BADRI PRASAD *v.* GIRDHAR, L. R. 8 A. 92 Rev.; A. I. R. 1927 All. 405 **743**

——— **s. 196.** *See* AGRA TENANCY ACT, 1901, ss. 79, 196 **352**

——— **s. 199 (1) (a)**—*Ejectment suit—Question of title—Order of Revenue Court to file civil suit—Omission to implead all plaintiffs as parties to civil suit, effect of.*

The mere fact of the institution of a declaratory suit in the Civil Court is not a compliance with the direction of the Revenue Court under s. 199 (1) (*a*) of the Agra Tenancy Act, unless all the plaintiffs to the ejectment suit are made defendants in the civil suit. **A** DHIRAJI *v.* CHANDRA KALI, L. R. 8 A. 108 Rev.; A. I. R. 1927 All. 398 **520**

——— **s. 273.** *See* AGRA TENANCY ACT, 1926, s. 44 **471**

Agra Tenancy Act (III of 1926), ss. 44, 273—*Ejectment suit—Plea of tenancy—Procedure—Jurisdiction of Civil and Revenue Courts.*

The only possible way to so interpret the provisions of s. 44 of the Agra Tenancy Act as not to be inconsistent with the provisions of s. 273 of the Act is to hold that all that is intended by s. 44 of the Act is to give an option to a land-holder to file a suit for ejectment against a trespasser either in the Civil or in the Revenue Court. Where such a suit is filed in the Civil Court and the defendant sets up a plea of tenancy the Court must follow the procedure laid down by s. 273 of the Act.

Defendant was a tenant of the plaintiff and was ejected by him through the Revenue Court. Plaintiff subsequently instituted a suit in the Civil Court for ejectment of the defendant on the ground that notwithstanding his ejectment by the Revenue Court the defendant had forcibly taken possession of the land in dispute. The plea of the defendant was that

Agra Tenancy Act—1926 -concld.

after his ejectment by the Revenue Court he was again re-admitted as a tenant of the holding in dispute by the plaintiff and was not in possession as a trespasser:

Held, that the suit was maintainable in the Civil Court but that in view of the plea of the defendant the procedure laid down in s. 273 of the Agra Tenancy Act must be followed. **A** DEBI SAHAI *v.* DAULAT, L. R. 8 A. 104 Rev ; A. I. R. 1927 All. 346 **471**

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——— *Bengal Chamber of Commerce Rules, rr. 13, 14—Reference to Chamber—Arbitrator's duty to afford opportunity to adduce evidence of market rate.*

Although there may be occasions in which it is incumbent on the Bengal Chamber of Commerce to give parties suitable opportunities of adducing evidence, yet each case has to be judged on the merits of its particular facts. *Prima facie*, it is not necessary for the arbitrators to hear oral evidence about market rates which are as a rule well within their own knowledge and within the special experience for which arbitrators are selected. **C** BHICAN CHAND CHARORIA *v.* G. AND M. FOGT, 44 C. L. J. 422; A. I. R. 1927 Cal. 227 **299**

——— *Court, inherent power of, to revoke arbitration.*

A Court has inherent power to revoke the appointment of an arbitrator before the making of an award in a proper case. But this power should always be exercised with the greatest caution. **L** AMIN CHAND

Arbitration—concld.

KANSHI RAM *v.* KANSHI RAM-MITTAR SAIN, A. I. R. 1927 Lah. 187 **46**

——— Order setting aside award—Revision. *See* C. P. C., 1908, s. 115 **429**

——— *Reference without intervention of Court—Remission of award to Umpire, legality of—Umpire deciding case on notes of arbitrators without notice to parties—Legal misconduct.*

Where an award is made by an Umpire on a reference without the intervention of the Court, the Court has no power to remit the award to the Umpire.

An Umpire is guilty of legal misconduct where he holds no enquiry and decides the case on the notes of the arbitrators without giving notice to the parties to adduce evidence or state their case on the evidence produced. **L** KARM CHAND *v.* JASODHAN **896**

Arbitration Act (IX of 1899), ss. 8, 9—*Appointment of arbitrators—Vacancy, mode of filling—Award on time-barred claim, validity of.*

The question whether in filling a vacancy s. 8 or s. 9 of the Arbitration Act applies depends not upon whether one arbitrator ultimately acts or two but whether the submission provides for the appointment of one arbitrator by concurrence of both parties or of two arbitrators one by each party independently of the other.

When a submission provides that the reference shall be to two arbitrators and an arbitrator appointed by one of the parties is duly declared to be the sole arbitrator and he thereafter refuses to act, the vacancy is to be supplied by the parties under the provision of s. 9 of the Arbitration Act.

A claim which at the time of reference to arbitration is time-barred under the provisions of the Limitation Act can validly form the subject-matter of a reference. **S** S. L. BALMOKAND *v.* UTTAMCHAND BRIJLAL **890**

Arms Act (XI of 1878), s. 19 (f)—*Discovery of arms on information from accused—Conviction, legality of.*

Where an article, the possession of which is forbidden by the Arms Act, has been discovered by reason of information given by an accused person, the conviction based upon that evidence is legally sound. **L** NAURANG SINGH *v.* EMPEROR, 28 Cr. L. J. 250; 9 Lah. L. J. 211 **122**

——— **s. 19 (f)**—*Recovery of cartridges from house occupied by accused but previously occupied by him and his brother—Offence.*

During the investigation of a certain theft case the house of the accused was searched by the Police and as a result of this investigation two cartidges of a rifle were discovered from an earthen pitcher placed in his house. The accused admitted the recovery of cartridges but stated that it was not within his knowledge and that his brother who was an ex-military employee might have placed them in the house which was jointly occupied by the accused and his brother. The Magistrate believed the story of the accused to be true:

Held, that no offence under s. 19 (*f*). Arms Act, had been established. **L** MANIGIR *v.* EMPEROR, 21 Cr. L. J. 339 **819**

——— **ss. 19 (f), 22.** *See* PENAL CODE, 1860, s. 120B **113**

Award—Dissenting arbitrators—Intentional absence—Validity of award. *See* LIMITATION ACT, 1908, SCH. I ART. 158 **634**

Award—concld.

——— Suit to set aside decree based on award—Limitation. *See* LIMITATION ACT, 1908, SCH I, ART. 91 596

Banker and customer. *See* CONTRACT ACT, 1872, ss. 7, 8, 9 1023

——— *Money deposited with Bank to be lent out on security—Depositor, whether secured creditor.*

J. having some money to spare for investing in loans handed over the money to a Bank and received a note-book in which it was stated that the money was for safe custody. As a matter of agreement and practice, however, *J.* used to secure borrowers who would agree to pledge ornaments by way of security. The borrower was taken by *J.* to the manager of the Bank, the ornaments were kept by way of security, and money was advanced on interest out of which a certain share was paid to *J.* No money of *J.* used to be lent out by the Bank without the security of ornaments. When a man came to redeem his ornaments *J.* used to go to the Bank with him and the ornaments were released on payment:

Held, that *J.* occupied the position of a secured creditor of the Bank. A *In the matter of*. ALLAHABAD UNION BANK, LTD., 25 A. L. J. 329; 49 A. 376 62

Benami—*Benami* assignment of decree. *See* C. P. C., 1908, O. XXI, R. 16 545

Benami transaction. *See* CONTRACT ACT, 1872, s 73 422

——— *Practice of* benami *among Burmans—Gift, presumption of* benami *character of—Proof of* benami *character.*

Among Burmans the practice of *benami* is not indigenous and though it has to some considerable extent taken root, it is yet not so common as among the Natives of India proper. The device is very seldom employed except as a means of defeating or delaying the immediately impending claims of some creditor or other person.

In fact more proof is needed of the *benami* nature of a transaction where parties to it are Burmans than is necessary where the parties concerned are Hindus or Muhammadans. R MA GYI *v.* MA ME, 4 R. 522; A. I. R. 1927 Rang. 102 250

Benamidar—*Pro note, suit on, by* benamidar, *whether maintainable.*

Per *Ramesam, J.*—A person whose name does not appear in a promissory note as payee cannot sue on it alleging that the payee was a *benamidar* for himself. M SWAMI NATHA ODAYAR *v.* SUBBARAMA IYER, 51 M. L. J. 856; A. I. R. 1927 Mad. 219; 25 L. W. 411 10

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 4—*Gradual and sudden accretion, rules applicable to.*

Under the terms of the Bengal Alluvion and Diluvion Regulation, 1825, land which gradually accedes to another estate becomes annexed to it. Where, however, a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment and adds it to another estate without destroying its identity, the land on being clearly recognized becomes the property of the original owner and the same rule applies where land is taken away by a river gradually but is restored suddenly. A SRI THAKURJI *v.* JAIKAL KUNWAR, 25 A. L. J. 222; A. I. R. 1927 All. 243; 49 A. 328 9

Bengal Cess Act. *See* CESS ACT.

Bengal Chamber of Commerce Rules, rr. 13, 14. *See* ARBITRATION 299

Bengal Land Redemption and Foreclosure Regulation (XVII of 1806), ss. 7, 8—*Mortgage—Foreclosure proceedings—Presentation by special Mukhtar—Validity of presentation—Notice of foreclosure—Absence of reference to s. 7—Error as to amount—Proceedings, validity of—Power-of-attorney—Construction—General clause, effect of.*

The presentation of an application under s. 8 of the Bengal Land Redemption and Foreclosure Regulation XVII of 1806 by a special *mukhtar* on the strength of a special power-of-attorney is not defective inasmuch as the word 'himself' in the said section is merely another way of putting 'in person' and by virtue of the provisions of O. III, r. 3 of the Code of Civil Procedure, acts which can be done in person can be done by an attorney.

In a notice for foreclosure proceedings under Bengal Land Redemption and Foreclosure Regulation XVII of 1806, the mortgagee has the option either of giving the actual contents of s. 7 and specifying the three methods in which foreclosure may be avoided, or of quoting the actual section and referring the mortgagor to its contents. A notice is not invalid merely because words 's. 7' do not occur in it provided the contents of the section are embodied in it.

An error in the amount shown in such notice does not render the notice invalid provided the claim is made quite clear, it being for the mortgagor to deposit or tender the amount which he believes to be due on the mortgage.

A power-of-attorney authorising a person to conduct foreclosure proceedings which states that all the steps taken by him shall be accepted as done by the executant, empowers the holder of the power to present the application for foreclosure even though such power is not expressly conferred. L GOBIND MAL *v.* RAM CHAND, 9 Lah. L. J. 14; 28 P. L. R. 153; A I. R. 1927 Lah 141 329

Bengal Public Demands Recovery Act (III B. C. of 1913), ss. 7, 23, 37—*Sale—Omission to fill up certificate, to serve notice of proclamation of sale, etc., effect of—Signing of notice with stamped signature—Death of debtor after attachment and before sale—Suit to set aside sale on ground of fraud and irregularities—Fraud not proved—Failure of entire suit—Limitation Act (IX of 1908), Sch. I, Art. 12—Time when begins to run—'Final confirmation.'*

The omission to fill up the blanks in the certificate portion of form No. 1 of the Appendix to the Bengal Public Demands Recovery Act is not a material omission invalidating the certificate where the tabular statement in the form has been duly filled up.

A notice under s. 7 of the Bengal Public Demands Recovery Act may be signed by the Certificate Officer with a lithographic signature.

Failure to give notice to the certificate debtor before drawing up the proclamation of sale is a mere irregularity.

It is not open to the debtor or his legal representative to take exception to the validity of a sale on the ground that the statement that the holding should be sold with power to annul all encumbrances, was wanting in the sale proclamation.

Under the tenancy law, the purchaser of an occupancy holding sold for arrears of rent takes it with certain defined rights and the omission to mention such rights cannot invalidate the sale.

Omission to publish a sale proclamation at the local *Thana* as required by the rules is not fatal to the sale.

In view of the provisions of s. 23 of the Bengal Public Demands Recovery Act a sale cannot be set aside by a Certificate Officer without proof of material irregularity and consequent substantial injury, and it cannot be set aside without such proof even in a separate suit.

The death of a debtor after attachment of his property and before sale does not necessarily invalidate the sale; such a sale holds good until appropriate steps are taken to set it aside.

A suit by a debtor to set aside a sale under the Bengal Public Demands Recovery Act on the ground of fraud and material irregularity in the conduct of the sale must fail where the debtor fails to prove fraud inasmuch as in the absence of fraud the questions can only be determined by the Certificate Officer.

Limitation for a suit to set aside a sale under the Bengal Public Demands Recovery Act runs under Art. 12 of Sch. I of the Limitation Act only from the date of the final confirmation of the sale, and so long as the sale is under the consideration of the Revenue Authorities it cannot be said to have been confirmed and become final. C HARA PRASAD GAIN *v.* GOPAL CHANDRA GAIN, 45 C. L. J. 73; 31 C. W. N. 299; A. I. R. 1927 Cal. 315 **997**

——— **ss. 23, 37.** *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, 1913, ss. 7, 23, 37 **997**

Bengal Tenancy Act (VIII of 1885), s. 5—*Construction of document—Document purporting to create tenancy containing clauses more appropriate to* raiyati *interest—Interest created, nature of—Transfer of Property Act (IV of 1882), ss. 6, 41—Non-permanent tenure created before Bengal Tenancy Act but after Transfer of Property Act came into force, transferability of—Acquiescence and estoppel, doctrine of—Transfer of tenancy—Transferor's name allowed to continue in landlord's* sherista—*Acquiescence.*

Where a document purports to create a tenancy in respect of certain land, there is a presumption that the interest created is that of a tenure-holder even though the document contains some clauses which are more consistent with the creation of a *raiyati* interest than with the creation of a tenure and that presumption continues until it is rebutted by evidence to the contrary.

A tenancy created after the passing of the Transfer of Property Act and before the Bengal Tenancy Act came into force is transferable even if it be a non-permanent tenancy by virtue of the provisions of s. 6 of the Transfer of Property Act.

The principle laid down in s. 41, Transfer of Property Act, relates to a case where one stands by and acquiesces in something that is being done by another and if in consequence of such acquiescence some injury is caused to some third party, it is not open to the person so acquiescing to say that what was done by that other person was not authorised by him.

The mere fact that a transferee from a tenant refrains from instituting a suit for a declaration to get his name recorded in the landlord's *sherista* cannot be taken as an acquiescence on his part or allowing the transferor to represent him in the landlord's *sherista.* C BHAGABAN DAS *v* BISWESWAR NATH SHAHA, 44 C. L. J. 434; A. I. R. 1927 Cal. 220 **302**

——— **s. 5**—*Tenure-holder or* raiyat *- Holding of over one hundred* bighas—*Presumption, rebuttal of—*

"Cultivator," "raiyat," use of, effect of—Accretions—Determination of fair rent—Kabuliyat, expiry of, effect of.

The question whether a person is a *raiyat* or a tenure-holder ultimately depends on questions of fact and in order to arrive at a decision the Court must look to the attendant circumstances also.

In order to determine whether the presumption raised under s. 5 of the Bengal Tenancy Act has been rebutted, the true test is to see for what purpose the tenancy was created, and where the lease is equivocal the attendant circumstances must be looked to in order to judge of the purpose for which the tenancy was created. Where the original lease is in a printed form no importance can be attached to the use in it of the word "cultivator," nor does the use of the word "*raiyat*" in a rent receipt carry the matter any further.

Where a person has the status of a tenure-holder with regard to a parent tenure, he will have the same status with regard to any accretions to the tenure.

Where a tenant holds over after the expiry of the term of a *kabuliyat*, it is open to the Settlement Officer to determine a fair rent after determining the true status of the tenant, irrespective of the stipulations contained in the time-expired *kabuliyat.* C KARUNA CHANDRA DAS *v.* SECRETARY OF STATE FOR INDIA, A. I. R. 1927 Cal. 413 **465**

——— **ss. 23, 103, 105, 106, 178**—*Record of Rights—Presumption as to correctness—Rebuttal—Burden of proof*

When the Record of Rights has once been finally published it cannot be attacked on the ground that certain procedure adopted by the Revenue Authorities in arriving at the final conclusion does not support the entry as finally published. If the party aggrieved by that entry takes objection under the provisions of s. 105 or 106 of the Bengal Tenancy Act, the objection might be considered by the Revenue Officer. But when a Record of Rights is challenged in a Civil Court the party challenging this record must adduce in evidence, in order to rebut the presumption, matters other than what happened during the proceedings prior to the final publication before the Revenue Officer. It is well-known that the Settlement Authorities may come to certain conclusions at one time of the proceeding which they may modify during the course of the preparation of the record. But the record which is finally published is that with which the Civil Court is concerned. C LAKHI NATH BERA *v* NABADWIP CHANDRA NANDI, 31 C. W. N. 192; A. I. R. 1927 Cal. 258 **7**

——— **ss. 27, 30 (b), 35**—*Enhancement of rent—Tests of fairness of rent—Rise in price of staple food crops—Neglect of* gilandazi.

Under s. 35 of the Bengal Tenancy Act when a rise in the price of the staple food crops has been established, there ought, in the absence of special circumstances, to be a corresponding increase in the rent. A comparison of the incidence of the rent with the average outturn of the land is not the only way of determining fairness of rent.

The fact that a landlord has neglected *gilandazi* is not, in itself, a ground for refusing enhancement of cash rent. P at SAYEDATULNISSA *v.* AMRIT MAHTO, 8 Pat. L. T. 117; A. I. R. 1927 Pat. 144 **754**

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——— **ss. 30 (b), 35.** *See* BENGAL TENANCY ACT, 1885, ss. 27 ETC. **754**

——— **s. 40**—*Commutation proceedings—Procedure—Non-appearance of guardian of minor—Absence of prejudice—Validity of proceedings—Civil Procedure Code (Act V of 1908), O. XXXII, r. 3, whether applies to commutation proceedings.*

Proceedings under s. 40 of the Bengal Tenancy Act are miscellaneous proceedings by a Revenue Officer in regard to which there are no provisions as to procedure either in the Act itself or in the rules framed under the Act. The only matter for a Court to consider, where the legality of proceedings under the said section is impugned on the ground that the guardian of a minor who was a party to the proceedings had not appeared, is whether the minor has been prejudiced by the non-appearance of the guardian, and in the absence of such prejudice, a Civil Court cannot set aside the proceedings.

The provisions of O. XXXII, r. 3 of the Code of Civil Procedure do not apply to such proceedings. **C** HARI CHARAN SIL *v.* BIPIN BEHARI MUKHOPADHYA, A. I. R. 1927 Cal. 374 **146**

——— **s. 87.** *See* CR. P. C., 1898, s. 145 (4) **117**

——— **ss. 102, 106**, *scope of*—Res judicata—*Suit for correction of entry—Subsequent suit for possession in Civil Court.*

A decision in a suit under s. 106, Bengal Tenancy Act, for correction of the entry of names of owners of a *taluq* does not operate as *res judicata* in a subsequent civil suit for possession between the same parties. **C** ASRAFANNESSA KHATUN *v* HEM CHANDRA CHAUDHURY, 44 C. L. J. 467; A. I. R. 1927 Cal. 216; 54 C. 114 **293**

——— **s. 103**—*Conflicting entries in two Records of Rights—Presumption of correctness, whether rebutted—Orissa Tenancy Act (II of 1913), s. 117.*

The absence of a specific provision in the Bengal Tenancy Act corresponding to s. 117 of the Orissa Tenancy Act does not in any way affect the provisions contained in s. 103 of the Bengal Tenancy Act.

When there are two Records of Rights prepared at different times, entries in both of them will be presumed to be correct entries of facts existing at the time the entries were made. There is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. **Pat** ABHIRAM BEDANTA *v.* CHINTAMANI BEDANTA, 8 Pat. L. T. 121; A. I. R. 1927 Pat. 164; 6 Pat. 342 **701**

——— **s. 103B.** *See* GRANT **453**

——— **s. 149**—*Civil Procedure Code (Act V of 1908), s. 11—Landlord and tenant—Rent claimed by third party—Deposit in Court—Suit claiming rent—Title, question of, decision of*—Res judicata.

Sub-s. (3) of s. 149 of the Bengal Tenancy Act contemplates a suit which culminates not in a decree but an order of a limited kind, an order restraining payment out of the money deposited under sub-s. (1) of the section. It is, therefore, an order not finally decisive of the substantive rights of the parties but providing a machinery for the purpose of carrying out the scheme whereby it is sought to relieve a tenant from harassment.

Where in such a suit the Court incidentally goes into the question of title as regards the land the rent of which is in dispute, any finding of this kind

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will not operate as *res judicata* on the question of title between the parties in any subsequent litigation. **C** KHETRA MOHAN SAHA SARDAR *v.* AKHIL CHANDRA DAS BHOWMIK; A. I. R. 1927 Cal. 431 **427**

——— **s. 182**—*Homestead land—Occupation by person other than* raiyat—*Section 182, whether applicable—Permanent tenancy, proof of.*

Section 182 of the Bengal Tenancy Act is not applicable where the person in possession of homestead land is not a *raiyat* of the village.

A permanent tenancy cannot be inferred from the mere fact that a person was in possession of a house in the homestead land of a village for about ten or eleven years paying the same rent, and was residing in the village for a long time. **Pat** MADHU SUDAN SINGH *v.* JEOLAL, A. I. R. 1926 Pat. 606 **584**

Bombay Bhagdari and Narwadari Tenures Act (V of 1862), s. 3. *See* EVIDENCE ACT, 1872 s. 116 **1004**

Bombay District Municipal Act (III of 1901), ss. 58, 178—*Duty of Municipality to provide for public education—Governor-in-Council, power of, to frame rules—Order directing Commissioner to prescribe date within which duty must be performed—Order of Commissioner directing payment of money to officer appointed to carry out duty, legality of.*

It is not essential under sub-s. (3) of s. 178 of the Bombay District Municipal Act that an order directing that a certain sum of money out of Municipal funds be paid to an officer who has been appointed to carry out the duties of the Municipality in a certain matter should be addressed to a Municipal servant. It is enough if the order is addressed to an officer who has custody of the Municipal funds on behalf of the Municipality.

Under s. 58 of the Bombay District Municipal Act power is conferred upon the Governor in Council to prescribe the extent of the independent authority of any Municipality in respect of public education and the necessary implication is that the observance of that prescription is an obligation on the Municipality under the Act, even though it may not have been expressly so laid down by the Act.

Under s. 178 of the Act there is an obligation on a Municipality to observe the rules framed by the Governor-in-Council under s. 58 of the Act for the purpose of prescribing the extent of the independent authority of the Municipality in respect of public education.

Where a Municipality has made a default in performing any duty imposed on it by or under the Bombay District Municipal Act, the Governor in Council has power under s. 178 of the Act, to direct the Commissioner to fix a period for the performance of such duty and if the Municipality fails to perform the duty within that period, an order can be made by the Commissioner directing any officer who has custody of Municipal funds on behalf of the Municipality to place such funds as may be necessary at the disposal of such officer as may be appointed in order to perform the duty left unperformed by the Municipality. **B** MANIBHAI GOVINDBHAI PATEL *v.* NADIAD CITY MUNICIPALITY, 28 Bom. L. R. 1465; A. I. R. 1927 Bom. 55; 51 B. 105 **98**

Bombay High Court Appellate Side Rules, rr. 2, 40. *See* C. P. C., 1908, ss. 148 ETC. **147**

Bombay High Court, Original Side Rules, Nos. 242, 243—*Judgment of Chamber Judge, whether should state reasons—Letter to Prothonotary containing order and directing communication to parties, whether valid judgment—Adjournment, effect of—Civil Procedure Code (Act V of 1908), O. XXII, r. 2—Judgment of Original Side, requisites of.*

It is not necessary on the Original Side of the High Court for a Judge in Chambers to give his reasons for making any particular order on a summons or petition, and although the fact that a Judge may adjourn a petition or summons into Court would generally mean that the matter is of greater complexity or importance, and that, accordingly, as a matter of convenience, the learned Judge should give his reasons for his final decision, yet a mere adjournment into Court does not necessarily involve that.

The provision in the Civil Procedure Code that a judgment is to state the reasons and is to be signed by the Judge does not apply to the High Court on its Original Side.

Rules 242 and 243 of the Bombay High Court Rules do not necessarily imply that a judgment of a Judge of the Original Side should contain the reasons for his decision.

A letter addressed by a Judge of the Original Side of a High Court to the Prothonotary of the High Court specifying what his order on a particular petition is and containing directions to treat the contents as his order to be communicated to the parties is a valid judgment. **B** MATHERAN STEAM LIGHT TRAMWAY *v.* B. N. LANG, 29 Bom. L. R. 126; A. I. R. 1927 Bom. 113; 51 B 267 **941**

Bombay Public Conveyances Act VI of 1863, s. 1. *See* MOTOR VEHICLES ACT, 1914, s. 16 **1053**

Buddhist Law—*Partition—Grandchildren's right to claim partition.*

Out-of-time grandchildren by an *Orasa* child cannot claim partition of the joint property of their grandparents on grandfather's re-marriage after their grandmother's death. **R** MA AH PU *v.* U PO LAI, 5 Bur. L. J. 203; A. I. R. 1927 Rang. 111 **323**

Burial ground—*Dedication—Presumption against reservation in favour of grantor.*

It is reasonable to presume that where land is given for a cemetery there is no reservation by the grantor. **A** KHUDA BAX *v.* RAGHUNANDAN LAL, A. I. R. 1927 All. 381 **623**

Burmese Buddhist Law—*Adoption—Right of adopted son, whether lost by mere living apart.*

A *kittima* adopted son does not lose his right to inherit merely because he was living apart. The real question to be decided in such a case is whether the filial relation has been maintained or severed. **R** MAUNG SAN U *v.* MA PYAW GYI, 6 Bur. L. J. 10 **1007**

C. I. F. Contract. *See* CONTRACT ACT, 1872, s. 107 **567**

Calcutta Rent Act (III of 1920), s. 15—*Decision fixing standard rent—Judgment* in rem—*Subsequent tenants, whether can re-open—Certificate under s. 15, granting of.*

A decision fixing the standard rent attaches to the premises and not to the person or parties to the suit; it is a judgment *in rem* and not *in personam*. An order passed by a Rent Controller cannot, therefore, be re-opened on the application of a subsequent tenant.

Where a Rent Controller refuses to re-open the question of standard rent on the ground that it has once been decided, he is not bound to issue a certificate to the applicant under s. 15 of the Calcutta Rent Act. **C** AHAMUDDIN *v.* BANKU BEHARY DUTT, 31 C. W. N. 308; A. I. R. 1927 Cal. 305 **781**

Carriers Act (III of 1865), ss. 9, 10—*Notice under s. 10—Service on local agent, validity of—Through booking, legal incidents of—Liability of carrier to whom goods are delivered.*

Where goods are addressed to a place beyond the scope of a carrier's business so that from one point he must forward them by another carrier, the carrier is responsible for the goods for the whole journey unless he limits his liability by agreement.

[The nature of a through booking contract discussed.]

In view of the absence of any provision in the Carriers Act corresponding to s. 140 of the Railways Act, a notice under s. 10 of the Carriers Act may be served on a local representative of the carrier. **C** I. G. NAVIGATION & RY. CO. LTD. *v.* GIRDHARILAL GOBARDHONE DAS, 31 C. W. N. 358; A. I. R. 1927 Cal. 394; 54 C. 430 **903**

Cattle Trespass Act (I of 1871), s. 20—*Criminal Procedure Code (Act V of 1898), ss. 4 (o), 29—Offence under s. 20, Cattle Trespass Act—Jurisdiction of Magistrate—Special authorisation, whether necessary—Criminal trial—Joinder of charges under s. 20, Cattle Trespass Act, and s. 504, Penal Code, legality of—'Same transaction.'*

The inclusion in s. 4 (*o*) of the Criminal Procedure Code in the definition of an offence of an "act in respect of which a complaint may be made under s. 20 of the Cattle Trespass Act" renders it unnecessary for a Magistrate who is generally empowered under the Criminal Procedure Code to receive complaints of offences, to be specially authorised by the District Magistrate to receive complaints under that section of the Cattle Trespass Act.

A joinder of charges for offences under s. 20 of the Cattle Trespass Act and s. 504 of the Penal Code is not illegal, where the acts constituting the offences formed part of the same transaction. **M** DEENADAYULU NAIDU *v.* RATNA PADAYACHI, 52 M. L. J. 251; 25 L. W. 282; (1927) M. W. N. 167; 28 Cr. L. J. 301; A. I. R. 1927 Mad. 396 **381**

C. P. Land Revenue Act (II of 1917), s. 80. *See* LANDLORD AND TENANT **438**

——— **s. 107**—*Lease under s. 107—Contract in name of one person—Consideration contributed by others—Rights and liabilities of latter against former.*

When any person takes in his own name a contract, with money belonging to himself and others, the rights of those others against him are not affected by his omission to mention their names, whatever their rights and liabilities in respect of the other party to the contract may be.

This principle is not inapplicable to leases granted compulsorily under the provisions of s. 107 of the C. P. Land Revenue Act. **N** SUKHDEO *v.* UJAL **772**

——— **s. 156**—*Suit for village profits—Set-off claimed by co-sharer—Agreement, whether necessary—Permission of Court—*Sadar Lambardar, *remuneration of.*

Under s. 156 of the C. P. Land Revenue Act no agreement is necessary in order to entitle a co-sharer to claim a set-off in a suit for village profits although it cannot be claimed without the permission of the trial Court.

C. P. Land Revenue Act—concld.

A *Sadar Lambardar* is not entitled to any remuneration. N MANMOHANSINGH *v.* BISHALSINGH, A. I. R. 1927 Nag. 175 **812**

C. P. Tenancy Act (I of 1920), s. 4—*Absolute occupancy holding—Adverse possession against widow—Recognition by landlord—Reversionary rights, whether destroyed.*

If a woman entitled to maintenance is in adverse possession of an absolute occupancy holding of a widow inherited by her after the death of her husband, the recognition of her by the landlord, in the absence of any proof that he dealt with such person independently of her position as a dependent or representative of the family of last male-holder, cannot give her the status of an absolute occupancy tenant so as to work a forfeiture of the interest of the reversioner in the holding after the widow's death.

The only effect of the recognition will be to raise a personal estoppel against the landlord in the matter of ejecting her as a trespasser. N DESHRANI *v.* KISHORE SINGH, 22 N. L. R. 175; A. I. R. 1927 Nag. 104 **446**

—— **ss. 13, 89**—*Occupancy holding—Transfer in favour of* Lambardar *and a co-sharer—Surrender—Consent of other co-sharers—Acceptance of debit of amount on account of holding—Partition—Transfer, whether can be set aside and by whom—Suit for setting aside transfer, proper frame of—Transfer in favour of co-sharer—Ejectment—Remedy of proprietary body—Application under s. 13—Contribution—Transferee, whether entitled to share—Remedy, nature of—Discretion of Court.*

A transfer by sale of an occupancy holding under a registered document to the *Lambardar* is a surrender to him as the landlord even though another co-sharer has been included in the sale-deed as a co-vendee with the *Lambardar*.

If the holding transferred continues to be in the possession of the *Lambardar* and the co-sharer as their separate *khudkasht* land or their occupancy holding with the consent of the other co-sharers, it must be deemed that the whole proprietary body has agreed to the transfer through their agent the *Lambardar* and the agreement is not any-the-less binding by the mere fact of the *Lambardar* being one of the transferees.

The agreement must be deemed to have been ratified by the other co-sharers who are not the transferees by acceptance at the end of each of the years the latter continue in occupation of the land, of some debit against each of the transferees, in respect of the land, in the village accounts, as also by doing nothing in the matter of claiming possession against them for a length of time.

No member of the proprietary body can set aside this agreement except on the ground of fraud or under s. 215 or s. 216 of the Contract Act or s. 90 of the Trusts Act, on the ground that the land has been allotted by the *Lambardar* to himself. In either of the cases the whole proprietary body will have to sue except, of course, the transferee or transferees.

If the transfer is in favour of a co-sharer who is not a *Lambardar*, it is not in favour of the entire proprietary body. The transferee has purchased it for his own benefit and must be considered an outsider for the purposes of ejectment as well as the transfer; he is simply the transferee of an occupancy holding and can be ejected only on application to a Revenue Officer under s. 13 of the C. P. Tenancy Act by the whole proprietary body.

C. P. Tenancy Act—concld.

The co-sharer-transferee though entitled to go into possession, as a co-sharer with others after his ejectment as a result of the application under s. 13 of the Act by the whole proprietary body is not entitled to a contribution from the body of a share in the cost of acquisition.

The relief as to contribution is at the best an equitable relief the grant of which is purely discretionary with the Court. The discretion cannot be exercised in favour of a co-sharer who was not a transferee, if the claim for contribution is made after a considerable delay of four years. N DEVAJI *v.* GOVIND, A. I. R. 1927 Nag. 161 **27**

—— **s. 89.** *See* C. P. TENANCY ACT, 1920, ss. 13, 89 **27**

Cess Act (IX B. C. of 1880), ss. 15, 40, 182—*Re-valuation under s. 15—Omission to serve notice on holder, effect of—Period from which re-valuation takes effect—Rules under s. 182, r. 30, whether* ultra vires.

In order to levy cesses on any estate where the matter falls within the provisions of s. 40 the procedure laid down in that section is imperative and unless it is followed the taxing authority cannot impose any burden of taxation on any person.

Section 40 is applicable only where there is any cess to be levied in the district as a whole, that is, if there is a district re-valuation; and where there is a re-valuation only of an estate or a tenure in any district it is not imperative that notice should be served on the holder of that estate or tenure according to the provisions of the last paragraph of s. 40.

The period from which a re-valuation under s. 15 of the Cess Act takes effect is that prescribed in r. 30 of the rules made by the Board of Revenue under s. 182 of the Act. The said rule is not *ultra vires.* C ABANI NATH MUKERJI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, 31 C. W. N. 329; 54 C. 119; A. I. R. 1927 Cal. 322 **887**

—— **s. 40.** *See* CESS ACT, 1880, ss. 15 ETC. **887**

—— **s. 182, r. 30** whether *ultra vires. See* CESS ACT, 1880, ss. 15 ETC. **887**

Charge—Partition—Property made liable for payment of debt. *See* TRUSTS ACT, 1882, s. 6 **506**

Civil Procedure Code (Act V of 1908), ss. 3, 23—*Suit pending on Original Side of High Court—Division Bench, power of, to transfer—Judge of Original Side, whether 'subordinate' to High Court—'District Court,' meaning of.*

A Judge of the Original Side of a High Court is not subordinate to the High Court and a Division Bench of the High Court has, therefore, no jurisdiction to transfer a case pending on the Original Side to another Court under s. 23 of the Code of Civil Procedure.

Although the word 'District' in the Civil Procedure Code includes not merely the local limits of what is ordinarily called a District Court, but includes the local limits of a High Court in its Ordinary Original Civil Jurisdiction, the words 'District Court' cannot, wherever they appear in the Civil Procedure Code, be construed to include a High Court in the exercise of its Ordinary Original Civil Jurisdiction. C HAYAT MAHOMED *v.* MANNU, 45 C. L. J 71; A. I. R. 1927 Cal. 290 **331**

—— **s. 10.** *See* INTERNATIONAL LAW **951**

—— **s. 11.**

See BENGAL TENANCY ACT, 1885, s. 149 **427**

See PUNJAB TENANCY ACT, 1887, s. 77 (*g*) (*p*) **849**

——— **s. 11**—*Alienation by Hindu father—Decree setting aside alienation on condition of deposit of part of consideration—Subsequent suit by vendee for balance of purchase-money*—Res judicata—*Limitation—Accrual of cause of action—Limitation Act (IX of 1908), Sch. I, Art. 97.*

The plaintiffs purchased a certain property from a Hindu father. The sons sued to set aside the sale and a decree was passed cancelling the sale and ordering delivery of possession of the property to the sons on their depositing a certain portion of the sale consideration in Court. In a suit by the plaintiffs against the sons as legal representatives of the vendor for refund of the balance of the purchase-money:

Held, (1) that the suit was not barred by *res judicata* by the decision in the prior suit inasmuch as money paid to the father as consideration for the sale at the time of sale could not be regarded as a debt of the father until the sale had been set aside and the right of the vendees to get back the sale consideration had accrued;

(2) that the decree in the prior suit became operative only on the deposit of the amount ordered to be deposited and the period of limitation for the suit began to run under Art. 97 of Sch. I of the Limitation Act only from that date and not from the date of the passing of the decree. **A** RAGHUNATH PRASAD *v.* RAM BHAROSE **745**

——— **s. 11**—*Evidence Act (I of 1872), s. 115*—Res judicata *between co-defendants—Estoppel—Prejudice, absence of, effect of.*

In order that a decision on a certain issue as between co-defendants may operate as *res judicata* in a subsequent suit in which those co-defendants are arrayed on opposite sides, it is necessary that there should be a conflict of interest between the two defendants, and a determination of the issue arising because of such conflict of interest should be necessary for awarding proper relief to the plaintiff in the suit.

Plaintiff made a gift of certain property in favour of the defendant. A suit was brought by a daughter and a daughter's son of the plaintiff for cancellation of the gift on the ground that the plaintiff was insane at the time when he made the gift. Both the plaintiff and the defendant were impleaded as defendants to that suit and successfully contested the suit. Subsequently a suit was instituted on behalf of the plaintiff by his wife to cancel the deed of gift on the same ground, namely, that the plaintiff was a lunatic:

Held, that the decision in the prior suit did not operate as *res judicata* in the subsequent suit in favour of the defendant and that the plaintiff was not estopped from proving his insanity in the subsequent suit. **A** KAMTA PRASAD MISER *v* BHULAI MISIR, A. I. R. 1927 All. 365 **527**

——— **s. 11**—Res judicata, *doctrine of, applicability of—Finding arrived at in proceeding for Letters of Administration, whether* res judicata *in subsequent civil suit—Failure to put forward evidence in previous suit, effect of.*

The doctrine of *res judicata* is not a rule of technicality but is based upon general principles of law which must be given effect to for the purpose of giving finality to judicial decisions. The real principle is that if a matter has been fought out in a Court having jurisdiction to decide that matter, the decision on that matter would operate as *res judicata* although the Courts might not be the same.

A finding with regard to the relationship of the parties to a proceeding for the grant of Letters of Administration would operate as *res judicata* in a subsequent suit between the parties in which the question of relationship arises.

If a man fighting a case fights it on false statements and does not call necessary evidence in support of his statements, he cannot afterwards gain any advantage for those omissions of his. He must be considered to be as much bound by the decision given in the case as he would have been if he had put forward a true case and called all the evidence in support of it that was available. **C** DWIJAPADA DAS *v.* KALIPADA DE, A. I. R. 1927 Cal. 421; 31 C. W. N. 898 **510**

——— **s. 11**—Res judicata, *doctrine of, applicability of, to question of law—Court trying prior suit, whether must be competent to try subsequent suit.*

There is nothing in the language of s. 11 of the Civil Procedure Code to limit the operation of the section to an issue of fact. A decision on a question of law may, therefore, operate as *res judicata.*

In order that a decision on an issue in a prior suit may operate as *res judicata* in a subsequent suit, the Court which tried the prior suit must have been competent to try the subsequent suit and not merely the issue in the subsequent suit with regard to which the plea of *res judicata* is advanced. **A** HUB LAL *v.* GILZARI LAL, L. R. 8 A. 101 Rev.; A. I. R 1927 All. 297; 25 A. L. J 564 **601**

——— **s. 11**—Res judicata—*Landlord and tenant—Suit by landlord for possession and damages for cutting trees—Plea of permanent tenancy found against—Possession disallowed but damages decreed—Decision on permanent tenancy whether* res judicata—*Permanent tenant's right to cut trees—Mortgage—Mortgagee's right to eject tenants of mortgagor.*

A landlord sued his tenant for possession of land and also to recover a certain amount as damages for trees cut. The tenant pleaded that the trees belonged to him as he was a permanent tenant and also on other grounds. The plea of permanent tenancy was found against and the claim for damages was decreed, but possession was disallowed on the ground that notice had not been given to the tenant to terminate his tenancy. The landlord gave notice to quit and sued for possession. The tenant set up permanent tenancy:

Held, that the decision in the previous suit that the tenant had no permanent tenancy operated as *res judicata* inasmuch as, although the prayer for possession was disallowed in the previous suit, the decision on the question of permanent tenancy was necessary for deciding the question of damages.

A permanent tenant is the owner of the trees growing on the land

A mortgagee who is entitled to the possession of the mortgaged property can determine the tenancy of an annual tenant of land forming part of such property without the consent of the mortgagor. **B** BARJORJI SHAPURJI *v.* SHRIPATPRASADJI VIHARILALJI, 2 Bom. L. R. 215; A. I. R. 1927 Bom. 145 **1039**

——— **ss. 11, 100, O. II, r. 2**—Res judicata—*Competency of Court to try suit—Value of all causes of action, whether to be considered—Bar of O. II, r. 2,*

applicability of, to distinct causes of action—Suit for possession by vendee—Subsequent suit for damages for breach of covenant for title, whether maintainable—Limitation Act (IX of 1908), Sch I, Art. 116—Vendor and purchaser—Covenant for title—Vendor without title—Possession not delivered—Suit for breach of covenant—Starting point of limitation.

Although taking all the causes of action together, the second suit may be outside the jurisdiction of the Court which tried the first suit, still, if the specific question which forms the subject of *res judicata* be within the jurisdiction of the Court which tried the first suit and was determined by that Court, the rule of *res judicata* will apply even though the whole suit as subsequently brought be beyond the jurisdiction of the Court which tried the first suit.

Section 11 of the Civil Procedure Code only requires that the issue and not that the subject-matter of the suit should be common.

Order II, r. 2, Civil Procedure Code, only requires that every part of the claim which the plaintiff is entitled to make "in respect of the cause of action" should be made. Where the causes of action for the remedies are quite distinct, O. II, r. 2 is not a bar for a fresh suit on the later cause of action.

Where, from the inception the vendor has no title to convey and the vendee is not put in possession of the property sold, the starting point of limitation for a suit for damages for breach of covenant for title is the date of the sale and a suit brought more then six years thereafter is barred under Art. 116 of Sch. I to the Limitation Act.

A plaintiff, who upon failing to obtain one remedy sues for an alternative one, is not entitled to exclude the time taken up by the former proceedings.

A joint Hindu father made a bequest of certain properties to his daughter. With a view to dispute the bequest, one of the sons sold the property to the plaintiff who sued for possession impleading the sons and daughter as parties. The sons, however, contended that the sale was nominal and unsupported by consideration and the daughter contended that the bequest was valid. The trial Court found against both the pleas and gave the plaintiff a decree. On appeal by the daughter, the gift was upheld and the suit was dismissed. In a suit instituted by the plaintiff more than six years from the date of denial of plaintiff's title by the defendant in his written statement, for damages for breach of warranty of title against the heirs of the vendor :

Held, (1) that the plaintiff's claim was not barred by O. II, r 2, Civil Procedure Code;

(2) that the plaintiff's cause of action arose on the date of sale itself, or, at the latest, when the vendor filed a written statement repudiating the plaintiff's title, and that the suit was, therefore, barred under Art. 116 of Sch. I to the Limitation Act. **M** PITTARACHARIAR *v.* ALAMELUMANGAIAMMAL, 25 L. W. 11; A. I. R. 1927 Mad. 273 **40**

——— **s. 13 (b)**—*Foreign judgment*—Ex parte *judgment without trial on evidence—Suit on judgment, maintainability of—'Judgment on the merits.'*

A suit does not lie in British India on a foreign judgment given on default of appearance of the defendant on the plaint allegations without any trial on evidence. Such a judgment is not one on the merits of the case within the meaning of s. 13 (*b*) of the Civil Procedure Code. **M** R. E. MAHOMED KASIM & CO. *v.* SEENI PAKIR, 52 M. L. J. 240; 25 L. W. 307; A. I. R. 1927 Mad. 265; 50 M. 261 **555**

——— **s. 20 (c)**—*Suit to set aside decree—Jurisdiction of Court within whose limits decree is attempted to be executed.*

A Court has jurisdiction to entertain a suit to set aside a decree, if the decree is attempted to be put into execution within the territorial limits of the jurisdiction of such Court. **L** TOHAR MAL UTTAM CHAND *v.* JAMES FINLEY & CO. LTD. **164**

——— **s. 22**—*Jurisdiction, question of, decided against defendant—Transfer application by defendant, whether barred—Plaintiff's right to choose forum—Balance of convenience, meaning of.*

Section 22, Civil Procedure Code, does not absolutely bar an application for transfer by the defendant where he has objected to the jurisdiction of the Court and gone to trial on that issue alone and has finally failed. But, where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the transfer of the case will not be allowed.

It is the right of the plaintiff to choose the Court in which to institute the suit and the Court should not interfere with this right except on very strong grounds. In considering the question of balance of convenience for purposes of transfer, it is not the convenience of the defendant only that has to be considered; but the convenience of the plaintiff deserves primary consideration. **L** PAHLAD RAI *v.* SHIV RAM, A. I. R. 1927 Lah. 183 **67**

——— **ss. 22, 23, 151**—*Suit instituted in one of two Courts having jurisdiction—Defendant desiring to obtain transfer of suit—Procedure—Inherent power of Court to direct transfer.*

Where a suit is instituted in one of two Courts both of which would have jurisdiction to try the suit and the defendant desires to stop the trial of the suit in the Court in which it is instituted, the proper course for him is to make an application to the High Court under sub-s (3) of s. 23 of the Civil Procedure Code for an order that the suit should be transferred to the other Court which has jurisdiction to try it. Where, however, this procedure is not availed of, there is no scope for passing an order under s. 151 of the Civil Procedure Code directing in the interests of justice, that the suit should be tried by the other Court which has jurisdiction to try it. **B** VALLABBHAI NARANJI *v.* CHHOTALAL PURSHOTTAMDAS & CO., 28 Bom. L. R. 1442; A. I. R. 1927 Bom. 79; 51 B. 26 **154**

——— **s. 23.** *See* C. P. C., 1908, ss. 3, 23 **331**

——— **s. 24.** *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 3 ETC **265**

——— **ss. 35, 100**—*Costs, award of—Appeal second, whether lies.*

The general principle to be followed is that costs should follow the event.

A second appeal as to costs will lie from an appellate decree when the lower Court has exercised its discretion as to costs arbitrarily and not according to general principles. **L** NARAIN DAS *v.* KHUSHI RAM, 2 Lah. Cas. 232; 27 P. L. R. 391 **598**

——— **s. 42**—*Preliminary decree set aside in appeal—Sale under first Court's decree, validity of—Executing Court's duty to see whether decree sought to be*

Civil Procedure Code—1908—contd.

executed subsists—Court to which decree is transferred for execution, powers of.

Though a Court executing a transferred decree has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree, yet it is the duty of the Court when facts are brought to its notice showing that the decree in respect of which execution is sought is no longer in existence, to ascertain whether in fact that is so and refuse to allow an execution sale to proceed until it is satisfied that the decree is still in existence.

Where an appeal is preferred the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed it is that decree and only that which can be made final between the parties. Where the Appellate Court has modified a preliminary decree in various respects so as to obliterate both the preliminary and the final decree passed by the trial Court, execution cannot be proceeded with under the decree of the trial Court. **R** S. M. HASHIM *v.* J. A. MARTIN, 4 R. 562; 5 Bur. L. J. 239; A. I. R. 1927 Rang. 104 **285**

——— **s. 47.** *See* MADRAS ESTATES LAND ACT, 1908, ss. 189, 192 **678**

——— **s. 47**—*Mortgage suit—Exemption of party claiming adverse title—Suit by exempted party for declaration of title, maintainability of—"Questions relating to the execution, discharge or satisfaction of the decree."*

In a suit on a mortgage one of the defendants pleaded that the mortgaged property had been sold to him by the mortgagor before the execution of the mortgage. This plea was found true, and he was exempted as a party from the suit which was decreed against the mortgagor:

Held, that a suit for declaration of title and for possession in the alternative by the party so exempted was not barred under s. 47, Civil Procedure Code, inasmuch as the questions in the suit did not relate to the execution, discharge or satisfaction of the decree in the mortgage suit **A** SHIBBI *v.* HARDHIAN SINGH, 25 A. L. J. 253; A. I. R. 1927 All. 378; 49 A. 379 **495**

——— **s. 47, O. XXI, r. 58**—*Decree against estate of deceased person—Person impleaded as having intermeddled with estate of deceased, whether 'party' to decree—Objection to attachment, whether falls within s. 47 or O. XXI, r. 58—Appeal.*

A creditor sued the widow and the brothers of his deceased debtor on a bond executed by him. The widow was impleaded as the legal representative of the debtor and the brothers were impleaded on the ground that they had intermeddled with the deceased's estate. Though the brothers at first denied that they had in any way intermeddled with any property of the deceased, they joined the widow in consenting to the passing of a decree against the estate of the deceased. The creditor attached certain property in the hands of one of the brothers as belonging to the deceased's estate. The latter objected on the ground that the property was his:

Held, that the brothers having consented to the passing of a decree against the estate, were parties to the decree and the objection came within the purview of s. 47 of the Civil Procedure Code. **L** NABI BAKHSH *v.* UDHO RAM, 28 P. L. R. 121 **786**

Civil Procedure Code—1908—contd.

——— **s. 47, O. XXI, r. 58**—*Execution of decree—Attachment—Objection by judgment-debtor that property attached is in his possession as manager—Objection, nature of.*

Where a decree is passed against a judgment-debtor in his personal capacity and he takes an objection to the attachment of certain property in his possession in execution of such decree upon the ground that although the property is in his possession it is not in his possession in his personal capacity but as a manager of endowed property, the question must be regarded as one arising between the parties to the suit in which the decree was passed and inasmuch as it is a question relating to the execution, discharge or satisfaction of the decree, it must be decided under s 47 of the Civil Procedure Code. **O** SHAH NAIM ATA *v.* GIRDHARI LAL, 4 O. W. N. 102; A. I. R. 1927 Oudh 120; 2 Luck. 145 **464**

——— **s. 47, O. XXI, r. 71**—*Execution sale—Default of bidder—Re-sale—Order against defaulting bidder to pay excess to decree-holder, whether appealable—'Decree'.*

An order passed under O. XXI, r 71 of the Code of Civil Procedure that a defaulting bidder at a sale in execution shall pay to the decree-holder the excess of his bid over the highest bid at re-sale falls within s. 47 of the Code and is appealable. **N** NAGAPPA *v.* BALKISAN DAS, 23 N. L. R. 14; A. I. R. 1927 Nag. 112 **691**

——— **s. 47, O. XXI, rr. 85, 86, 92**—*Executing Court, jurisdiction of, to set aside sale after confirmation—Order setting aside confirmation of sale, whether appealable—Time for payment of balance of purchase-money—Court's power to extend time with consent of parties.*

The Executing Court has no jurisdiction to set aside a sale after it has been confirmed.

An order setting aside the confirmation of a sale on the ground that the balance of the auction-money was not paid within 15 days, and remitting to the tribunal constituted under the Sikh Gurdwaras Act an issue as to whether the property under attachment belongs to a particular Gurdwara, is not an order under s. 47, Civil Procedure Code, and is, therefore, not open to appeal.

The time prescribed by O. XXI, r. 85, Civil Procedure Code, for payment of the balance of the purchase-money can be extended with the consent of all the parties concerned. **L** RADHA KISHAN *v.* HARI SINGH **800**

——— **s. 47, O. XLI, r. 5**—*Stay of execution—Appeal, whether lies—Execution of decree—Order disposing of objection, finality of.*

No appeal lies from an order staying execution of a decree.

Where an order passed in the course of execution proceedings has become final it is binding upon the parties in the subsequent stages of the execution. **L** PARMA NAND *v.* RAJ DEVI, 9 Lah L. J. 193 **23**

——— **s. 47, O. XLI, r. 5**—*Stay of execution, refusal of—Appeal, whether lies.*

No appeal lies from an order refusing to stay execution of a decree. **L** SANT SINGH *v.* HARI DATT, A. I. R. 1927 Lah. 235 **76**

——— **s. 48, O. VI, r. 17**—*Execution application against certain properties—Subsequent application for execution against other properties after period of limitation, whether maintainable—Amendment of petition*

Civil Procedure Code—1908—contd.

A decree-holder cannot file a complete application for execution against certain property before the expiry of the term of twelve years prescribed by s. 48, Civil Procedure Code, and then after the expiry of the period, apply for execution against other items of property treating that application as one for amendment of the previous application. **M** ALAPATI SYAMALADOSS *v.* DORADLA SUBBAYYA, 52 M. L. J. 137; 38 M. L. T. 42; A. I. R. 1927 Mad. 347 **20**

——— **s. 50**—*Decree for injunction—Death of judgment-debtor—Execution against legal representatives—Transfer by legal representatives pending execution—Decree, whether can be enforced against transferee*—Lis pendens—*Transfer of Property Act (IV of 1882), s. 52—'Rights,' whether include right to injunction.*

A decree granting a permanent injunction with respect to the use of immoveable property can, on the death of the judgment-debtor, be enforced against his legal representatives, as well as against persons to whom the property is transferred by such legal representatives pending execution proceedings.

The word 'rights' in s. 52 of the Transfer of Property Act is wide enough to cover the right to an injunction restraining another from causing acts interfering with rights of ownership and easement. **B** KRISHNABAI PANDURANG SALAGARE *v.* SAVLARAM GANGARAM, 29 Bom. L. R. 60; 51 B. 37; A. I. R. 1927 Bom. 93 **582**

——— **s. 51 (d), O. XXI, r. 63, O. XL, r. 1, O. XLIII, r. 1 (s)**—*Execution proceedings—Attachment—Objection—Suit by objector successful—Executing Court, duty of, to remove attachment—Receiver—Order appointing Receiver in execution proceedings—Appeal by objector, maintainability of.*

Order XL, r. 1 of the Civil Procedure Code is a general provision relating to appointment of Receivers and even if an order appointing a Receiver is made in execution proceedings it cannot be said that it does not fall within its purview. A person affected by such an order has a right of appeal under O. XLIII, r. 1 (*s*) of the Civil Procedure Code.

Where an objector to an attachment in execution proceedings succeeds in obtaining a decree declaring that the property attached is not liable to attachment, the executing Court cannot, on the application of the decree-holder, in view of the possibility of an appeal proving successful, order the objector to furnish security for keeping accounts of the income and for the restitution thereof or appoint a Receiver where he fails to furnish such security. **L** ATTA ULLAH KHAN *v.* BALA MAL A. I. R. 1927 Lah. 190 **298**

——— **s. 55 (4).** *See* CONTRACT ACT, 1872, s. 135 **762**

——— **s. 60 (1), O. XXI, rr. 65, 76**—*Right to share in offerings to idol, whether can be attached and sold*—'Utpat Vritti' *of Pandharpur temple, nature of—Execution sale—Power of Court to restrict bidders to particular class of people.*

The share of a priest of the temple of Shri Rukhmini of Pandharpur, in the *Utpat Vritti* (right to receive the net proceeds of the offerings of the temple) comes within s 60 (1) of the Code of Civil Procedure and can be attached and sold in execution.

An executing Court may, for good cause, restrict bidders at a Court sale to a particular class or classes of persons. **B** DIGAMBAR TATYA UTPAT *v.* HARI DAMODAR UTPAT, 29 Bom. L. R. 102; A. I. R. 1927 Bom. 143 **1008**

Civil Procedure Code—1908—contd.

——— **s. 60 (c)**—*Execution of decree—Attachment, exemption from—House of agriculturist—Burden of proof.*

Where it is claimed that a house is exempt from attachment in execution of a decree by virtue of the provisions of s. 60 (*c*) of the Civil Procedure Code, the burden of proof lies on the judgment-debtor to establish that he is an agriculturist not merely in name but in the strict sense of the term and that the house is occupied by him as such agriculturist. **L** BUTE SHAH *v.* GURANDITTA **104**

——— **s. 64, Expl. O. XXI, r. 89**—*Mortgagee from judgment-debtor after attachment and before sale, whether entitled to apply to set aside sale.*

A person who obtains a mortgage of a judgment-debtor's property after it is attached in execution but before the date of its sale, is entitled to apply under O. XXI, r. 89, Civil Procedure Code, for setting aside the sale.

A transfer of interest in immoveable property after attachment and before sale is void only against the decree-holder who applies for attachment and if his decree amount is paid in full with costs and charges of attachment and sale, the transferee acquires a good title. The explanation to s. 64, Civil Procedure Code, does not control the clear provisions of O. XXI, r. 89 of the Code. **M** PANDIRI VIRANNA *v.* GRANDHI SATTIRAJU, 52 M. L. J. 157; A. I. R. 1927 Mad. 445 **82**

——— **s. 92**—*Suit under s. 92—Power of Court to direct taking of accounts.*

The provisions of s. 92, Civil Procedure Code, are wide enough to entitle the Court to direct an account against a trustee and to make an order on him to pay the amount found to be due on the taking of those accounts. **M** THUSHTU BALAKRISHNA CHETTIAR *v.* V. KRISHNAMURTHI IYER, 52 M. L. J. 182; (1927) M. W. N. 202; 38 M. L. T. 143: A. I. R. 1927 Mad. 416 **841**

——— **s. 92, O. III, r. 4, O. XLI, r. 4**—*Appeal by some of the plaintiffs authorised to file suit, legality of—Power of one appellant to sign power-of-attorney on behalf of the rest.*

In a suit under s 92 of the Civil Procedure Code, all the persons authorised to institute the suit constitute one plaintiff and all must combine to take any material step in the prosecution of the suit. An appeal filed by some of them only is incompetent.

Provisions of O. XLI, r 4, Civil Procedure Code, do not authorise the filing of an appeal from a suit under s. 92 of the Code by some only of the plaintiffs authorised to file the suit.

In the absence of proof that one of the appellants is duly authorised by the others to sign the power-of-attorney of the Counsel on their behalf such power-of-attorney must be signed by all the appellants personally. **L** MUHAMMAD ISHAQ *v.* MUHAMMAD HUSSAIN KHAN **838**

——— **s. 96.** *See* MADRAS ESTATES LAND ACT, 1908, ss. 189, 192 **678**

——— **ss. 96, 151, 152, O. XLVII, r. 1**—*Decree—Amendment of decree in accordance with judgment—Procedure—Arithmetical or clerical error, how to be judged and corrected—Extrinsic evidence, admissibility of.*

A decree which has been drawn up in accordance with the judgment, unless the judgment is amended or set aside, cannot be amended or set aside by an indirect attack.

Only arithmetical or clerical errors in the judg-

ment can be corrected under s. 151 or s. 152 of the Civil Procedure Code. Any other error can be set right either by way of appeal or review.

In order to consider whether there is any arithmetical or clerical error in the judgment, apart from what is contained in the judgment itself no other evidence should be taken as to the matter on which the Court based its judgment. C MAHOMED MALIHA *v.* MAHOMED ISMAIL KHAN, 44 C. L. J. 441; A. I. R. 1927 Cal. 203 **309**

——— **s. 99, O. XXXIV, r. 5**—*Omission to draw up final decree, effect of—Preliminary decree, whether can be executed—Suit against wrong legal representative—No objection by true legal representative—Decree, binding nature of.*

Where a Court has omitted to draw up formally a final decree in a mortgage suit, if the preliminary decree has been made absolute, this decree coupled with the order making it absolute may be taken to be the final decree.

An omission to draw up a formal final decree may be condoned where the terms of the decree sought to be executed are otherwise ascertained or clearly ascertainable. Section 99 of the Civil Procedure Code will cover such an error where it does not affect the merits of the case or the jurisdiction of the Court

A suit upon a mortgage executed on behalf of a minor was instituted after the minor's death against his step-mother as his heir. The minor's grandfather who was made a party to the suit contended that he was not a necessary party and his name was struck off. In execution of the decree passed against the step-mother, the person who claimed under a transfer from the step-mother and the grandfather contended that the decree was invalid inasmuch as the grandfather and not the step-mother was the legal heir:

Held, (1) that it must be taken to have been decided for the purposes of the suit that the step-mother was the proper heir and thatthe decision was binding on the transferee;

(2) that it was not open tothe transferee to object to the execution of the decree on the ground that he had obtained some interest from the grandfather independent of the minor's interests.

[The necessity of following the rules of the Civil Procedure Code and the forms, relating to preliminary and final decrees pointed out.] B CHHAGANLAL SAKARLAL VANI *v.* JAYARAM DEORAJ THAKAR, 29 Bom. L. R. 107; 51 B. 125; A. I R. 1927 Bom. 131 **956**

——— **s. 100.**

See C. P C., 1908, ss. 11, 100, O II, R. 2 **40**

See CUSTOM **605**

——— **s. 100**—*Pleas recorded parties not properly examined with advertence to law—Decision, whether binding on second Appellate Court.*

If there is no attempt by the Court to focus the contention of the parties by proper examination with advertence to the law bearing on the point, and the real points are missed, even though the bald pleas of the parties are on record, the trial is vitiated and the decision is liable to be ignored even in second appeal. N GHASIA *v.* RAM SINGH, A. I. R. 1927 Nag. 180 **855**

——— **s. 100**—*Second appeal—Finding based upon construction of documentary evidence, whether decision of fact.*

A finding based upon the construction of or inferences drawn from documentary evidence but in no sense based upon the legal effect of the documents cannot be questioned in second appeal.

The decision, therefore, in a pre-emption suit that a certain *mahal* is not a portion of or identical with another *mahal* based upon the construction of certain documents is a decision of fact and cannot be disturbed in second appeal. O BADRI SINGH *v.* RAM BAHADUR SINGH, 4 O. W. N. 165 **631**

——— **s. 100**—*Second appeal—Finding of fact—Evidence not considered—Interference.*

There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact. The fact that evidence, including documentary evidence, has not been properly considered is not, therefore, a ground for second appeal. O KUNWAR BAHADUR *v.* NAIB, 13 O L. J 599 **792**

——— **s. 100**—*Second appeal—Omission to notice material circumstances—Misdirection on important point—Interference—Remand*

Where an Appellate Court has failed to notice material circumstances and the evidence in the case and has misdirected itself on an important point, the High Court can interfere in the second appeal and direct the case to be re heard. M VAYSA RAYAR *v.* SUBBARAYAR, A I. R. 1927 Mad. 493 **306**

——— **ss. 100, 115**—*Provincial Small Cause Courts Act (IX of 1887), s. 16—Jurisdiction, objection to, raised for first time in second appeal—Interference, when justifiable—Test.*

When an objection to the jurisdiction of the trial Court is raised for the first time in second appeal, parties must be deemed to have consented to the case being tried originally in the Court in which it was so tried and a discretion rests in the Second Appellate Court not to interfere with the decree of the Court below whether under s. 115 or s. 100 of the Civil Procedure Code solely on the question of jurisdiction if the equities of the case do not demand interference and the interests of justice do not justify such interference, especially when the interests of the parties have been more thoroughly safeguarded by the trial of the case in the ordinary Court rather than in a Small Cause Court. N RAJARAM *v.* MUKUND RAO, A. I. R. 1927 Nag. 164 **37**

——— **s. 100, O. XVII, r. 1**—*'Sufficient reason' for not producing evidence, whether question of law—Second appeal.*

The question whether or not a party had sufficient cause for not producing its evidence on a particular date is a question of fact and cannot be agitated in second appeal. L NABI BAKHSH *v.* NUR-UD-DIN **301**

——— **s. 105, O. IX, r. 13**—*Application to set aside* ex parte *decree, dismissal of—Final appeal against decree—Right to raise same points.*

Where a defendant against whom an *ex parte* decree has been passed applies to set it aside on grounds mentioned in O. IX, r. 13 of the Civil Procedure Code and fails to get relief but does not contest the order by way of appeal, he is not entitled to raise the same point in the final appeal against the decree. Nor can he, in such appeal, object to the evidence on which the lower Court has relied in support of its finding. M LAKSHMI AMMAL *v.* DEVADASI NAYUDU **553**

——— **s. 109 (a)**—*Order refusing leave to sue* in forma pauperis, *whether 'final order'—Appeal to Privy Council.*

An order refusing leave to appeal *in forma pauperis* is not a final order within the meaning of s. 109 (*a*) of the Civil Procedure Code and is not, therefore, appealable to the Privy Council.

Per *Dawson Miller, C. J.*—Every order in one sense finally determines some right of the parties whether it be a right to appeal or whether it be a right to have an extension of time or whether it be any other kind of right; but before one can have a final decree or order there must be some final adjudication upon the subject-matter of the suit, that is to say the rights claimed by one party in the suit itself and denied by the other. **Pat** RAM PRASAD SAH *v.* FULPATI KUER, 6 Pat. 67; A. I. R. 1927 Pat. 175 **886**

——— **s. 115.**

See CR. P. C., 1898, ss. 476, 476B **376**
See LIMITATION ACT, 1908, s 5 **936**
See LIMITATION ACT, 1908, SCH. I, ART. 158 **634**
——— Failure to exercise discretion—Revision whether lies. *See* LIMITATION ACT, 1908, s. 5 **727**

——— **s. 115**—*Revision—Interference—Error of law—Award not signed by one arbitrator—Referring Court, power of, to determine validity of award.*

A High Court cannot, in revision, set aside a decree of a lower Court passed in accordance with an award on the ground that the award was not signed by one of the *punches*, inasmuch as the question whether an award is valid or not is one especially reserved for the decision of the Court making the order of reference and even if it has erred on a question of law in coming to a decision on that point, that, in itself, is not a ground for the exercise of the revisional jurisdiction of the High Court. **A** PRABHU DAYAL *v.* MUNSHI LAL **76**

——— **ss. 115, 151, O. IX, r. 13**—*Application to set aside* ex parte *decree—Dismissal for default—Restoration—'Sufficient cause'—Refusal to restore—Material irregularity—Revision.*

An application to set aside an order dismissing in default an application for setting aside an *ex parte* decree is competent and a Court acts with material irregularity in the exercise of its jurisdiction if it dismisses the application for restoration on the ground that such an application is not maintainable.

On the day fixed for the hearing of an application to set aside an *ex parte* decree the petitioner did not appear as it was not a day fixed for evidence and as he was living at a very distant place. His Counsel had deputed his *Munshi* to watch and inform him when the case was called. The Counsel arrived two minutes after the application had been dismissed in default:

Held, that there was sufficient cause for setting aside the order dismissing the restoration application in default and that an order refusing to set aside that order of dismissal was materially irregular and could be set aside in revision. **L** HUKAM CHAND *v.* JAWALA SINGH **313**

——— **ss. 115, 151, O. XLI, rr. 23, 25, O. XLIII, r. 1 (a)**—*Order of remand—Fresh issues—Remand under inherent power—Appeal—Revision.*

An Appellate Court has an inherent power of remand under s. 151, Civil Procedure Code, apart from O. XLI, r. 23, Civil Procedure Code, and no appeal lies against an order made in exercise of this power.

Where in an appeal the Appellate Court found that the appeal could not be satisfactorily disposed of in the absence of certain findings and, therefore, reversed the decision of the first Court, settled fresh issues and remanded the suit for fresh disposal by the trial Court:

Held, (1) that no appeal lay against the order of remand;

(2) that the Appellate Court acted within the limits of its jurisdiction and the order was not capable of being revised under s. 115, Civil Procedure Code. **M** BALLA MALLAYYA *v.* PEDDI VEERAYYA, 52 M. L. J. 90; 25 L. W. 198; 38 M. L. T. 15; A. I. R. 1927 Mad. 335 **135**

——— **s. 115, O. IX, r. 4**—*Dismissal of suit in default—Restoration application, summary dismissal of—Material irregularity—Revision.*

Dismissal of an application for restoration summarily without recording evidence and going into its merits is a material irregularity justifying interference in revision. **L** KURA RAM-NEKI RAM *v.* JAIMAL, A I. R. 1927 Lah. 239 **677**

——— **s. 115, O. IX, r. 13**—*Application to set aside* ex parte *decree—Order erroneously treating application as within limitation—Revision, whether competent.*

An erroneous decision that an application to set aside an *ex parte* decree is within limitation is not open to revision under s. 115 of the Civil Procedure Code.

Section 115 of the Civil Procedure Code is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. **A** BABU RAM v. MUNNA LAL, 25 A. L. J. 399; A. I. R. 1927 All. 358 **638**

..... **s. 115, O. XLVII, r. 1**—*Arbitration pending suit—Award—Order setting aside award—Revision—Review—Preliminary objection not raised before hearing, whether can be heard in review.*

An order setting aside an award of an arbitrator in a reference pending a suit is a final order so far as the parties are concerned even though the case has not been finally decided and can, therefore, be revised under s. 115 of the Civil Procedure Code.

A preliminary objection as to the maintainability of a revision petition should be raised before the commencement of the hearing of the petition, and if no such objection is raised at that time it cannot be heard in an application for review of the order in revision **O** SHYAM LAL *v.* CHANDRIKA DAT RAM PANDEY, 13 O. L. J. 507 **429**

——— **ss. 144, 151, O. XXI, r. 92**—*Execution sale—Order for restitution under s. 151, whether appealable—Tenants of auction-purchaser, whether can be proceeded against in execution.*

An order for restitution, made under s. 151 of the Civil Procedure Code, but in fact, in exercise, by analogy, of the jurisdiction under s. 144 of the Code, is appealable.

When an execution sale is set aside, the judgment-debtor is not entitled in execution proceedings to have an order for delivery of possession by way of restitution against a person who has been settled on the land by the auction-purchaser after his purchase.

The proper remedy of the judgment-debtor in such a case is either to treat him as a tenant or to sue to eject him as a trespasser. **C** GNANADA SUNDARI MAJUMDAR *v.* CHANDRA KUMAR DE, 31 C. W. N. 290; A. I. R. 1927 Cal. 285 **735**

——— **s. 145**—*Security bond executed by third party, whether enforceable under s. 145, Civil Pro-*

cedure Code—Additional interest, provision for, in security bond whether legal.

Where during the pendency of an appeal against a decree in consideration of the decree-holder postponing execution, a third person executes a security bond for due satisfaction of the decree, the security bond is enforceable in proceedings under s. 145 and a separate suit therefor is not necessary. It makes no difference that the security is furnished by a third person not a party to the suit.

If a surety offers security which is accepted and undertakes to pay additional interest on condition that execution is stayed, the decree-holder is entitled to insist that that contract shall be carried out. **M** BALKRISHNA CHETTIAR *v.* KRISHNAMURTHI IYER, 52 M. L. J. 182; (1927) M. W. N. 202; 38 M. L. T. 143; A. I. R. 1927 Mad. 416 **841**

——— **s. 145, O. XXII, rr. 4, 9**—*Death of party—Abatement—Order setting aside abatement—Procedure—Decree passed against person not representing estate of deceased, whether binding on estate—Surety, whether liable.*

Where an application is made to set aside an abatement and to bring on record the legal representatives of a deceased party to the suit, the Court, if it grants the application, should not merely make an order setting aside the abatement but should also make an express order directing that the legal representatives of the deceased party should be impleaded as parties to the suit.

Where a defendant dies and a person who is not his legal representative is brought on the record as such, a decree obtained against the latter cannot bind the estate of the deceased or the persons rightly entitled to that estate. Such a decree cannot, therefore, be enforced against a person who had stood surety for the satisfaction of any decree that might be passed against the original defendant in the suit.

It is essential that a person trying to make a surety liable should satisfy the conditions of the surety bond.

Where a defendant dies and his legal representative is brought on the record and a decree is passed against him the Court cannot direct that the decretal amount should be paid out of the estate of the deceased. The proper order in such a case is to pass a decree against the legal representative limiting his liability to the extent of the assets which have come to his hands as representing the estate of the deceased. **B** PUKHRAJ JESHRAJ MARWADI *v.* JAMSETJI RUSTUM IRANI, 28 Bom. L. R. 1382; 50 B. 802; A. I. R. 1927 Bom. 63 **185**

——— **s. 146, O. XXI, r. 15, Sch. III, para. 11 (3)**—*Death of decree-holder—Application for execution by one of surviving co-parceners, validity of—Proceedings before Collector—Subsequent application—Limitation—Exclusion of time.*

An application for execution presented by one only of the surviving co-parceners of a deceased judgment-debtor is not invalid in law so as to prevent the deduction of time mentioned in sub-para. (3) of para. 11 of the Third Schedule of the Code, in computing the period of limitation of a subsequent application for execution for the benefit of all the co-parceners. **B** MADHAV PRABHAKAR OKA *v.* BALAJI COVIND JOSHI, 29 Bom. L. R. 75; 51 B. 143; A. I. R. 1927 Bom. 123 **619**

——— **s. 148.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 27 **134**

——— **s. 148, O. IX, r. 5**—*Bombay High Court Appellate Side Rules, rr. 2, 40 Appeal—Notice to respondent, non-service of—Fresh notice, application for—Procedure—Delay—Order excusing delay, whether can be objected to.*

Where a notice issued to a respondent is returned unserved, r. 40 of the Appellate Side Rules of the Bombay High Court allows the appellant to make an application for fresh service within a month from the date on which the *Sheristedar* intimates to him the fact that the notice has failed to be served on the respondent. If he does not make such an application within the time allowed, then the Court can extend the time and excuse the delay under s. 148 of the Civil Procedure Code. Under heads II and VII of r. 2 of the Appellate Side Rules, this can be done by a Single Judge and it may be done by an *ex parte* order. Once such an order has been obtained, the opposite party cannot subsequently object to it. **B** BABANNA SANGAPPA *v.* PARAVA NINGBASAPPA, 28 Bom. L. R. 1446; 50 B. 815; A. I. R. 1927 Bom. 68 **147**

——— **s. 151.**

See C. P. C., 1908, ss. 22 ETC **154**
See C. P. C., 1908, s. 115 **313**
See C. P. C., 1908, s. 141 **735**

——— **ss. 151, 152.** *See* C. P. C., 1908, ss. 96 ETC. **309**

——— **s. 151, O. IX**—*Inherent powers, nature of—Jurisdiction under s. 151 not 'extraordinary' but 'residuary'—Extraordinary circumstances whether necessary for invoking inherent powers—O. IX not applicable to execution proceedings.*

Order IX of the Civil Procedure Code is not applicable to cases where execution proceedings have been dismissed for default.

The power which a Court possesses under s. 151 of the Civil Procedure Code cannot justly be said to be of an 'extraordinary' nature. The power is inherent in every Court and if there are proper materials it has got to be exercised *ex debito justitiæ*. The provision in s. 151 has been made for the purpose of allowing a Court to do substantial justice for the administration of which alone the Court exists and in matters about which the Code is silent.

A Court is not, therefore, justified in refusing to exercise its powers under s. 151, Civil Procedure Code, on the ground that there are no extraordinary circumstances justifying the exercise of such power. **C** SARAT CHANDRA HALDAR *v.* MITRA MUKERJEE & Co., A. I. R. 1927 Cal. 420 **518**

——— **s. 152**—*Suit for money—Compromise providing for charge—Decree deliberately making no provision for charge—Change of law—Amendment of decree, so as to include provision as to charge, whether permissible.*

In a suit for money filed in 1907, the parties entered into a compromise by which the defendant agreed to pay a certain sum of money to the plaintiff creating a charge therefor on certain immoveable properties. After deliberate and due consideration of the law as then understood, the Court, in drawing up the decree, omitted the provision creating a charge. In 1922, when the law on the subject had become solidified an application was made under s 152, Civil Procedure Code, to amend the decree so as to include the provision for charge:

Held, that the application could not be granted. **M** DORADLA SUBBAYYA SETTY *v.* ALAPATI SYAMALADOSS, A. I. R. 1927 Mad. 178 **165**

——— s. 297. *See* CR. P. C., 1898, ss. 161 ETC. 353

——— O. I, r. 9, O. XXXIV, r. 1—*Mortgage-suit—Non-joinder of interested parties when fatal to suit—Dismissal by trial Court for non-joinder—Appellate Court when interferes—Impleading of parties in appeal.*

The failure to join a person interested in a mortgage, whether that failure be in a suit by the mortgagor for redemption or in a suit by the mortgagee on the foot of the mortgage, will not be fatal to the suit if a decree can be passed that will not injuriously affect the absent party. But failure to implead a real defendant with an interest to oppose the suit is fatal to the suit.

Order XXXIV, r. 1 of the Civil Procedure Code must be read subject to O. I, r. 9. A KARRAR HUSAIN *v.* JAI NARAIN RAI, A. I. R. 1927 All. 230 198

——— O. I, r. 10. *See* LIMITATION ACT, 1908, s. 22 680

——— O. II, r. 2. *See* C. P. C., 1908, ss. 11, 100, O. II, R. 2 40

——— O. III, r. 4. *See* C. P. C., 1908, s. 92 838

——— O. VI, r. 14, O. XXIX, r. 1—*Corporation, suit by—Attorney, whether can sign plaint—Amendment of plaint—Discretion of Court.*

In the case of a suit instituted by a Company, the plaint must be signed and verified either by the Secretary or by a Director or other principal officer of the Company able to depose to the facts of the case as provided by O. XXIX, r. 1 of the Civil Procedure Code. An attorney appointed by the Company is incompetent to sign and verify a plaint on its behalf, but the Court may, if the plaint is not properly signed and verified, in its discretion, permit the plaint to be signed and verified as required by O. XXIX, r. 1, of the Civil Procedure Code. S OSBORNE GARRETT & Co. *v.* RAISI JOTHABHOY 450

——— O. VI, r. 17. *See* C. P. C., 1908, s. 48 20

——— O. VI, r. 17—*Amendment of pleadings—Agreement by Hindu father—Specific performance, suit for—Appeal—Claim to recover earnest money, whether can be enforced against sons.*

Plaintiff instituted a suit for specific performance of an agreement to sell immoveable property against a Hindu father and his sons on the allegation that the father had entered into the agreement as the head of the joint family. In the alternative, the plaintiff asked for damages for breach of contract. The suit was dismissed by the trial Court and during the pendency of an appeal by the plaintiff to the High Court, the first defendant died and his sons and grandsons were substituted in his place as his legal representatives. At the hearing of the appeal the claim for specific performance was abandoned and it was contended on behalf of the plaintiff that he was entitled to recover the earnest money paid by him with reasonable interest:

Held, that the abandonment of the claim for specific performance did not alter the suit as framed into an action for money had and received, or for the recovery of a debt and that the relief claimed could not be granted in the suit against the respondents who were the sons and grandsons of the original defendant No. 1.

It is not permissible by amendment to change the nature of the suit as framed. P C RAMSARAN MANDAR *v.* MAHABIR SAHU, 25 A. L. J. 74: (1927) M. W. N. 69; A. I. R. 1927 P. C. 18; 8 P. L. T. 98; 38 M. L. T. 74; 52 M. L. J. 402; 31 C. W. N. 469; 25 L, W. 635; 45 C. L. J 313; 29 Bom. L. R 796; 6 Pat. 323 56.

——— O. VI, r. 17, O. XXXII, rr. 3, 12—*Limitation Act (IX of 1908), s. 22—Suit instituted by next friend on behalf of adult plaintiff—Procedure—Amendment—Power of Court—Limitation, whether affected.*

Under O. VI, r. 17 of the Civil Procedure Code, the powers given for amendment of pleadings are very wide and liberal and no amendment should be refused at any stage of a suit unless it changes the character of the suit .

Where a suit is instituted *bona fide* on behalf of a minor plaintiff by his next friend but it is discovered that before the institution of the suit the minor had attained his majority, the suit is not liable to be dismissed but can proceed after amendment of the title by striking out of the name of the next friend and describing the plaintiff as an adult. Such amendment does not amount to the addition of a new partt within the meaning of s. 22 of the Limitation Acy and no question of limitation, therefore, arises by reason of the amendment. C NARAYAN CHANDRA DAS *v.* DULAL CHANDRA DUTTA, A. I. R. 1927 CAL. 477 469

——— O. IX, *See* C. P. C., 1908, s. 151 508

——— O. IX, rr. 2, 4, O. XVII, r. 3—*Failure to pay charges for service of summons on defendant—Dismissal in default—Restoration, legality of.*

A suit was dismissed on account of the plaintiff's failure to pay the charges for service of summons on some of the defendants as ordered by the Court. Subsequently, the plaintiff offered to pay the amount and the suit was restored:

Held, that the order of dismissal was one passed under O. IX, r. 2 of the Civil Procedure Code and not one under O. XVII, r. 3 and that, therefore, the Court had jurisdiction to restore the suit under O. IX, r. 4. A BAQAR HUSSAIN *v.* TIRPATI GOVIND NATH TEWARI 691

——— O. IX, r. 3—*Dismissal for default on day fixed for judgment, legality of.*

There is no rule of procedure justifying the dismissal of a suit for non-appearance of the parties on the day fixed for delivery of the judgment. L BURA *v.* TEJA SINGH, 9 Lah. L. J. 178; 28 P. L. R. 324 472

——— O. IX, r. 4. *See* C. P. C., 1908, s. 115 677

——— O. IX, r. 5. *See* C. P. C., 1808, ss. 148 ETC. 147

——— O. IX, r. 9—*Dismissal in default—Restoration—'Sufficient cause'—Misjudgment of Counsel as to when case will be taken up.*

Misjudgment on the part of a Counsel as to when his case was probably going to be taken up, where there is no statement that he was engaged in some other case, is not a sufficient ground for his absence when a case is taken up. L BIRU RAM *v.* RODA MAL, A. I. R. 1927 Lah. 224 793

——— O. IX, r. 9, O. XXI, r. 90, O. XLIII, r. 1, cls. (c) (j)—*Application to set aside execution sale—Dismissal for default—Application for restoration, maintainability of—Appeal, whether lies.*

No appeal lies against an order refusing to set aside an order dismissing for default an application to set aside a sale under O. XXI, r. 90 of the Civil Procedure Code.

Order IX, r. 9 of the Code of Civil Procedure is not applicable to an application for setting aside a sale in execution of a decree under O. XXI, r. 90 of the

Civil Procedure Code—1908—contd.

Code of Civil Procedure. C DASARATHY CHAKRAVARTY v. KHAUNISH CHANDRA RAY, 45 C. L. J. 60 343

——— **O. IX, r. 13.** *See* C. P. C., 1908, s. 115 638

——— **O. XVII, r. 3.** *See* C. P. C., 1908, O. IX, RR. 2, 4 691

——— **O. XVII, r. 3**—*Commission, issue of—Court, whether can proceed to determine suit before return of Commission.*

Where a Commission is ordered to issue, the Court should wait for the return of the Commission before proceeding to hear and determine the case. A BINDHACHAL SINGH v. NAND PRASAD 29

——— **O. XVII, r. 3**—*Plaintiff ordered to appear as witness—Non-appearance—Dismissal of suit for default, legality of—Procedure.*

A Court cannot dismiss a suit under O. XVII, r, 3, Civil Procedure Code, merely because one of the plaintiffs who has been ordered to appear as a witness and to give evidence on a particular day fails to appear on that day; it should take the other evidence in the case and decide the suit on the merits. L GULAB RAI-BHOLA RAM v. FARID 788

——— **O. XX, r. 1**—*Limitation Act (IX of 1908), Sch. I, Arts. 152, 156—Judgment pronounced without notice to parties—Appeal—Limitation, commencement of.*

Where a judgment is pronounced in the absence of the parties or their Pleaders on a day of which they had no notice, the judgment cannot be said to have been pronounced in accordance with law and limitation for appeal begins to run not from the day on which it is announced but from the date on which the party or his Pleader receives intimation of the decision of the case against him. L SEWA RAM v. HASSU, 28 P. L. R. 132 909

——— **O. XXI, r. 2.** *See* LIMITATION ACT, 1908, SCH. I, ART. 182 574

——— **O. XXI, rr. 13, 66**—*Decree for rent—Sale proclamation—Omission to mention charge for subsequent arrears of rent—Sale, whether free of encumbrance—Subsequent suit for rent against purchaser—Estoppel—Evidence Act (I of 1872), s. 115.*

Under O. XXI, rr. 13 and 66 of the Civil Procedure Code a decree-holder is bound to specify precisely what interest is being sold.

The holder of a decree for rent who fails to disclose in the sale proclamation the existence of arrears of rent for subsequent years that have accrued due at the time of the proclamation and thereby leads intending purchasers to believe that the property is sold free from incumbrances is estopped from claiming the arrears from the auction-purchaser in a subsequent suit. M GIRIYA SHETTI v. ANATHAMMA SHETTITHI, 38 M. L. T. 49; 52 M. L. J. 222 493

——— **O. XXI, r. 15.** *See* C. P. C., 1908, s. 146 619

——— **O. XXI, r. 16**—*Assignment of decree—Benami assignment—Beneficiary's right to execute.*

Where a decree has been transferred to a particular person under an instrument in writing, no other person claiming that he was the real owner under the transfer and that the transferee named therein was a mere *benamidar* for him, can apply for execution of the decree under O. XXI, r. 16 of the Civil Procedure Code. L GURDIAL SINGH v. GURBAKHSH SINGH, 8 Lah. 35; A. I. R. 1927 Lah. 110; 9 Lah. L. J. 133; 28 P. L. R. 239 545

Civil Procedure Code—1908—contd.

——— **O XXI, r. 22.** *See* LIMITATION ACT, 1908, s. 15 475

——— **O. XXI, r. 50, O. XXX, rr. 1, 2, 3**—*Decree against firm—Partner, death of, before institution of suit—Legal representatives, whether liable in execution.*

Held, by the majority (*Rupchand and Lobo, A. J. Cs.*, dissenting):—Where a suit is brought against a firm and a decree is obtained in such suit, the legal representatives of a person who was a partner in the firm at the time when the cause of action accrued but who was dead at the time when the suit was instituted, are liable to be proceeded against in execution of the decree under O. XXI, r. 50 (2) of the Civil Procedure Code. S GOKALDAS KHATAOO v. LACHMANDAS, A. I. R. 1927 Sind. 130 204

——— **O. XXI, r. 58.**

See C. P. C., 1908, s. 47, O. XXI, R. 58 464, 786

——— **O. XXI, rr. 58 to 63.** *See* LIMITATION ACT, 1908, SCH. I, ART. 11 763

——— **O. XXI, r. 63.** *See* C. P. C., 1908, s. 51 (*d*) ETC. 298

——— **O. XXI, rr. 65, 76.** *See* C. P. C., 1908, s. 60 (1) 1008

——— **O. XXI, r. 66.** *See* C. P. C., 1908, O. XXI, R. 13 493

——— **O. XXI, rr. 66, 90**—*Sale proclamation—Omission to state place of sale—Delay in starting sale—Material irregularity.*

Omission to mention the place of sale in a sale proclamation is a serious flaw in publishing the sale and constitutes a material irregularity.

There is no hard and fast rule that an execution sale must start punctually at the appointed time. R MAUNG PO THA v. NAGAPPA CHETTYAR, 5 Bur. L. J. 183; A. I. R. 1927 Rang. 84 74

——— **O. XXI, rr. 69, 90**—*Execution sale—Adjournment—Omission to issue fresh proclamation—Material irregularity—Setting aside of sale, when justified.*

Where a sale held on a fixed date is not concluded on that day and the officer conducting the sale adjourns it and intends to hold it again on another date, the sale cannot be held and concluded without a fresh proclamation. An omission, however, to issue a fresh proclamation, though a material irregularity is not a ground for setting aside the sale where substantial injury has not been caused thereby. O KASHIF HUSAIN v. GANGA BAKSH SINGH, 4 O. W. N. 273 787

——— **O. XXI, r. 71.** *See* C. P. C., 1908, s. 47 691

——— **O. XXI, rr. 85, 86.** *See* C. P. C., 1908, s. 47 800

——— **O. XXI, r. 89.** *See* C. P. C., 1908, s. 64, O. XXI, R. 89 82

——— **O. XXI, r. 89**—*Execution of decree—Sale of non-ancestral property by Collector—Application to set aside sale on payment—Court, proper.*

The Court mentioned in r. 89 of O. XXI of the Civil Procedure Code is the execution Court and not the Court of the Collector or the Sale Officer where the sale proceedings take place. In the case of non-ancestral property, therefore, an application under r. 89 must be made to the execution Court and not to the Collector who has held the sale. A BISHWANATH SINGH v. DASRATH DUBE 726

——— **O. XXI, r. 90.**

See C. P. C., 1908, O. IX, R. 9 343

See C. P. C., 1908, O. XXI, RR. 69, 90 787

——— **O. XXI, rr. 91, 92**—*Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale of property not belonging to judgment-debtor—Purchase by decree-holder—Application to cancel sale and issue fresh execution of decree—Limitation.*

Under s. 51 (*b*) of the Civil Procedure Code an execution Court has authority and jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor for attachment and sale.

A Court sale carries no guarantee that the property sold is the property of the judgment-debtor and the auction-purchaser takes the risk and bears the loss if it is subsequently discovered that the property is not the property of the judgment-debtor. Therefore, an auction-sale of property which subsequently turns out not to belong to the judgment-debtor cannot be said to be void.

Where in such a case the decree-holder himself is the auction-purchaser and the decree is satisfied by the proceeds of the sale and the decree-holder subsequently discovers that the judgment-debtor was not the owner of the property and makes an application for cancellation of the sale and fresh execution of the decree, the application falls within the purview of r. 91 of O. XXI of the Civil Procedure Code and cannot be entertained if it is made more than thirty days after the sale. **M** MUTHUKUMARASAMIA PILLAI *v.* MUTHUSAMI THEVAN, 52 M. L. J. 148; 25 L. W. 232; 38 M. L. T. 84; A. I. R. 1927 Mad. 394 **522**

——— **O. XXI, r. 92.**

See C. P. C., 1908, s. 47 **800**

See C. P. C., 1908, s. 141 **735**

——— **O. XXI, r. 92**—*Execution of decree—Sale—Dismissal of execution before confirmation, effect of—Sale, whether can be confirmed.*

Where a decree-holder and a judgment-debtor come to a settlement and agree to a dismissal of the execution case before an auction-sale is confirmed, there is no decree left capable of execution and the Executing Court becomes *functus officio* and the sale cannot be confirmed.

The position is different where the sale is confirmed and the parties to the decree come to a settlement while legal proceedings are pending for the reversal of the order of confirmation. **N** MAROTI *v.* VITHOBA **565**

——— **O. XXI, r. 92**—*Limitation Act (IX of 1908), Sch. I, Art. 166—Execution of decree—Sale—Decree satisfied before confirmation—Application to set aside sale—Limitation.*

Although after the confirmation of an auction-sale, the auction-purchaser's title dates back to the date of the sale, yet where the sale has not been confirmed he cannot be held to represent the interests of the parties to the suit.

Where before the confirmation of an auction-sale, the decree is admitted by the decree-holder to be satisfied, it ceases to exist as a decree capable of execution, and the very foundation of the powers of the Execution Court, namely, the existence of a decree capable of execution, having disappeared, the Court's powers in execution also cease, and confirmation of the sale which is a proceeding in execution cannot be ordered.

Where in such a case the judgment-debtor makes an application that the sale should be set aside, the application does not fall within the purview of r. 92 of O. XXI of the Civil Procedure Code and is not governed by Art. 166 of Sch. I to the Limitation Act. **N** RAMCHANDRA *v.* SADASHEO **561**

——— **O. XXI, r. 96**—*Purchaser of property subject to lease—No right to be put in actual possession.*

A purchaser in execution sale of property subject to a lease is entitled only to be put in constructive or symbolical possession of the property. **R** S. R. M. M. R. M. CHETTYAR FIRM *v.* U BA LON, 6 Bur. L. J. 7; A. I. R 1927 Rang. 127 **1014**

——— **O. XXI, rr. 97, 98**—*Decree for possession of land—Executing Court's power to order demolition of house standing on land.*

The executing Court has power to remove any person who refuses to vacate the land and to deliver actual possession to the decree-holder but where a decree for possession of land is silent as to the house standing on it, it cannot direct that the building should be pulled down, that being a matter for the decree-holder to consider, after he has obtained possession. **R** KAUK SIKE *v.* ONG HOCK SEIN, 5 Bur. L. J. 201; A. I. R. 1927 Rang. 82 **301**

——— **O. XXII, r. 2**—Judgment of Original Side, requisites of. *See* BOMBAY HIGH COURT ORIGINAL SIDE RULES **941**

——— **O. XXII, rr. 3, 11**—*Appeal—Death of appellant—Legal representatives, all, not brought on record, effect of—Abatement.*

When a party dies during the pendency of a suit or an appeal, then, in order that the suit or appeal may proceed it is necessary that his legal representatives should be brought on the record within the prescribed period of limitation, and the expression 'legal representatives', in such a case, means and includes all those persons whose presence on the record is necessary in order to completely represent the estate of the deceased. Where any of such persons is not brought on the record, the suit or appeal, as the case may be, remains imperfectly constituted and cannot proceed. **L** MUHAMMAD HASSAN *v.* INAYAT HUSSAIN, 28 P. L. R. 3; A. I. R. 1927 Lah. 94 **418**

——— **O. XXII, r. 4**—*Death of defendant-respondent—Application to bring legal representatives on record made within time—Mistake as to names—Failure to implead some of the heirs—Procedure—Abatement.*

There is nothing in the rules of procedure to compel a party to give exact information as to the names, addresses and other particulars of the persons supposed to be the legal representatives of a deceased party within any prescribed limit of time. All that the law requires is that he should make a *bona fide* reasonable application within the time allowed by law. **O** AL NABI *v.* HABIBUNNISA, 4 O. W. N. 323; A. I. R. 1927 Oudh 170 **802**

——— **O. XXII, r. 4**—*Death of one of several respondents—Legal representatives not brought on record—Abatement, whether partial or* in toto—*Tests.*

Whether a suit or an appeal abates in whole or in part depends on whether the interests of the respondents are or are not separately defined. If they are separable, the suit or appeal will abate only as regards the interest of the deceased. If they are joint the proceedings will abate as regards the whole of the joint interests. **L** KARAM KHAN *v.* MAST ALI KHAN, 28 P. L. R. 148 **839**

——— **O. XXII, r. 4**—*Suit for possession against defendants claiming to be in possession jointly, dismissal of—Appeal—Death of one respondent—*

Civil Procedure Code—1908—contd.

Legal representatives not brought on record—Abatement, extent of.

Where a suit to recover possession of immovable property from two defendants, both of whom claim to be jointly in possession of the property, is dismissed by the trial Court and during the pendency of an appeal by the plaintiff one of the defendants-respondents dies and his legal representatives are not brought upon the record within the prescribed period, the appeal abates not only as against the legal representatives of the deceased respondent, but also against the surviving respondents. **A** SITA RAM *v.* ROSHAN LAL **563**

——— **O. XXII, rr. 4, 9.** *See* C. P. C., 1908, s. 145 **185**

——— **O. XXII, rr. 4, 10**—*Mortgage-suit—Preliminary decree—Death of judgment-debtor—Legal representatives not brought on record—Abatement.*

Where after the passing of a preliminary decree in a mortgage suit the judgment-debtor dies and his legal representatives are not brought upon the record within the period prescribed, the suit abates under r. 4 of O. XXII of the Civil Procedure Code. Rule 10 of the order has no application in such a case. **A** ALI BAHADUR BEG *v.* RAFI-ULLAH, A. I. R. 1927 All. 272; 49 A. 310 **288**

——— **O. XXII, rr. 4, 11**—*Abatement—Suit for redemption—Appeal—Death of one of joint mortgagee-respondents—Representatives not impleaded in time—Appeal abates as a whole—Ignorance of death, effect of.*

Where the legal representative of a respondent who dies during the pendency of an appeal is not brought upon the record within the period allowed by law, the appeal automatically abates as against him, even though the appellant was not aware of the death of the respondent.

The test to determine whether or not the failure to bring upon the record the heirs of one of several respondents, who has died, has the effect of causing an abatement of the entire appeal, or *qua* that particular respondent alone, is as to whether or not the appeal can be decided without, as a result of that decision, bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other the appeal must abate as a whole.

Where during the pendency of an appeal from a suit for redemption of a joint mortgage in favour of two persons, one of the mortgagees dies and his legal representatives are not impleaded as parties in time, the appeal abates as a whole. **A** SHEO CHAND MISRA *v.* SITARAM MISRA, A. I. R. 1927 All. 331 **482**

——— **O. XXII, r. 8**—*Insolvency of plaintiff—Official assignee allowed to continue suit without furnishing security—Security, whether can be demanded at later stage.*

Where a plaintiff is adjudged an insolvent and the Official Assignee elects to proceed with the suit, the time for requiring him to furnish security for the costs of the defendant under r. 8 of O. XXII of the Civil Procedure Code is when he brings himself on the record as plaintiff.

Where without requiring any such security the option is given to the Official Assignee to continue the suit, it is not open to the Court at a later stage to insist on his furnishing security for the defendant's costs of suit. **M** VENUSWAMI IYENGAR *v.* VARADARAJA IYER, A. I. R. 1927 Mad. 511 **440**

——— **O. XXII, r. 11**—*Court, whether entitled to postpone payment under decree with consent of decree.*

Order XX, r. 11 (2), Civil Procedure Code, empowers a Court in executing a decree to order, with the consent of the decree-holder, the payment of the decree amount to be postponed upon such terms as to taking of security as it thinks fit. **M** BALKRISHNA CHETTIAR *v.* KRISHNAMURTHI IYER, 52 M. L. J. 182; (1927) M. W. N. 202; 38 M. L. T. 143; A. I. R. 1927 Mad. 416 **841**

——— **O. XXIII, r. 1.** *See* PART PERFORMANCE **866**

——— **O. XXIII, r. 3.** *See* REGISTRATION ACT, 1908, s. 17 (2) **783**

——— **O. XXIX, r. 1.** *See* C. P. C., 1908, O. VI, R 14 **450**

——— **O. XXX, r. 1.** *See* CONTRACT ACT, 1872, s. 253 **616**

——— **O. XXX, rr. 1, 2, 3.** *See* C. P. C., 1908, O. XXI, R. 50 **204**

——— **O. XXX, r. 4**—*Suit by surviving partner in his own name for partnership debt—Maintainability of suit—Contract Act (IX of 1872), s. 45—Joint promisees—Right to sue.*

Order XXX, r. 4 of the Code of Civil Procedure which permits a partner to sue in the firm name even though some of his co-partners may have died before the suit was instituted and permits it to be continued without the joinder of the legal representatives of a partner who may have died during its pendency applies only when suits are brought in the name of the firm. It does not enable one of several partners to sue alone in his own individual name for a partnership debt. **L** HARI SINGH *v.* FIRM KARM CHAND KANSHI RAM, 8 Lah. 1; A. I. R. 1927 Lah. 115 **721**

——— **O. XXXII, r. 3.**

See BENGAL TENANCY ACT, 1885, s. 40 **146**

See SUCCESSION ACT, 1865, ss. 234, 250 **177**

——— **O. XXXII, rr. 3, 4**—*Guardian* ad litem, *appointment of—Person having interest in suit, whether proper guardian—Formal order of appointment, absence of, effect of.*

In a suit for restitution of conjugal rights against a minor female, a person who is alleged to have had a hand in the marriage of the defendant with the plaintiff is not a proper person to be appointed guardian *ad litem* of the defendant.

A trial Court rejected the application of a certain person to be appointed guardian *ad litem* of a minor defendant, but subsequently it acted upon the written statement filed by that person on behalf of the minor and framed issues on its basis and proceeded to try such issues with the result that the suit was finally dismissed:

Held, that the Court must be taken to have cancelled its previous order rejecting the application for appointment of guardian *ad litem* and to have treated the applicant as such guardian and that the failure of the Court to make a formal order to that effect did not vitiate the proceedings. **L** SARDARA *v.* HAYAT BIBI, 9 Lah. L. J. 206 **468**

——— **O. XXXII, rr. 3, 12.** *See* C. P. C., 1908, O. VI, R. 17 **469**

——— **O. XXXII, r. 7, O. XXXIV, r. 5**—*Transfer of Property Act (IV of 1882), s. 82—Mortgage suit—Preliminary decree—Non-payment into Court—*

Assignment of decree in favour of purchaser of equity of redemption of one of mortgaged items—Decree, whether extinguished—Assignee brought on record—Final decree, whether can be passed—Proportionate abatement of mortgage amount—Transfer by next friend of minor plaintiff without sanction of Court, void or voidable—Execution by transferee—Proper procedure—Security against claims of minor.

Where the amount due under a preliminary decree in a mortgage suit is not paid into Court before the appointed day, a decree for sale must be made under O. XXXIV, r. 5, cl. (2) of the Civil Procedure Code.

Where after the preliminary decree, a defendant, purchaser of the equity of redemption of one of the mortgaged properties, obtains an assignment of the rights of the decree-holder in the name of a *benamidar*, the effect of the assignment is not to destroy the rights under the mortgage-decree and substitute therefor a mere right of contribution. The assignee-decree-holder if brought on record as party is entitled to obtain a final decree for sale. But, as a consequence of the assignment, the mortgage amount must be held to have been reduced by the proportionate part of it to which the property purchased by him was liable. Such amount should, under s. 82 of the Transfer of Property Act, be ascertained by taking the proportion of its value to the total value of the mortgaged properties.

An assignment of the rights under a preliminary decree in a mortgage suit by the next friend of a minor decree-holder without the sanction of the Court under O. XXXII, r. 7 of the Civil Procedure Code is not void but merely voidable at the instance of the minor.

Where objection is taken by the defendants to the validity of such an assignment when the assignee seeks to execute the decree, the assignee-decree-holder should be directed to furnish security to the satisfaction of the executing Court for indemnifying the defendants against any possible claims by the minor plaintiff on the ground that the assignment on his behalf was made without the sanction of the Court. **M** SUNDARAMMAL *v.* SUNDARA REDDI, 38 M. L. T. 148; A. I. R. 1927 Mad. 560 **338**

——— **O. XXXIII, r. 1**—*Pauper, application for leave to sue as—Ornaments and dower-debt, whether property—Plaintiff suing in representative character—Personal property, whether can be considered for purposes of determining pauperism.*

Ornaments which a woman ordinarily wears are of the same class of personal property as her wearing apparel for the purpose of determining whether she is or is not a pauper. Unless, therefore, it is shown that the ornaments which a woman possesses are something beyond and more valuable than what a woman of her class ordinarily uses, it cannot be held that she is not a pauper merely by reason of the fact that she possesses such ornaments.

A dower-debt due to a wife from her husband even where the husband has sufficient means to pay the debt cannot be said to be property or means of which the wife is "possessed" within the meaning of r. 1 of O. XXXIII of the Civil Procedure Code.

When a plaintiff sues in a representative character, such as a *mutwalli*, trustee or a *shebait*, unless it is shown that he has in his possession property belonging to the *waqf* estate or trust or the idol for whom he sues, sufficient to enable him to pay the requisite Court-fee prescribed by law, he may be allowed to sue as a pauper even if it is shown that he has sufficient personal property of his own. The capacity of a person suing in a representative character must be kept distinct from his personal capacity. **C** MABIA KHATUN *v.* SATKARI, 45 C. L. J. 68; A. I. R. 1927 Cal. 309 **264**

——— **O. XXXIII, rr. 6, 7**—*Application for leave to sue as pauper—Inquiry into pauperism—No objection from Government—Duty of Court to take evidence adduced by opposite party.*

Having regard to the provisions of rr. 6 and 7 of O. XXXIII of the Civil Procedure Code, a Court inquiring into the pauperism of an applicant for leave to sue as a pauper, is bound to receive the evidence which the opposite party may adduce in disproof of pauperism even though the application is not opposed by the Government. **C** NONI KRISHNA BOSAK *v.* NABAMONJURI DASSI, A. I. R. 1927 Cal. 464 **726**

——— **O. XXXIV, O. XL**—*Mortgage-decree—Execution—Appointment of Receiver, legality of—Equitable execution, exceptional remedy.*

Order XL of the Civil Procedure Code relating to the appointment of Receivers has no application to the execution of mortgage-decrees.

Appointment of a Receiver by way of execution is an exceptional remedy derived from English practice. **A** MAKHAN LAL *v.* MUSHTAQ ALI **735**

——— **O. XXXIV, r. 1.**

See C. P. C., 1908, O. I, R. 9 **198**

See TRANSFER OF PROPERTY ACT, 1882, ss. 61, 62 **86**

——— **O. XXXIV, r. 1**—*Mortgage, suit on—Person claiming adversely to mortgagor, whether necessary or proper party.*

A person claiming a title paramount to that of the mortgagor and the mortgagee is not a necessary or a proper party in a suit brought by the mortgagee to enforce the mortgage and the question of such paramount title cannot be litigated in such a suit. **S** PUNJAB NATIONAL BANK LTD. *v.* ADAMJI LOOKMANJI & SONS **195**

——— **O. XXXIV, r. 4.** *See* MORTGAGE **577**

——— **O. XXXIV, rr. 4, 5**—*Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage suit—Preliminary decree—Appeal—Final decree, application for—Limitation*

Where there has been an appeal from a preliminary mortgage-decree under O. XXXIV, r. 4, sub-r. (1) of the Civil Procedure Code and the Appellate Court has not extended the time for payment, the period of three years within which under Art 181 of Sch. I to the Limitation Act, an application for a final decree under O. XXXIV, r. 5, sub-r. (2) must be made, runs from the date of the decree of the Appellate Court and not from the expiry of the time for payment fixed by the preliminary decree.

When an appellant appeals to the High Court, unless there is some rule dismissing the appeal for want of time or an order is procured dismissing it, his appeal stands till it is heard and the final decree passed in the appeal by the High Court must be carried out. **P C** FITZHOLMES *v.* BANK OF UPPER INDIA LTD, 25 A. L. J. 78; A. I. R. 1927 P. C. 25; (1927) M. W. N. 87; 38 M. L. T. 46; 4 O. W. N. 181; 28 P. L. R. 117; 52 M. L. J. 366; 31 C. W. N. 444; 25 L. W. 722; 45 C. L. J. 297; 29 Bom. L. R. 782; 8 Lah. 253; 8 P. L. T. 377 **22**

——— **O. XXXIV, rr. 4, 5**—*Mortgage-suit—Com-*

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promise decree directing payment by instalments—Final decree, whether necessary.

Where a compromise decree based on a mortgage provides for the payment of the mortgage-money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due, O. XXXIV, r. 4 of the Civil Procedure Code has no application to the case and consequently it is unnecessary to apply for a final decree in the terms of r. 5 of the Order. A ASKARI HASAN *v.* JAHANGIRI MAL, 25 A. L. J. 107; A. I. R. 1927 All. 167; 49 A. 297 **59**

——— **O. XXXIV, r. 5.**
See C. P. C., 1908, s. 99 **956**
See C. P. C., 1908, O. XXXII, R. 7 **338**

——— **O. XXXIV, r. 6**—*Limitation Act (IX of 1908), Sch. I, Art. 181—Mortgage-decree—Sale subsequently set aside—Purchase-money, refund of—Personal decree, application for, whether maintainable—Limitation.*

Where a sale held under a mortgage-decree is set aside and the mortgagee is directed to return the purchase-money to the auction-purchaser, he is entitled to maintain an application for a personal decree under r. 6 of O. XXXIV of the Civil Procedure Code and limitation for such an application begins to run from the date on which the purchase-money is refunded to the auction-purchaser. A BADAL SINGH *v.* DEBI SARAN DHAR DUBE, 25 A. L. J. 485; A. I. R. 1927 All. 395 **775**

——— **O. XXXIV, r. 7**—*Redemption suit—Preliminary decree—Account, whether must be taken.*

In a suit for redemption it is usual to have an account taken, but if at the time of the passing of the preliminary decree the Court can arrive at the exact sum payable by the plaintiff, it is not necessary to make a direction that an account should be taken, P C PATHUMSA AMMAL *v.* RAJAGOPALA MUDALIYAR, A. I. R. 1927 P. C. 17; (1927) M. W. N. 147; 25 L. W. 346; 52 M L. J. 407; 45 C. L. J. 300; 29 Bom. L. R. 777; 31 C. W. N. 804 **91**

——— **O. XXXIV, r. 8**—*Mortgage—Suit for redemption—Preliminary decree—Second suit for redemption before passing of final decree, whether maintainable—Limitation Act (IX of 1908), Sch. I, Art. 181.*

A mortgagor who has failed to comply with the terms of a decree in a redemption suit filed by him, is not entitled during the continuance of that suit, or before the final decree in that suit has become incapable of execution, to maintain a second suit for redemption of the same mortgage.

During the period of three years prescribed by Art, 181 of Sch. I of the Limitation Act for applying for a final decree, a suit for redemption continues and during that period the rights of the mortgagor and mortgagee are governed by the preliminary decree. A ABDUL KARIM *v.* DURGA PRASAD, A. I. R. 1927 All. 305 **324**

——— **O. XL.** *See* C. P. C., 1908, O. XXXIV **735**
——— **O. XL.** *See* CR. P. C., 1898, ss. 424 ETC. **351**
——— **O. XL, r. 1.** *See* C. P. C., 1908, s. 51 (*d*) ETC. **298**

——— **O. XL, r. 1**—*Practice—Appointment of Receivers—Motion to be made in open Court.*

Application for the appointment of Receivers should be made in the ordinary way by notice of motion in open Court and not in Chambers B MASHAM ISPAHANI *v.* AHMED ISPAHANI, 29 Bom. L. R. 214; A. I. R. 1927 Bom. 256 **1031**

Civil Procedure Code—1908—contd.

——— **O. XL, r. 1, O. XLIII, r. 1 (s)**—*Order appointing Receiver conditional on furnishing security—Appeal, whether lies.*

An order appointing a particular person a Receiver on condition of his furnishing security does not become complete till the security is furnished and before the security is furnished the order is not appealable under O. XLIII, r. 1 (*s*) of the Civil Procedure Code. C SHYAM LAL SINGH *v.* MADHUSUDAN SINGH, 31 C. W. N. 235; 45 C. L. J. 63; A. I. R. 1927 Cal. 253 **140**

——— **O. XL, r. 4**—*Receiver's account—Objection by party—Procedure—Order directing party to file regular suit against Receiver, legality of.*

Where after the submission of accounts by a Receiver a Commissioner appointed to ascertain the mesne profits gives a higher figure as mesne profits than that shown by the Receiver, the proper course to be adopted is to hold an enquiry to find out whether the Receiver has occasioned any loss by his wilful default or gross negligence and to pass an order under O. XL, r. 4, Civil Procedure Code, or if desired to proceed against the sureties under s. 145. It is not proper to direct the parties to institute a regular suit against the Receiver and his sureties. R P. L. T. L. CHETTYAR FIRM *v.* MAUNG THA LU, 6 Bur. L. J. 15 **996**

——— **O. XLI, r. 1, O. XLII, r. 1**—*Appeal, second—Decree of lower Appellate Court, necessity of filing.*

Order XLII, r. 1, Civil Procedure Code, read with O. XLI, r. 1 makes it imperative that in every second appeal the memorandum of appeal should be accompanied by a copy of the decree of the lower Appellate Court. L HAKAM BEG *v.* RAHIM SHAH **810**

——— **O. XLI, r. 4.** *See* C. P. C., 1908, s. 92 **838**

——— **O. XLI, rr. 4, 33**—*Appeal by some judgment-debtors—Others not made parties—Decree, whether can be reversed in respect of all.*

Where a decree appealed from proceeds on a ground common to all the plaintiffs or all the defendants and only some of them appeal against the decree, the power vested in the Appellate Court by r. 4, of O. XLI, of the Civil Procedure Code to reverse or vary the decree appealed from in favour of all the plaintiffs or all the defendants, is not restricted to cases in which the plaintiffs or defendants who have not appealed are made parties to the appeal. Such power can be exercised by the Appellate Court even if the plaintiffs or the defendants who have not appealed are not made parties to the appeal. A MAHA MANGAL RAI *v.* KISHUN KANDU, A. I. R. 1927 All. 311 **346**

——— **O. XLI, r. 5.**
See C. P. C., 1908, ss. 22 ETC **157**
See C. P. C., 1908, s. 47 **23**

——— **O. XLI, r. 23**—*Court Fees Act (VII of 1870), s. 13—Remand for amendment of plaint and re-trial—Court-fee, refund of—Appeal, whether lies.*

An order of remand directing the amendment of the plaint and a trial of the suit falls within the purview of r. 23 of O. XLI of the Civil Procedure Code.

An order refunding Court-fee when remand is made can only be passed under s. 13 of the Court Fees Act, in a case where the remand is made under O. XLI, r. 23 of the Civil Procedure Code. L MOHAMMAD SHAFI *v.* PANCHAYAT FATEHGARH, A. I. R. 1927 Lah. 196 **49**

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——— O. XLI, rr. 23, 25. *See* C. P. C., 1908, s. 115 ETC. 135

——— O. XLI, rr. 23, 25—*Decision not on preliminary point—Remand, legality of.*

Where the decision of a trial Court is not based on a preliminary point, an order of remand cannot properly be made under O. XLI, r. 23 of the Civil Procedure Code. If an Appellate Court finds, in a case which has not been disposed of by the trial Court on a preliminary point, that any particular issue has not been decided by the trial Court or that further evidence is necessary on the point it should act under O. XLI, r. 25 of the Code. A reversal of the decree and remand of the whole case with liberty to the parties to open up the whole case is illegal. **B** KALU DALPAT PATIL *v.* NARAYAN DAGADU SUTAR, 29 Bom. L. R. 56; A. I. R. 1927 Bom. 111 578

——— O. XLI, r. 33. *See* C. P. C., 1908, O. XLI, RR. 4, 33 346

——— O. XLII, r. 1. *See* C. P C., 1908, O. XLI, R. 1 810

——— O. XLII, r. 1—*Review—Admission of review on particular ground—Decision on other grounds, legality of.*

Even though a Court determining a review is not necessarily confined to the grounds upon which the review is granted, yet, where a review is granted upon one ground it cannot be argued and decided upon a totally distinct and unconnected ground in a case where the actual officer who hears the review would have no authority to admit the review upon the latter ground. **O** MOHAMMAD HADI *v.* SADIQ HUSAIN, 13 O. L. J. 544; A. I. R, 1927 Oudh 131 425

——— O. XLIII, r. 1 (a). *See* C. P. C., 1908, s. 115 ETC 135

——— O. XLIII, r. 1. (c) (j). *See* C. P. C., 1908, O. IX, R. 9 343

——— O. XLIII, r. 1 (s).
See C. P. C., 1908, s. 51 (*d*) ETC. 298
See C. P. C., 1908, O. XL, R. 1 140

——— O. XLV, r. 4—*Appeal to Privy Council—Consolidation—'Same judgment,' meaning of.*

A sale-deed was executed by four persons each of whom took a separate document from the vendee by which he was given an option of re-purchase. Plaintiff, who was one of the four vendors, brought a suit for specific performance of the agreement evidenced by the document passed in his favour. He also brought a separate suit as heir of one of the other vendors in whose favour a similar document had been passed. The trial Court dismissed the latter suit on the ground that the plaintiff had not proved his heirship but a decree was given in favour of the plaintiff in the former suit. One of the main questions raised in the suits was whether the document sued on was inadmissible in evidence for want of registration and the trial Court decided that it was admissible in evidence. On appeal to the High Court it was held that the document was inadmissible in evidence, being compulsorily registrable and the decree of the trial Court in plaintiff's favour was reversed and that against the plaintiff was confirmed. The High Court wrote its main judgment in one case and decided the other case by a reference to its judgment in the previous case. Plaintiff made an application for leave to appeal to the Privy Council but inasmuch as the value of each suit separately was below Rs. 10,000, he made an application to have the two suits consolidated for the purpose of the pecuniary valuation nvolved:

Civil Procedure Code—1908—contd.

Held, that having regard to the fact that the only question which arose in the appeals to the Privy Council was the question of admissibility of the document sued upon under the Registration Act, the suits must be deemed to have been decided by the "same judgment" within the meaning of r. 4 of O. XLV of the Civil Procedure Code and should be consolidated. **B** JIVANGIRI GURU CHAMALGIRI *v.* GAJANAN NARAYAN PETKAR, 50 B. 753; A. I. R. 1927 Bom. 19 143

——— O. XLVII, r. 1. *See* C. P. C., 1908, s. 115 429

——— O. XLVII, r. 1—*Review—Erroneous view of law, whether good ground for review—"Any other sufficient reason", scope of.*

An erroneous view on a point of law cannot be deemed to fall within the provisions of r 1 (1) of O. XLVII of the Civil Procedure Code.

The words "any other sufficient reason" as used in O. XLVII, r. 1, Civil Procedure Code, mean a reason sufficient on grounds at least analogous to those specified immediately previously. **N** SADASHEO *v.* VITHOBA 30

——— Sch. II, Para. 14 (c). *See* LIMITATION ACT, 1908, SCH. I, ART. 158 634

——— Sch. II, para. 20—*Arbitration—Award, order refusing to file—Award, whether can be enforced independently.*

It is not necessary for the validity of an award that it should be filed in Court. The refusal of a Court to file an award does not vitiate it, but merely leaves it to have its ordinary legal effect. **A** SIWAN RAI, *v.* LACHMI SINGH 762

——— Sch. III, para. 11—*"Alienate", meaning of—Transfer in future, whether prohibited—Sale—Agreement to sell whether can be implied from void sale—Right* in personam*—Part performance, principle of, whether applicable to void sales—Mortgage—Mortgagee, when entitled to possession—Sale of village—House and* kotha, *whether pass to purchaser—Presumption.*

The word "alienate" in para. 11 of the Sch. III of the Civil Procedure Code is used *ejusdem generis* with the preceding words "mortgage, charge and lease" and the provision does not prohibit the transfer in future of interest in property in respect of which proceedings before the Collector are pending. Agreements to sell such property are not affected by the pendency of the Collector's proceedings.

A contract to convey immoveable property in future for a certain amount is only a personal contract and gives rise to a right *in personam* which may be satisfied either by the performance of the specific act or by giving compensation.

If the sale of property is statutorily void an agreement to sell enforceable in law cannot be implied to exist separately and independently of the sale itself and it cannot be given effect to because the sale no longer exists and the agreement is merged in the sale.

The equitable doctrine of part performance cannot be applied to the case of a transaction which is void *ab initio* and not merely unenforceable in law owing to a mere defect of form or absence of formality normally necessary to make it legal.

A mortgagee has no right to the possession of property mortgaged unless and until he forecloses and he cannot, therefore, keep out of possession a person to whom the property has been sold by the mortgagor.

Civil Procedure Code—1908—concld.

A house and a *kotha* in a village are appurtenant to it and in the absence of any words excluding them from the operation of a sale of the village, they cannot be retained by the vendor. **N** NARAYAN *v.* VITHOBA, A. I. R. 1927 Nag. 177 **863**

——— **Sch. III, rr. 11 (3).** *See* C. P. C., 1908, s 146 **619**

Companies—*Articles of Association—Borrowing powers—Construction—Borrowing in excess of powers—Duties of strangers—Presumption of regularity of internal affairs—Benefit to Company, effect of—Subrogation.*

Where the Articles of Association of a Company give borrowing powers in a certain manner, the share-holders and the Corporation itself are entitled to say that the safe-guards of the Articles should be observed.

A person dealing with a Company must take the Articles to be such as appears at the office of the registrar of Companies to be in force. If the Directors propose to do something in excess of their powers thereunder, he is not entitled to assume that their powers have been extended by a special resolution inasmuch as such a resolution, if passed, would be registered.

The principle that a Company is liable in equity to refund money improperly borrowed by its Directors on its behalf but in fact *bona fide* applied in discharging debts or liabilities of the Company cannot be applied where the debt or liability discharged is an item in unsettled accounts expressly challenged by the Company. **C** NATIONAL COAL CO., LTD. *v.* GYAN RANJAN BHATTACHARYA, 45 C. L. J. 96; A. I. R. 1927 Cal. 299 **875**

——— *Articles of Association—Share certificate loss of—Issue of new certificate—Indemnity—Discretion of Directors—Power of Court.*

One of the Articles of Association of a Company provided that if any certificate of shares was worn out or was defaced, then, upon the production thereof to the Directors, they may order the same to be cancelled and may issue a new certificate in lieu thereof and if any certificate was lost or destroyed, then upon proof to the satisfaction of the Directors, or in default of proof, on such indemnity as the Directors deem adequate being given, a new certificate in lieu thereof should be given to the party entitled to such lost or destroyed certificate:

Held, that an absolute discretion was given to the Directors as to the indemnity to be furnished in the case of a lost or destroyed certificate and that the Court would not interfere with the exercise of such discretion where there was no question of the *mala fides* of the Directors. **C** DULICHAND SAMSUKH *v.* DUNBAR MILLS CO., 31 C. W. N. 155 **182**

Companies Act (VII of 1913), ss. 2 (3), 164, 199, 200—*Payment order by one High Court—Contributories residing in* mofussil *centres within jurisdiction of another High Court—Enforcement of order—Procedure.*

Where payment orders have been made by one High Court in the matter of the winding-up of a Company under the Companies Act for various amounts against contributories residing in certain *mofussil* parts within the jurisdiction of another High Court, such orders for purposes of enforcement of them in execution must, by the conjoint effect of ss. 2 (3), 199 and 200 of the Act, be treated in the same manner as a decree passed by the latter High Court and may be transferred for execution to the various District Courts within whose respective jurisdictions the contributories reside. To such a case s. 164 of the Act has no application whatever. **M** *In the matter of* THE INDIAN COMPANIES ACT, 25 L. W. 113; A. I. R. 1927 Mad. 271 **744**

——— **s. 164.** *See* COMPANIES ACT, 1913, ss. 2 (3) ETC. **744**

——— **ss. 199, 200.** *See* COMPANIES ACT, 1913, ss. 2 (3) ETC. **744**

——— **s. 235.** *See* LIMITATION ACT, 1908, SCH. I. ART. 36 **907**

Conflict of laws—*Migration—Law applicable to emigrant—Presumption—Personal law.*

When a person migrates from one country to another there is a presumption that he carries with him his personal law and unless there is something to show that he has adopted the law of his new domicile he must be deemed to be still governed by the old law. **A** SUKHBIR SINGH *v.* MANGEISAR RAO, 25 A. L. J. 185; A. I. R. 1927 All. 252; 49 A. 302 **778**

Consent—Acquiescence and consent distinguished. *See* LANDLORD AND TENANT **855**

Construction of document, whether question of law. *See* PRECEDENTS **413**

Contract—*Agreement to lease shop—Possession not given to lessee—Damages, measure of—Profits derivable from business, whether recoverable—Contract Act (IX of 1872), s. 73.*

The plaintiff, a commission agent, took a shop on lease from the defendant after paying him a certain amount as advance. The defendant did not give him possession. The defendant did no business for 8 months although similar shops were available in the same locality, and sued the plaintiff for recovery of the advance amount and damages calculated on the basis of what he could have earned as a commission agent during those 8 months. His claim was allowed by the lower Courts. On Letters Patent Appeal:

Held, that the plaintiff was not entitled to the damages claimed. **L** NEKI RAM *v.* PIRBHU DAYAL, 28 P. L. R. 101; 9 Lah. L. J. 89 **662**

——— Contract by correspondence—Construction. *See* CONTRACT ACT, 1872, s. 73 **422**

——— *Offer and acceptance—Acceptance not according to offer, effect of—'Ensuing year.'*

The defendant made an application to a Municipality on 17th November, 1925, offering Rs. 150 for the *gab* (silt) for the 'ensuing year.' The Municipality passed a resolution saying that the silt might be given up to 31st March, 1926, to the defendant for Rs. 150 provided he arranged to remove it immediately. This resolution was never sent to the defendant, but a letter was sent by the Secretary on 16th December, 1925, in which it was stated that his offer was accepted with reference to the resolution mentioned above. The defendant immediately began removing the silt. After 31st March, 1926, he was not allowed to remove the silt. In a suit by the Municipality for recovery of Rs. 100, being the balance due from the defendant:

Held, that the words 'ensuing year' referred to a period of one year and not the remaining part of the current year, that, therefore, there was either no contract at all between the Municipality and the defendant or a contract in accordance with the Secretary's letter of acceptance and that in either case the suit could not be maintained. **L** MUHAMMAD

Contract—concld.

HUSSAIN *v.* MUNICIPAL COMMITTEE, GUJRANWALA, A. I. R. 1927 Lah. 240 **573**

——— *Sale of land—Time not of the essence.*

Time is not of the essence of the contract in contracts relating to sales of immoveable property. **B** KALU DALPAT PATIL *v.* NARAYAN DAGADU SUTAR, 29 Bom. L. R. 56; A. I. R. 1927 Bom. 111 **578**

Contract Act (IX of 1872), ss. 7, 8, 9—*Offer and acceptance—Acceptance by conduct—Mere silence, effect of—Bank giving intimation that higher interest will be charged—Taking further loan—Acceptance.*

It was agreed between the plaintiff and the defendant Bank that the plaintiff should deposit bales of cotton and obtain loans re-payable on demand from the Bank. The loans were to bear a particular rate of interest. Provision was also made for variation of the rate of interest by agreement between the parties. The Bank subsequently informed the plaintiff that they intended to charge a higher rate of interest. The plaintiff did not reply, but obtained a further loan from the Bank :

Held, that though the plaintiff's failure to reply did not amount to an acceptance of the proposal of the Bank to continue the loan only on higher interest, his taking a further loan subsequent to that offer amounted to an acceptance of the offer and the plaintiff was liable to pay the higher rate of interest.

Per *Ashworth, J.*—A correct interpretation of ss. 7, 8 and 9 of the Contract Act does not import into Indian Law the English Law as to acceptance by conduct. On a proper interpretation of these sections there are only three cases in which acceptance can be made otherwise than in words. One is when the promisor has specified a manner in which his proposal is to be accepted and that manner is not acceptance in words but acceptance otherwise than in words. A second is when acceptance is by performance of a condition of the proposal and the third is when acceptance of proposal is by the acceptance of any consideration offered for a reciprocal promise invited from the promisee. There is, however, one further case in which there may be acceptance by conduct which is not covered by ss. 7, 8 and 9. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly.

No duty is cast by the law upon a person to whom an offer is made to reply to that offer. A GADDAR MAL *v.* TATA INDUSTRIAL BANK LTD., BOMBAY, 25 A. L. J. 372; A. I. R. 1927 All. 407 **1023**

——— **s. 11**—*Contract by minor—Ratification after attaining majority—Validity of contract.*

A minor is not competent on attaining majority to execute a fresh bond ratifying as it were a bond executed by him during his minority. **A** BINDESHARI BUX SINGH *v.* CHANDIKA PRASAD, 25 A. L. J. 132; 49 A. 137; A. I. R. 1927 All. 242 **748**

——— **ss. 16, 74**—*Undue influence, what amounts to—Borrower in need of money, effect of—Compound interest, whether penal.*

A stipulation as to the payment of compound interest can be held to be penal only when the rate of interest increases in case of default of payment.

To attract the operation of the provisions of s. 16 of the Contract Act, it is necessary to prove that one of the parties to the transaction was in a position to dominate the will of the other. The mere unconscionableness of the bargain is not the first thing to be considered in this connection. The exaction of excessive and usurious interest even though there may be ample security does not by itself raise any presumption of undue influence unless it is first established that the lender was in a position to dominate the will of the borrower. The mere fact that the borrower was in great need of money at the time of taking the loan is not sufficient to give rise to a presumption of undue influence. **A** MUHAMMAD SAID KHAN *v.* INDARPATI SINGH, A. I. R. 1927 All. 315 **679**

Contract Act—contd.

——— **ss. 19, 19A, 37, 42, 45**—*Contract induced by undue influence—Death of party—Right of legal representatives to set aside document—Specific Relief Act (I of 1877), s 35—Trusts Act (II of 1882), s. 88.*

A suit to set aside a document for fraud or undue influence can be brought by the legal representatives of the party injured.

Where a person of weak mind has been induced to make a nominal transfer of his properties in favour of a near relation on the statement or representation that the latter would manage it for him and keep it out of harm's way, the transferee puts himself in a fiduciary position, and the legal representatives of the transferor are consequently entitled under s. 88 of the Trusts Act to sue for recovery of the property from the transferee. **B** SHRAVAN GOBA MAHAJAN *v.* KASHIRAM DEVJI, 29 Bom. L. R. 115; 51 B. 133; A. I. R. 1927 Bom. 384 **932**

——— **s. 20**—*Compromise of doubtful rights—Mistake as to fact not essential to agreement—Contract not void.*

Certain lands in the City of Lucknow were held by the defendants as tenants under the Secretary of State. The latter sued for possession of the lands. The defendants denied his title, but the suit was compromised by the defendants who acknowledged the Secretary of State's title and executed a *kabuliyat* to him. It was subsequently decided by the Privy Council, in a suit not *inter partes* that the title to lands occupied by houses in the City of Lucknow rested in the occupants of the houses and not in the Crown. In a suit for rent by the Secretary of State the defendants contended that the compromise was void as it was vitiated by a mistake of fact as to the title of the Crown :

Held, that the essence of the compromise was the recognition of the antecedent title independently of whether it actually existed or not and the matter that the title lay actually in the Secretary of State, not being a fact essential to the agreement, the compromise was not void under s. 20 of the Contract Act. **O** SECRETARY OF STATE FOR INDIA *v* NABI BAKHSH, A. I. R. 1927 Nag. 198 **730**

——— **s. 20**—*Specific Relief Act (I of 1877), s. 14—Provincial Insolvency Act (IX of 1887), Sch. I, Art. 15—Civil Procedure Code (Act V of 1908), ss. 100, 115—Vendor and purchaser—Deficiency in area sold—Purchaser's right to compensation—Suit for compensation—Suit of Small Cause nature—Second appeal—Misapplication of law—Revision.*

Section 20 of the Contract Act is not applicable where the purchaser obtains substantially the thing which is the subject-matter of sale.

Compensation can be awarded to a vendee for deficiency in the area of land purchased by him and it makes no manner of difference that the mistake is

discovered only after the conveyance has been executed and registered.

A suit by a vendee for compensation for deficiency in the area sold is a suit of a Small Cause nature.

Misapplication of law by a Court is a material irregularity in the exercise of its jurisdiction justifying interference in revision. R U PAN *v.* MAUNG PO TU, 5 Bur. L J. 206; A. I. R. 1927 Rang. 90 **327**

——— **s. 23**—*Agreement to perform* 'puja' *for success in litigation, whether against public policy —Unrighteous object.*

The plaintiff and the defendant entered into a contract under which the plaintiff undertook to perform a kind of '*puja*' or '*anushthan*' in order to bring about the defendant's success in a pending litigation, and the defendant agreed to give the plaintiff in return one-tenth of the amount recovered by means of the litigation. It was found that the intention of the parties was that the plaintiff should exercise some influence unauthorised by law, whether righteous or the reverse, and whether through any particular deity or not with the object of bringing about the success of the defendant. The plaintiff carried out his part of the contract and the defendant was successful. The plaintiff sued to enforce payment of the one-tenth:

Held, that the contract was against public policy and, therefore, void and unenforceable A BHAGWAN DAT SHASTRI *v.* RAJA RAM, 25 A. L. J 518; A. I. R. 1927 All. 406 **1040**

——— **s. 23**—*Gambling, money advanced for—Place of gambling not proved to be public or a gaming house - Loan, whether recoverable—Public policy.*

In the absence of evidence that the gambling for the purpose of carrying on which a loan is advanced, was going on in a public place or a gaming house, the amount of the loan is recoverable from the debtor inasmuch as the loan was not advanced for a purpose which was necessarily illegal. N DADU KHUSHIRAM *v.* HORILAL KASIRA, A. I. R. 1927 Nag. 155 **345**

——— **s. 23**—*Monopoly to sell vegetables—Public policy.*

Grant of a monopoly by a *panchayat* in favour of a person to sell vegetables in a village is opposed to public policy under s. 23, Contract Act. L DEVI DAYAL *v.* NARAIN SINGH **859**

——— **s. 23**—*Public policy—Compromise of dispute —Withdrawal of prosecution, effect of.*

Where the withdrawal of a criminal case of a trifling nature is one of the motives for the compromise of a real dispute, it would not follow that the ompromise is void as being against public policy.

Where an agreement is in itself a fair settlement of the dispute between the parties and would possibly have been arrived at even if there had been no criminal prosecution pending at the time, the agreement cannot be held to be void merely because the withdrawal of a criminal prosecution was also one of the motives for the compromise. A ONKAR MAL *v.* ASHIQ ALI, A I. R. 1927 All. 318; 25 A. L. J. 495 **499**

——— **ss. 23, 239**—*Contract forbidden by law—Forest contractor—Agreement to take* shikmi *partner, legality of—Partnership, definition of.*

An agreement between two or more persons to participate in the right to cut and remove the trees from a forest in certain shares irrespective of the profit or loss that may accrue from the sale of the trees does not constitute a partnership inasmuch as under s. 239, Contract Act, an agreement to share profits is essential to the constitution of a partnership.

Where conditions are prescribed by Statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the conditions was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed, but they are valid if no specific penalty is attached to the specific transaction and if it appears that the condition was imposed for merely administrative purposes, *e. g.*, the convenient collection of the revenue. Therefore, a contract by which a Forest Contractor from a State takes some persons as *shikmi* partners in violation of the rules of the State prohibiting him from doing so, not being forbidden by law, is not void. L ABDULLAH *v.* ALLAH DIYA, 28 P. L. R. 161; 8 Lah. 310; A. I. R. 1927 Lah. 333 **846**

——— **s. 25**. *See* STAMP ACT, 1899, SCH, I, ARTS. 1, 5 (c) **593**

——— **s. 25 (1)**—'*Parties standing in a near relation*'—'*Natural love and affection*'—*Agreement by Muhammadan to pay maintenance to wife's father and mother—Validity of agreement.*

The meaning of the words "parties standing in a near relation" in s. 25 (1) of the Contract Act of 1872 should not be narrowed down so as to mean "near relatives."

The parents of a Muhammadan lady are relatives of her husband and they must be considered to be parties standing in a near relation to him. An agreement by a Muhammadan to pay certain maintenance to his wife's father and mother is, therefore, a valid disposition by virtue of s. 25 (1) of the Contract Act as having been made on account of natural love and affection between parties standing in a near relation to each other. O NISAR AHMAD KHAN *v* RAHMAT BEGUM, 4 O. W. N. 195; A I. R. 1927 Oudh 146 **350**

——— **s. 30**. *See* PENAL CODE, 1860, s. 405 **989**

——— **s. 30**—*Wager—Collateral contract—Principal depositing money with agent as security—Suit to recover deposit—Defence of illegality.*

A person employed as an agent in connection with a wager cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent money deposited by the principal with the agent by way of security. A HARDEO DAS-NANAK CHAND *v.* RAM PRASAD-SHYAM SUNDER LAL, 25 A. L. J. 223; A. I. R. 1927 All. 238; 49 A. 438 **774**

——— **ss. 30, 45**—Pacca adatia *business, nature of*—Pacca adatia's *right to demand margin money —Principal and agent—Contract giving absolute discretion to agent—Duty to prove existence of circumstances for exercise of discretion—Partnership — Surviving partner's right to sue.*

Although in accordance with the ordinary practice in Bombay the *pacca. adatias* are entitled to call for margin if the rise or fall in the market justified such a demand for margin, yet, the onus lies clearly on them to establish that circumstances had arisen which justified the exercise of their powers.

Even where a contract purports to give an agent

an absolute discretion as to calling for margin, it is yet incumbent on him to show that circumstances exist for the reasonable exercise of that discretion.

The common type of business dealing between a *pacca adatia* in Bombay and his up-country constituent may be speculative but is not necessarily a wager in the eyes of the law.

A partner may sue as such making his co-partners defendants where substantial grounds are shown for following such a procedure.

Notwithstanding s. 45 of the Contract Act it is not imperative to add the legal representatives of a deceased co-partner to an action for recovery of a debt by the surviving partners. B DEVSHI HARPAL *v.* BHIKAMCHAND RAMCHAND, 29 Bom. L. R. 147; A. I. R. 1927 Bom. 125 **993**

——— **ss. 32, 37.** *See* TRANSFER OF PROPERTY ACT, 1882, ss 11.40 **683**

——— **ss. 37, 42.** *See* CONTRACT ACT, 1872, ss. 19, 19A ETC. **932**

——— **s. 45.**

See C. P. P., 1908, O. XXX, R. 4 **721**

See CONTRACT ACT, 1872, ss. 19, 12A ETC **932**

See CONTRACT ACT, 1872, ss. 30, 45 **993**

——— **ss. 64, 65, 73, 74**—*Contract of sale—Rescission—Damages—Refund of earnest-money—Damages, whether can be set-off against earnest-money—Seller, when can claim damages—Vendor and purchaser—Duty of vendor to tender conveyance.*

There is no special law in India with regard to the return of earnest-money on the breach of a contract for sale of land. Every case in which any question of earnest-money arises can be decided on the provisions of ss. 64 or 65 and 73 or 74 of the Contract Act.

When a contract to sell is rescinded, the seller must restore the benefit he has received under it, under s. 64 of the Contract Act if he rescinds it himself, and under s. 65, if the purchaser rescinds it. But, when he rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under s. 73, and even if he has suffered none, he can be awarded a reasonable amount as compensation not exceeding the earnest-money, if there is the usual agreement of forfeiture in the contract under s 74. Either sum awarded as damages can be set-off against the amount of the earnest-money he has to refund.

It is the duty of a vendor of immoveable property to offer a proper conveyance to the purchaser and to call upon him to pay the purchase-money.

The question of the payment of damages to the seller can arise only if the purchaser is responsible for the breach of contract. N BAJIRAO *v.* SHIVRAM, A. I. R. 1927 Nag. 168 **860**

——— **s. 73.** *See* CONTRACT **662**

——— **s. 73**—*Breach of contract—Agreement to sell immoveable property*—Benami *transaction—Document, formal, to be drawn up, effect of—Completed contract—Further negotiations, effect of—Hindu Law—Contract to sell by manager—Damages, liability for—Damages, measure of.*

It is a common practice in this country that people, while paying money from their own pockets, purchase property for various reasons, in the names of the members of their families. Such transactions are well-known as *benami* transactions and their validity is recognized by the Courts. Where, therefore, a person enters into an agreement for the purchase of immoveable property in the name of his wife, he is not debarred from maintaining a suit for specific performance of the agreement or for damages for its breach by reasons of the fact that the property was intended to be conveyed in the name of his wife and not of himself.

A contract may be a completed and binding contract although a document in which its terms are to be embodied is to be executed and registered later on. The real test in such cases is the intention of the parties as to whether or not there is to be no binding contract till the document is executed or whether the document is merely to commemorate in the manner required by law the terms of a bargain already completed

Where during the course of a correspondence which passes between the parties a certain stage is reached when they are *ad idem*, there is a completed contract between them and the mere fact that there are subsequent negotiations between them cannot be relied upon to defeat a claim for specific performance based upon the completed contract. In other words, when once it is shown that there is a completed contract, it is impossible that further negotiations between the parties can, without the consent of both, get rid of what may be called the crystallised contract already arrived at and contained in the letters which have passed between the parties.

A manager of a joint Hindu family who has agreed to sell immoveable property belonging to himself and the other members of the family is personally liable under s. 73 of the Contract Act, for damages for failure to perform the contract, when it is found that the contract is not binding upon the other members of the family.

The measure of damages in a case of a breach of a contract to sell immoveable property is the difference between the price agreed upon between the parties and the price at which the defendant actually sold the property to a third person instead of selling it to the plaintiff. L RADHA KISHAN KAUL *v.* SHANKAR DAS, 9 Lah. L. J. 199; A. I. R. 1927 Lah. 252 **422**

——— **ss. 73, 74.** *See* CONTRACT ACT, 1872, ss. 64, 65 ETC **860**

——— **s. 74.**

See CONTRACT ACT, 1872, ss. 16, 74 **679**

See CUSTOM **269**

——— **s. 107**—*C. i. f. contract—Property when passes—Tender of Bill of Lading—Re-sale by seller.*

In case of a *c. i. f.* contract before a seller can claim right of re-sale it is essential for him to prove that he has performed his part of the contract by delivery or tender of the Bill of Lading or other relative shipping document to the buyer. L PAHLAD DAS-CHHOTELAL *v.* SOHAN LAL & Co, A. I. R. 1927 Lah. 223 **567**

——— **s. 107**—*Right of re-sale—Consignment through Railway—Property in goods, when passes to purchaser—Re-sale, right of, how to be exercised—Reasonable notice to purchaser.*

It is settled law that goods cannot be re-sold at the risk of the purchaser under s. 107 of the Contract Act until the property in them has passed to him.

Where goods are sent through Railway and the Railway receipt is addressed to the consignor himself, to be delivered to the purchaser only on the receipt of the price for the goods, the property in the goods does not pass to the purchaser till the price is paid.

Contract Act—contd.

A vendor who elects to exercise the right of re-sale given to him by s. 107, Contract Act, is bound to wait for a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling. L SUNDAR SINGH-JIT SINGH *v.* GULAB SINGH-KALYAN SINGH, A. I. R. 1927 Lah. 269 **795**

——— **s. 107**—*Right of re-sale—Passing of property—Contract denied from beginning—Damages.*

The right of re-sale may be the result either of a statutory provision or of agreement between the parties. The statutory right conferred by s. 107 of the Contract Act can only be exercised if the property in the goods has passed to the buyer.

Where a contract for sale of goods is repudiated by a party before the property in the goods sold has passed to the buyer, right of re-sale cannot be invoked by the other party and the measure of damages claimable is the difference between the market rate and the agreed rate. R ENG BAN HWAT & Co. *v.* LATIEF HAZI SHARIFF-HAJEE NOOR MAHCMED, 5 Bur. L. J. 198; A. I. R. 1927 Rang. 81 **307**

——— **ss. 134, 139**—*Omission to sue principal within limitation—Surety, whether discharged—Pursuing remedy against one of several debtors, effect of—Provincial Small Cause Courts Act (IX of 1887), s. 25—Limitation, wrong decision on point of—Revision, interference in—Accepting document, without formal proof, effect of.*

A creditor's omission to sue the principal within limitation is not an act or omission of the kind contemplated by s. 134 or 139, Contract Act, whereby the surety is discharged.

It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others does not bring the case within ss. 134 and 139, Contract Act.

A wrong decision on a question of limitation is not a valid ground for interference in revision under s. 25, Provincial Small Cause Courts Act, when substantial justice has been done.

Where party to a suit has accepted a certificate of an expert without formal proof thereof, he cannot be allowed later on to contend that it is inadmissible in evidence for want of proof. L DIL MUHAMMAD *v* SAIN DAS, A. I. R. 1927 Lah. 396 **922**

——— **s. 135**—*Civil Procedure Code (Act V of 1908), s. 55 (4)—Bond for judgment-debtor applying for insolvency—Decree-holder granting time to judgment-debtor—Surety, discharge of—Construction of bond.*

A surety bond executed under s. 55 (4) is one in favour of the Court though the ultimate beneficiary may be the decree-holder. Therefore, a surety under that section is not discharged under s. 135 of the Contract Act by the decree-holder granting time to the judgment-debtor.

A surety bond ran as follows:—"*Agar mudyun darkhast diwalya na dewega aur adalat main hazar na hoga to main baqaya zare digri jis kadar digridar ka hoga bhar dunga.*" The judgment-debtor applied for insolvency but, with decree-holder's consent, time was given to pay up the debt and the application was withdrawn:

Held, that the surety was not liable under the bond as both the conditions under the bond had not been fulfilled. L DHARI MAL *v.* KANSHI RAM, A. I. R. 1927 Lah. 336 **762**

——— **s. 239.** *See* CONTRACT ACT, 1872, ss. 23, 239 **846**

Contract Act—contd.

——— **s. 239**—*Partnership, essentials of—Agreement to give fixed salary in lieu of profits and non-liability for losses, effect of—Solicitors not trading firm.*

The legal existence of a partnership has to be determined from all the facts. A statement in a document that nothing therein contained is to constitute the relationship of partners, will not necessarily prevent the parties from being partners in the eyes of the law. So, too, a mere statement that the parties are to be partners will not necessarily constitute them partners in law. Further, although two persons may hold themselves out to be partners and be liable to third parties accordingly, yet it does not necessarily follow that they would be partners *inter se*.

It is perfectly open to partner A to say that as between himself and his Partner B, the Partner A shell bear all the comes of the business. In other words, it is not essential to constitute a partnership that the partners should agree to share the losses.

Partners may agree that on the determination of their partnership, the assets are to be dealt with in a particular way, for instance, that all the assets are then to belong to a particular partner.

It is open to partners to agree that one partner is to receive a fixed annual or monthly sum in lieu of a sum varying in accordance with the profits actually earned.

Solicitors are not a trading firm.

The plaintiff and the defendant two Solicitors, entered into an agreement that they should be partners of the firm of N. H. and Co., and should practise as attorneys under the said name and firm. The partnership was to be for one year and on its determination the defendant was to have no claim or interest whatever in the firm and its outstandings or in the property name or good-will thereof. The defendant was to receive a fixed amount monthly in lieu of profits and was not liable for any losses of the firm. Notice of the agreement was also issued to the clients of the partnership. In a suit between the parties to the agreement, the trial Court held that the defendant was not really a partner but a mere agent. On appeal:

Held, that the agreement amounted to a partnership. B RAGHUNANDAN NANU KOTHARE *v.* HORMASJI BEZONJI BAMJI, 29 Bom. L. R. 207; A. I. R. 1927 Bom. 187; 51 B. 342 **1025**

——— **ss. 246, 264**—*Provincial Insolvency Act (V of 1920), s. 6—Partnership—Partner, retirement of—Notice, necessary—Insolvency of firm—Partners, whether must be adjudicated insolvents, individually—Act of insolvency committed by one partner, effect of, as against others.*

Before the applicability of s. 264 of the Contract Act is attracted in any particular case the claimant must prove that a person whom he wishes to hold liable as partner was ostensibly a partner in the defendant firm at the date of the arising of the cause of action.

The expression "persons dealing with a firm" in s. 264 of the Contract Act applies equally to old and to new customers of the firm, but only to such of them as have dealt with the firm on the assumption that the person whom they wish to hold liable was a partner in that firm.

When a dormant partner retires from the partnership he need give no notice of his retirement in order to free himself from liability in respect of acts

done after his retirement. The reason is that, as he was never known to be a partner, no one can have relied on his connection with the firm, or can truly allege that when dealing with the firm, he continued to rely on the fact that the dormant partner was still connected therewith.

But when an apparent partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before the change took place are entitled to assume that no change has occurred until they have notice to the contrary. Even those who never had dealings with the firm, and who only knew of its existence by repute, are entitled to assume that it still exists until something is done to notify publicly that it exists no longer. An old customer, however, is entitled to a more specific notice than a person who never dealt with the firm at all.

So far then as new customers, who rely merely on the evidence of repute, are concerned, the requirements of the section would be sufficiently complied with if the ostensible or the retiring partner, as the case may be, gives public notice of the revocation of his authority to be represented by the other members of the firm.

So far as the old customers are concerned, it is possible for the retiring partner to ascertain their names and to inform them that he has ceased to be a partner and this must, therefore, be done.

In order to sustain a joint adjudication of insolvency against two or more persons, it is necessary that some act of insolvency should have been committed by each of them. But the act of insolvency may be a joint act committed by one partner on behalf of himself and as agent of others, or it may be committed by a person who is not a partner but a mere agent and his authority need not be special or explicit.

The act of a partner who gives notice that his firm has suspended or is about to suspend business is *prima facie* a joint act on behalf of all persons who are liable as partners in the firm unless they can show that they are solvent and able to pay the debts of the firm for which they are liable. In such a case a petitioning creditor is not required to prove the express authority of the partner on behalf of the other partners to give notice of suspension. **S** *In the matter of* MESSRS. DAVID SASSOON & CO. LTD., A. I. R. 1927 Sind 155 **389**

——— **s. 253**—*Partnership—Death of partner—Dissolution of partnership—'Contract to the contrary'—Agreement for accounting after sale of stock—Partnership being for single adventure—Co-heirs—Suit by some alone, maintainability of—Civil Procedure Code (Act V of 1908), O. XXX, r. 1.*

In the absence of a contract to the contrary the death of a partner dissolves the partnership and the fact that it is entered into for a single adventure does not necessarily lead to the inference of a contract to the contrary within the meaning of s. 253 of the Contract Act.

The mere fact that a deed of partnership provides that the accounts are to be taken after all the stock is sold cannot be held to mean that there is an agreement that if a partner dies before all the stock is sold there is to be no dissolution.

A suit by some only of the heirs of a deceased partner for accounts against the surviving partner without impleading the other heirs as parties is not sustainable. Such a defect cannot be cured by applying to add them as parties after a suit by them would be barred by limitation. **M** ABDUL HAWK *v.* TUMULARI VYKUNTAM, 52 M. L. J. 318; 25 L. W. 388; 33 M. L. T. 214; A. I. R. 1927 Mad. 491 **616**

——— **s. 264.** *See* CONTRACT ACT, 1872, ss. 246, 264 **389**

Contribution—Discretion of Court. *See* C. P. TENANCY ACT, 1920, ss. 13, 8 **27**

Co-owners—*Adverse possession—Mere non-participation in cultivation, effect of.*

In the absence of an ouster coupled with a denial of title the mere non-participation of a co-owner in the cultivation of the joint holding does not enable the other co-owners to prescribe a title by adverse possession for 12 years. **A** MEWA RAM *v.* LAL SAHAI, A. I. R. 1927 All. 410 **650.**

Coroners' Act (IV of 1871), s. 29—*Inquisition—Verdict of Jury against weight of evidence—Coroner, whether can refer to High Court—Amendment of inquisition—Quashing of inquisition—High Court, powers of.*

The Coroners' Act does not contemplate a reference by a Coroner to the High Court where he disagrees with the verdict of the Jury, but it is open to the High Court to interfere on application by parties affected by the inquisition.

An inquisition under the Coroners' Act cannot be quashed by the High Court on the ground that the findings of the Jury are against the evidence in the case.

The power to amend an inquisition is restricted to technical defects. **B** *In re* UMAR SOBANI, 29 Bom. L. R. 196; A. I. R. 1927 Bom. 63; 51 B. 300; 28 Cr. L. J. 385 **1041**

Co-sharer—*Dispossession of co-sharer in possession.*

Where one co-sharer is in possession of joint property through another co-sharer, the dispossession of the latter from the property must be regarded as a dispossession of the former also and it cannot be contended that after such dispossession the former must still be regarded as having continued in possession. **C** MAYEUDDI *v.* MAHAMMAD RAZZAB ALI, A. I. R. 1927 Cal. 457 **507**

——— Power to grant easement. *See* LIMITATION ACT, 1908, s 26 **498**

——— Adverse possession. *See* LIMITATION ACT, 1908, SCH. I, ART. 144 **145**

——— *Suit against* Lambardar—*Decree on basis of actual collection, legality of.*

It is open to the Courts in awarding a share of the profits of an estate in favour of a sharer as against a *Lambardar* to arrive at a conclusion upon the facts, that the *Lambardar* has collected more than he admits that he has collected and to give a share of the profits based upon the demands and not upon the basis of the collections recorded in the village papers. **O** DAL CHAND *v.* RAM PIARI **526**

Costs. *See* C. P. C., 1908, s. 35 **598**

——— *Successful party, when can be refused costs—False evidence, production of, effect of.*

A successful party cannot be refused costs merely on the ground that some of the evidence produced by it is false. **M** DALLA LAKSHMINARASARAJU *v.* BADARAVEDA VENKATARAJU, A. I. R. 1927 Mad. 474 **224**

Counsel and client—*Admission by Counsel on point of limitation, whether binding on client.*

An admission by a Counsel on a point of limitation being an admission on a point of law does not bind

Counsel and client—concld.

his client. L FATEH ALI v. AHMAD DIN, A. I. R. 1927 Lah. 284 **833**

Court Fees Act (VII of 1870)—*Madras Court Fees (Amendment) Act (V of 1922)—Judgment before amended Act—Review application after amendment—Court-fee leviable—Scale, whether under new Act—Mesne profits, Court-fees on, till date of application, whether payable.*

Where a judgment in appeal was passed before the increase in the Court-fees under the Madras Court Fees (Amendment) Act of 1922 came into force, and a review application was put in after the amended Act was passed:

Held, that the Court-fee leviable on such application must be calculated as if the application for review were a Memorandum of Appeal for the relief sought for and that the fee was leviable according to the new scale.

An application for review praying that the applicant may be relieved from the liability to pay mesne profits under the decree sought to be reviewed, must bear Court-fee on the amount of such mesne profits up to the date of the application. M *In re* PUNYA NAHAKO, 52 M. L. J. 128; 25 L W. 203; (1927) M. W. N. 101; 38 M L. T. 40; A. I. R. 1927 Mad. 360; 50 M. 488 **72**

——— **s. 7 II, IV (c), Sch. II, Art. 17**—*Suit for assessment of fair and equitable rent—Court-fee—'Other sums payable periodically,' construction of.*

A suit for declaration of title and for possession or in the alternative for assessment of fair and equitable rent, is a suit for declaration of title and for consequential relief, and falls within s. 7, cl. iv (c) of the Court Fees Act.

Inasmuch as there is no particular provision in the Court Fees Act applicable to a suit for assessment of fair and equitable rent, Court-fee should be paid *ad valorem* under Sch. I of the Act.

Section 7, cl. ii of the Court Fees Act is not applicable to a suit for assessment of rent which implies that no rent was paid previously by the tenant.

The expression 'other sums payable periodically' in s. 7 ii of the Court Fees Act must be construed as implying sums payable of the nature of maintenance and annuities upon the rule of *ejusdem generis*.

A prayer for assessment of rent is not in the nature of a declaratory relief and does not come under Art. 17 of Sch. II of the Court Fees Act.

Plaintiff prayed for assessment of rent at Rs. 10 per *katha*. A decree was passed for rent at Rs. 3 per *katha*. Plaintiff appealed for assessment at Rs. 10 as originally prayed for:

Held, that Court-fee on the plaintiff's claim in second appeal was payable only on the reduced claim that is, at Rs. 7 per *katha*. Pat DHANUKDHARI TEWARI v. NANI SONAR, 6 Pat. 17; A. I. R. 1927 Pat. 123; 8 P. L. T. 366 **913**

——— **s. 7, IV (c)**, *proviso, Madras Court Fees (Amendment) Act (V of 1922), s. 6—Suit for declaration of easement and injunction—Court-fee.*

A suit for a declaration of plaintiff's right of way and drainage over a piece of land and for a mandatory injunction to remove the fences and walls built in defiance of the said right falls within s. 7 iv (c) of the Court Fees Act. In Madras, by virtue of the proviso added by Madras Court Fees (Amendment) Act (V of 1922), the valuation should not be less than one-half of the value of the immoveable property calculated under s. 7, v. M VENKITAKRISHNA PATHER, *In re*, 25 L. W. 158; 52 M. L. J. 121; 38 M. L. T. 18; A. I. R. 1927 Mad. 348 **263**

——— **s. 7, cl. v**—*Suit for possession of land—Court-fee paid on market value—Appeal by defendant—Defendant, whether entitled to contest valuation adopted by plaintiff—Estoppel.*

A plaintiff's estimate of the value of the property in dispute in the suit if arrived at in contravention of the provisions of the Court Fees Act, cannot be allowed to operate to the prejudice of the defendant at any stage of the suit and the defendant can object to the valuation when it is in his interest to do so.

Plaintiff instituted a suit for possession of certain land against the defendant and valued the land for purposes of Court-fee according to its estimated market value. The suit was decreed and the defendant appealed. In his appeal the defendant admitted that the value of the land stated in the plaint was correct but he paid a Court-fee at a valuation corresponding to fifteen times the net profits arising from the land during the year next before the date of presenting the plaint:

Held, that the defendant was not estopped from questioning the valuation arrived at by the plaintiff and could not be compelled to pay Court-fee at a higher valuation than that prescribed by s. 7 cl. v of the Court Fees Act. A BHAGWAN PURI v. SECRETARY OF STATE FOR INDIA, 25 A. L. J. 258; A. I. R. 1927 All. 308; 49 A. 398 **35**

——— **s. 13.** *See* C. P. C., 1908, O. XLI, R. 23 **49**

——— **s. 19-I (1), Sch. III**—*Probate and Administration Act (V of 1881), s. 23—Will of Hindu father—Application for Probate—Court-fee payable, whether calculated on father's share only or on entire property.*

An application for Probate should bear a stamp duty on the value of the right, title and interest of the testator in the property bequeathed, and where the testator is a Hindu father with sons, so far as joint property is concerned, duty is payable on the testator's share in the property at the date of his death and not on the entire property including the share of the sons. M ANNAPURNAMMA v. ATCHUTARAMMAYYA, 38 M. L. T. 7 **111**

——— **Sch. II, Art. 17.** *See* COURT FEES ACT, 1870, s. 7 (2) ETC **913**

——— **Sch. II, Art. 17 (VI)**—*Partition suit—Preliminary decree—Order directing that property should be sold—Appeal—Court-fee payable—Necessary parties, failure to implead, effect of.*

After a preliminary decree had been passed in a partition suit, the Court on the application of one of the co-sharers directed that the property being incapable of partition should be sold. Against this order one of the co-sharers appealed but he did not make the co-sharers other than the one on whose application the order had been passed parties to the appeal:

Held, (1) that the case fell within the purview of Art. 17 (*vi*) of Sch. II of the Court Fees Act and that the memorandum of appeal required a Court-fee of Rs. 10;

(2) that the other co-sharers were necessary parties to the appeal and that in their absence the appeal could not proceed. L LACHHMAN DAS v. BAGHU RAM, A. I. R. 1927 Lah. 189 **17**

——— **Sch. II, Art. 6.** *See* MADRAS VILLAGE COURTS ACT, 1889, s. 53 **545**

Criminal Procedure Code, 1898—Applicability of, to searches under U. P. Excise Act. *See* U. P. EXCISE ACT, 1910, ss. 53, 63 **705**

——— **ss. 4 (h), 74 (4), 190, 250**—*False report by Excise Officer—Order for compensation—'Complaint'—'Police report.'*

An order for compensation may be made under s. 250, Criminal Procedure Code, against an Excise Officer who makes a false and frivolous report to a Magistrate.

The report of an Excise Officer is a complaint within s. 4 (*h*), Criminal Procedure Code, and is a Police report only for the purposes of s. 190 of the Code. **C** RADHIKA MOHAN DAS *v.* HAMID ALI, 28 Cr. L. J. 316; A. I. R. 1927 Cal. 405; 54 C. 371 **540**

——— **s. 16**—*Bench of Magistrates—President voting against finding of guilt, whether incompetent to give casting vote on question of sentence.*

The fact that the President of a Bench of Magistrates was among those who thought the accused were not guilty, does not render him incompetent to vote on the question of sentence, on the accused being found guilty by a majority of the Bench. **M** MENNAKANTI ROSAYYA, *In re*, 28 Cr. L. J. 310; A. I. R. 1927 Mad. 500 **534**

——— **ss. 17, 144, 195**—*Sanction by Magistrate for prosecution—Application for withdrawal—Proper forum—Sessions Judge or District Magistrate—Court to whom Magistrate 'is subordinate', meaning of.*

For the purposes of the Criminal Procedure Code, unless it is shown that there is some express provision to the contrary, the District Magistrate and not the Sessions Judge is the authority to whom the Sub-Divisional Magistrate is subordinate, and, therefore, when we find in this Act words relating to an officer to whom the Sub-Divisional Magistrate is subordinate we must construe that as meaning not the Sessions Judge but the District Magistrate.

A complaint made under the provisions of s. 195 (*a*) of the Code of Criminal Procedure by a Magistrate acting as a public servant is not a judicial order, and even if it were so, under the provisions of that section, there being no exception from the broad rule laid down in s. 17 of the Code, the officer to whom he is subordinate is the District Magistrate and not the Sessions Judge. An application for withdrawal of a complaint under s. 195 (*a*) made by a Sub-Divisional Magistrate should, therefore, be made to the District Magistrate and not to the Sessions Judge.

Where a Magistrate acts under cl. (*a*) of s. 195 (1) of the Code of Criminal Procedure he acts not as a Court but as a public servant, and sub-s. (3) of s. 195 of the Code does not, consequently, apply to such a case. **Pat** MAINI MISIR *v.* EMPEROR, 6 Pat. 39; A. I. R. 1927 Pat. 111; 28 Cr. L. J. 353; 8 P. L. T. 488 **961**

——— **s. 74 (4).** *See* CR. P. C., 1898, s. 4 (H) **540**

——— **s. 103.** *See* OPIUM ACT, 1878, ss. 14, 15 **980**

——— **ss. 107, 144**—*Breach of peace, apprehension of—Action against peaceful citizens, legality of—Magistrate's power to stultify High Court's order by taking action under some other law.*

When a breach of the peace is anticipated action is to be taken against the potential law-breakers and not against peaceful citizens whom it is expected that the law-breakers will molest.

A Magistrate should not stultify an order of the High Court by taking action under some other provision of the same Code or some other Code or Act. **L** KHAZAN CHAND *v.* EMPEROR, 28 Cr. L. J. 345; A. I. R. 1297 Lah. 430 **825**

Criminal Procedure Code—contd.

——— **s. 110**—*'By habit', 'habitually'—Depravity of character, necessity of—Commission of offences in* diara *land dispute, whether ground for proceeding under s. 110—'Desperate and dangerous', 'community' 'at large'—Person under conviction, order against legality of.*

The words 'by habit' and 'habitually' imply frequent practice or use and are used in s. 110 of the Code of Criminal Procedure in the sense of depravity of character as evidenced by the frequent repetition or commission of offences mentioned in the section.

Certain lands were thrown out by a river in a *zemindari* tract. The tenants formed themselves into a party to compel the *zemindar* to settle the land with them. They also entered into an agreement among themselves to divide the lands among all of them with whomsoever they were settled and to enforce the agreement themselves. Many loots, assaults and murders were committed by them against the *zemindar* and the recalcitrant members. Apart from this land dispute there was nothing on the record to show that the tenants bore any despicable character or that they were implicated in theft, extortion etc., or that they ever provoked a breach of the peace:

Held, that the tenants could not be said to have acquired the habit of committing offences so as to bring them within the purview of cls. (*a*) to (*e*) of s. 110 of the Criminal Procedure Code but that the course of their conduct showed that they had become desperate and dangerous and that, therefore, proceedings could be taken against them under cl. (*f*) of the said section.

Persons who form themselves into a society claiming a common right and professing to have common rights and privileges are members of a 'community'.

Persons who have been convicted and whose sentences have not expired are not 'at large' within the meaning of s. 110 of the Code and, therefore, there is no necessity to pass an order under the section against such persons. **Pat** BHUBANESHWAR KUER *v.* EMPEROR, 6 Pat. 1; A. I. R. 1927 Pat. 126; 8 P. L. T. 335; 28 Cr. L. J. 359 **967**

——— **s. 133**—*Public nuisance—Contamination of river water by industrial concern—Evidence of contamination—Complaint against several persons—Evidence against particular wrong-doers, necessity of—Order prohibiting discharge, whether can be passed.*

An order prohibiting the discharge into a river of an effluent which might be injurious to the health of the community which has rights to the use of the water in such stream, can be made under the second paragraph of s. 133 (1), Criminal Procedure Code.

It is not admissible for a tribunal to assume that, even if a nuisance is proved but not as against any particular party complained of as causing it, an order prohibiting such nuisance can be issued against all parties against whom complaints are made.

Where nuisance is complained of against two persons it is necessary to prove substantially, before an order could be made against either or both of them, that either or both caused the nuisance.

Although it is of the utmost importance that sources of public watersupply must be maintained pure and free from pollution by industrial factories, yet such pollution must be convincingly proved against a wrong-doer before any order can be passed against him.

The question whether the water of a river has been

Criminal Procedure Code—contd.

contaminated by the effluents of an industrial concern is one which calls for scientific enquiry and cannot be decided merely upon the opinion of the neighbouring villagers. **Pat** DESHI SUGAR MILL *v.* TUPSI KAHAR, A. I. R. 1926 Pat. 506; 28 Cr. L. J. 317; 8 Pat. L. T. 302 **541**

——— **ss. 133, 137**—*Nuisance—Order directing plot of land to be vacated—Title, question of—Procedure.*

Where a person against whom proceedings are taken under s. 133 of the Criminal Procedure Code sets up a title to a plot of land which he is required to vacate, the Court must proceed in accordance with the provisions of s. 137 of the Code and cannot make a summary order in the matter. **A** ABDUL KARIM *v.* EMPEROR, 28 Cr. L. J. 294; L. R. 8 A. 58 Cr.; A. I. R. 1927 All. 384 **374**

——— **ss. 133, 137 (1), 537, 539B**—*Nuisance—Magistrate's duty to record evidence—Decision on local inspection, legality of—Local inspection, object of—Magistrate's duty to record relevant facts—Non-compliance with s. 137 (1)—Illegality.*

A Magistrate cannot make an order under s. 133, Criminal Procedure Code, absolute without recording evidence and simply on the basis of a local inspection made by him.

The failure of a Magistrate to follow the procedure enjoined by s. 137 (1), Criminal Procedure Code, vitiates his order, and is not a mere irregularity of the nature contemplated by s. 537 (*a*) of the Code.

Section 537, Criminal Procedure Code, applies only to mere errors of procedure arising out of mere inadvertence, and not to substantive errors of law, and does not apply to cases of disregard or disobedience of mandatory provisions of the Code.

If a Magistrate makes use of knowledge derived from a local inspection without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial.

A local inspection by a Magistrate is only permitted by s. 539B, Criminal Procedure Code, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself.

In making a local inspection a Magistrate should in accordance with the provisions of s. 539B, Criminal Procedure Code, record a memorandum of any relevant facts observed by him at the time of inspection. **A** TIRKHA *v.* NANAK, 28 Cr. L. J. 291; L. R. 8 A. 59 Cr.; 25 A. L. J. 377; A. I. R. 1927 All. 350 **371**

——— **ss. 133, 139-A,** *as amended—Obstruction to right of way—Denial of public right of way supported by Revenue Records—Magistrate's duty to stay proceedings.*

Where in proceedings for removal of obstruction of public way under s. 133, Criminal Procedure Code, the party obstructing the way denies the existence of any public right in respect of the way and is supported by Revenue Records in his denial, the Magistrate is bound to stay the proceedings under s. 139-A, Criminal Procedure Code, till the matter is decided by a competent Civil Court. **L** NUR ALI SHAH *v.* NATHA, 28 Cr. L. J. 217 **119**

——— **s. 139A (II)**—*Stay of proceedings by Magistrate—Magistrate's power to direct a particular party to go to Civil Court.*

If a Magistrate stays his proceedings under s. 139A (*ii*), of the Criminal Procedure Code, these proceedings remain stayed until there is a decision by a competent Civil Court and there is nothing in the new section which entitles the Magistrate to say which party is to file the suit. On passing an order of stay under the section, the Magistrate ousts his own jurisdiction to decide anything about the question of title including the onus of proof **L** HARI CHAND *v.* DURGA DATT, 28 Cr. L. J. 363; A. I. R. 1927 Lah 227 **971**

——— **s. 144**—*Duty of Magistrates to protect civil rights of parties—Section 144, when to be resorted to.*

It is the obvious duty of the executive to uphold the civil rights declared by its own Civil Court. Although the interests of the public peace are paramount, where a Magistrate must be aware that there will probably be a disturbance of a person's civil rights it is his duty to exhaust every measure at his disposal to uphold declared civil rights before he abandons the attempt, and he should resort to s. 144 of the Code of Criminal Procedure only if there is no time or opportunity for any other course. **M** GADDAM VENKATASUBBA REDDI *v.* EMPEROR, 52 M. L. J. 298; 25 L. W. 375; A. I. R. 1927 Mad. 368; 28 Cr. L. J. 325 **709**

——— **ss. 144, 145**—*Police report and sketch, evidentiary value of—Order under s. 144, how far evidence of possession—Evidence—Admission of documents without objection—Evidentiary value, whether may be challenged subsequently.*

An order under s. 144 of the Criminal Procedure Code could only refer to a point of time when it was passed and cannot show who was in possession when the statutory period during which that order remained operative was at an end.

A judgment of a Criminal Court in which a person was acquitted and in which it was incidentally found that he was in possession can only be evidence of the fact that there was such a case and that it ended in such acquittal; the finding on the question of possession which is a ground of such acquittal can hardly be any evidence in subsequent proceedings between the parties with regard to the property in dispute.

The only legitimate use to which a Police report and sketch prepared in connection with proceedings under s. 145 of the Criminal Procedure Code could be put to is to treat them as the basis of the proceedings and as affording materials for determining the likelihood of breach of the peace and of the identity of the subject-matter of the dispute and of the disputing parties. The fact evidenced thereby, of the Sub-Inspector having seen the parties in possession of certain plots cannot be treated as evidence of possession.

The fact that such documents were admitted without objection does not prevent their admissibility as evidence of possession being challenged subsequently, the question being not a mere question of mode of proof but a question of the evidentiary value of their contents. **C** SHASHI MUKHI DEBI *v.* SARAT CHANDRA CHAKRAVARTY, 31 C. W. N. 310; A. I. R. 1927 Cal. 327; 28 Cr. L. J. 329; 45 C. L. J. 537 **713**

——— **s. 145**, *proceedings under—Malicious prosecution—Damages whether can be recovered.*

Damages may be recovered in respect of the institution of proceedings under s. 145 of the Criminal Procedure Code.

Damages for malicious prosecution are awarded to

compensate the plaintiff for expenses incurred by him in defending himself, pain to mind and body and loss of reputation, etc, which he has actually suffered, and not for injuries which he might have suffered if he had been convicted. A SUKH NANDAN SARUP v. FAZAL HUSAIN, A. I. R. 1927 All. 412 **449**

——— **s. 145**—*Scope of enquiry—Question of possession—Breach of peace—Final order, validity of.*

In proceedings under s. 145, Criminal Procedure Code, a Magistrate should not go into the question of title; his function is merely to go into the question of possession. A final order under s. 145, Criminal Procedure Code, should explain how a breach of peace is to be apprehended between the parties and contain a decision as to who was in possession of property on the date of the first order. L AMIR HASSAN v. QADIR BAKHSH, 28 P. L. R. 107; 28 Cr. L. J. 328 **712**

——— **ss. 145, 146**—*Dispute as to immoveable property—Fallow land—Presumption of possession by owner—Occasional acts of user, sufficient evidence of possession—Attachment, legality of.*

Possession under s 145 of the Criminal Procedure Code must be absolute and continuous and not occasional But by continuous possession is meant such possession which a party in possession may have occasion to exercise and has exercised and exercises whenever he likes. Continuity of possession should be understood with reference to the object over which it is exercised.

With respect to lands which are fallow and liable to be submerged, possession must be presumed to be with the owner until the contrary is proved. Occasional acts of user of such land by the owner constitute possession for the purposes of s. 145 of the Code. C LOKE NATH ROY v. BAZLAL GANI PATARI, 31 C. W. N. 334; A. I. R. 1927 Cal. 313; 28 Cr. L. J. 343 **823**

——— **s. 145 (4)**—*Bengal Tenancy Act (VIII of 1885), s. 87—Landlord resuming possession of abandoned holding—Forcible possession.*

Where a landlord resumes possession of an abandoned holding after compliance with the procedure laid down in s. 87 of the Bengal Tenancy Act, it cannot be said that he has taken forcible possession of the holding within the meaning of sub-s. (4) of s. 145 of the Criminal Procedure Code. C NIKUNJA BEHARI MULLIK v. USABATI DEVI, 31 C. W. N. 242; 28 Cr. L. J. 245 **117**

——— **ss. 161, 162, 297**—*Statement of witness that he did not make any statement to Police, admissibility of—Charge to Jury—Omission to draw attention of Jury to right of private defence—Misdirection.*

To attract the operation of s. 162 of the Criminal Procedure Code, there must be a statement which is capable of being recorded and reduced into writing and, therefore, a statement by a witness that he did not make any statement to the Police cannot be said to be a statement within the meaning of this section.

It is doubtful whether a statement of a witness to the Police that he knew nothing about the occurrence is not a statement within the meaning of s. 161 of the Criminal Procedure Code.

Failure on the part of the Court to put clearly before the Jury, the law relating to the right of private defence arising on the admitted and proved facts and to direct their attention to find as to whether the accused was, and, if so, how far, justified, in preventing injury to himself in attacking his opponent is a serious misdirection vitiating the trial. C ASERUDDIN v. EMPEROR, 53 C. 980; 28 Cr. L. J. 273; A. I. R. 1927 Cal. 257 **353**

——— **s. 162,** *whether overrides s. 27, Evidence Act (I of 1872).*

Section 162 of the Criminal Procedure Code overrides the provisions of s. 27 of the Evidence Act. N BHAGIA v. EMPEROR, 28 Cr. L. J. 310; A. I. R. 1927 Nag. 203 **820**

——— **ss. 164, 288**—*Statement made under s. 164, use of—Admission before Committing Magistrate that a certain statement was made under s. 164—Transfer of deposition to Sessions' record—Statement made under s. 164, whether evidence.*

A statement made by a witness under s. 164 of the Criminal Procedure Code can be used by the prosecution only to contradict the witness and to show that he is unreliable, with a view to taking his evidence out of the case which otherwise might re-act unfavourably upon the evidence of other witnesses examined for the prosecution.

Where a witness is asked in the course of his examination before the Committing Magistrate whether he made a certain statement when he was being examined under s. 164 of the Criminal Procedure Code and the witness admits having made such statement, and the deposition of the witness before the Committing Magistrate is subsequently transferred to the Sessions' record under the provisions of s. 288 of the Criminal Procedure Code, the statement admitted by him to have been made under s. 164 of the Code cannot be treated as substantive evidence in the case. M KARUPPANA PILLAI, *In re*, 28 Cr. L. J. 279 **359**

——— **ss. 164 364**—*Confession recorded in language not used by accused, effect of—Prejudice to accused, what is—Failure to record questions, effect of.*

The mere absence of the questions put by the Magistrate to the accused on the record, if the prisoner is not prejudiced in any way by the omission, does not make a confession illegal.

Though a Magistrate should record the confession in the language used by the accused, omission to do so may be overlooked if it has not injured the accused in his defence. Where it is clear from the statement of the Magistrate that though he recorded the statement in English he explained the various portions of the confession and put them to the accused before signing it, it cannot be said that the accused has been prejudiced in any way. L NAWAB v. EMPEROR, 28 Cr. L. J. 341; A. I. R. 1927 Lah. 285 **821**

——— **s. 190,**

See CR. P. C., 1898, s. 4 (*h*) **540**
See PRIVY COUNCIL **227**

——— **s. 195,** *See* CR. P. C., 1898, s. 17 ETC **961**

——— **ss 195, 476**—*Forgery committed by person not party to proceedings—Court, whether can proceed under s. 476—Penal Code (Act XLV of 1860), s. 193.*

Per *Prideaux, A. J. C.*—A Court has power to sanction the prosecution of a person for forgery committed with respect to proceedings in Court, whether that person is a party to those proceedings or not.

An offence like forgery, committed in reference to and to support any party in civil or criminal

proceedings, is really an offence against public justice. It is fabricating false evidence and would in any case be punishable under s. 193, Penal Code, and the Court can proceed against the person responsible under s. 476. **N** JOSABALLI *v.* AYUB KARIM KACHHI, A. I. R. 1927 Nag. 14; 28 Cr. L. J. 305 **529**

——— **ss. 195 (c), 476, 537**—*Proceedings under Guardians and Wards Act—Production of forged Will—Complaint for prosecution, necessity of—'Proceeding'—'Production'—Proceeding, whether should be pending on production of document—Want of complaint—Illegality.*

A proceeding within the meaning of s. 476 of the Criminal Procedure Code need not necessarily be one between two parties actually cited before the Court but includes a proceeding under the Guardians and Wards Act for the appointment of a guardian.

Proceedings initiated by an application under the Guardians and Wards Act for appointment or declaration of a guardian last or continue throughout the minority of the minor concerned.

The mere filing of a forged document as an annexure to a petition to a Court is a sufficient 'production' of the document in Court for the purposes of s. 195 (c), Criminal Procedure Code.

In order to bring such a case within the purview of s. 476, Criminal Procedure Code, it is not necessary that proceedings should have been pending from before the time of the production of the document.

The absence of a complaint in writing as required by the provisions of s. 476, Criminal Procedure Code, is an illegality which vitiates the trial. **N** TULARAM MARWADI *v.* EMPEROR, 28 Cr. L. J. 388; A. I. R. 1927 Nag. 184 **1044**

——— **ss. 202, 346**—*Case referred by Sub-Magistrate to Police for investigation—Charge sheet—Sending of case to superior Magistrate—"Evidence", whether confined to depositions recorded by Magistrate—"Inquiry," when begins.*

The word 'evidence' in s. 316, Criminal Procedure Code, includes all facts and statements disclosed by the inquiry held by the Magistrate and is not confined to depositions recorded by him.

When a Magistrate directs under s. 202, Criminal Procedure Code, inquiry by another Magistrate or Police Officer or other person, he is doing so in the course of his own enquiry into the offence and his own enquiry is, therefore, already begun. It is not necessary that the Magistrate should begin to take evidence before the enquiry can be said to begin.

Where a Sub-Magistrate refers a case under s. 202 to the Police for investigation and the Police send a charge-sheet to the Sub-Magistrate it is competent to the Magistrate to accept it and send the case up to a superior Magistrate under s. 346, Criminal Procedure Code where the trial is beyond his powers. **M** T. R. BALAKRISHNA REDDIAR, *In re*, 28 Cr. L. J. 384; A. I. R. 1927 Mad. 591 **992**

——— **ss. 209, 210, 437, 438**—*Inquiry into case triable by Court of Session—Magistrate, duty of—Order of Sessions Judge directing committal—Remedy—Reference by District Magistrate whether competent.*

A District Magistrate has no power to refer an order passed by a Sessions Judge to the High Court for the purpose of having it quashed or modified; and *a fortiori* he has no power to call upon the Sessions Judge to forward the reference to the High Court.

Where a Sessions Judge sets aside an order of discharge passed by a Magistrate and directs that the case should be committed to his Court, the person prejudicially affected by such order has the right to apply to the High Court in revision to set aside the order, and if he can show that it is an order which ought not to have been made and which the circumstances could not justify any Sessions Judge in making, the High Court has jurisdiction to reverse or modify such order. There is no other form of procedure by which such an order can be judicially reviewed.

It is the duty of a Magistrate inquiring into a case triable by the Court of Session, if the evidence is *prima facie* adequate, to commit the case for trial and leave the ultimate judicial decision to the trial Court; but if he has reason to think and is prepared to state for judicial reasons, in the exercise of his discretion in his committal order, that there is a possibility of an alternative view to that which is set out in the charge originally made, he can always commit the accused for trial on two or more alternative charges. What he cannot do is to shut the door finally to the possibility of a trial upon evidence which *prima facie* is capable of interpretation to support a graver charge.

Where the evidence is conflicting and lays itself open to suspicion, but where on the other hand it may be true, and may commend itself to certain tribunals, the Magistrate, even though he may have reason to doubt whether if he were trying the case, he would convict, has no right to substitute his judgment for the final judgment of the Court indicated by law for the trial and to arrive at final decision dismissing the case in the way in which he would do if he were the trial Court. If the evidence is balanced, however unevenly in his opinion, then it is a matter which is to be tried, and it is his duty to commit the case for trial. **A** EMPEROR *v.* ALLAH MAHR, 25 A. L. J. 191; L. R. 8 A. 43 Cr.; 28 Cr. L. J. 281; A. I. R. 1927 All. 279; 49 A. 443 **361**

——— **s. 234**—*Misjoinder of charges—Charges for falsification of pay bills and cash accounts for three months—Conviction for falsification of pay bills—No finding on falsification of accounts—Legality of trial.*

The accused, a Forest Ranger, was charged with having entered the name of a Forest Guard who was no longer in service at a rate of pay in the pay bill and the monthly cash accounts for three months, whereas as a matter of fact, another man was employed at a lower rate of pay for those months, and was sentenced on each of the three charges relating to the pay bill:

Held, that the trial was illegal though the Magistrate had not recorded any finding in respect of the falsification of the cash accounts, inasmuch as in the charge as framed by the Magistrate there were six distinct and separate charges of falsification of six separate and distinct documents, namely, three pay bills and three cash accounts. **C** KRISHNA LAL MITRA *v.* EMPEROR, 45 C. L. J. 1; 28 Cr. L. J. 291 **371**

——— **ss. 235, 239**—*Joint trial for separate offences, legality of—'Same transaction.'*

The joinder of two distinct offences in a single charge is an irregularity, but not an illegality.

What does or does not form part of the same transaction is a question of fact in each case.

The accused were charged with being members of an unlawful assembly and of committing theft of

Criminal Procedure Code—contd.

certain trees in a forest on two different occasions. There was an interval of 24 hours between the acts. The acts took place in different parts of the forest and related to different logs:

Held, that the acts committed on the two occasions were separate and not parts of the same transaction and a joint trial for the four offences was, therefore, illegal. C TAMEZKHAN *v.* RAJJABALI MIR, 31 C. W. N. 337; A. I. R. 1927 Cal. 330; 28 Cr. L. J. 347; 45 C. L. J. 591 **827**

——— **ss. 235, 239, 429**—*False statements by different persons in same case with same object—'Same transaction'—Joint trial, legality of—Distinct statements in same deposition—Separate charges, legality of—Reference, legality of—Revision—Power to investigate into facts.*

Accused No. 1 brought a suit as a member of a firm in whose favour a promissory note had been passed to recover the amount due thereunder on the basis that full consideration for the promissory note had been paid. He gave false evidence that full consideration had been in fact paid and denied the allegation of the executant of the instrument that a certain amount had been deducted. Accused No. 2 was a member of a firm which had a half interest in this loan. He also went to the witness-box and deposed similarly that full consideration was paid, in support of accused No. 1's case. The accused were charged and tried for offences under s. 193 of the Penal Code and convicted:

Held, Per *Fawcett* and *Crump, JJ.* (*Shah, J.* dissenting) that the two acts of the accused of giving false evidence were committed in the course of the same transaction within the meaning of s. 239 of the Criminal Procedure Code and that the joint trial was not, therefore, illegal.

Held, further, Per *Fawcett* and *Crump, JJ.*, that an accused can be separately tried and convicted for two false statements made on different subjects though in one and the same deposition.

Per *Shah, J.*—The mere fact that evidence is given by two or more witnesses with reference to the same purpose or to the same point involved in any judicial proceeding, either a suit or a criminal case, is not sufficient to justify the joint trial of different persons as to statements made by them separately in that proceeding.

Per *Fawcett, J.*—A distinct charge is not a condition precedent to abetment being a link which brings a case under the expression 'the same transaction' in s. 239 of the Criminal Procedure Code.

Per *Crump, J.*— A reference under s. 429, Criminal Procedure Code, where the point of difference does not necessarily involve conflicting decisions as to the disposal of the whole case is likely to lead to inconvenient results.

Where two persons committing offences are animated by a common purpose and there is continuity in their actions then there is only one transaction so far as they are concerned.

The High Court can, in criminal revision, consider how far findings of fact are justified though in practice it is unusual to do so. B SEJMAL PUNAMCHAND *v.* EMPEROR, 29 Bom. L. R. 170; A. I. R. 1927 Bom. 177; 51 B. 310; 28 Cr. L. J. 373 **981**

——— **ss. 239 (d), 537**—*'Same transaction'—Tests of unity of time and place, value of—Joint trial of offences not in course of same transaction, effect of.*

Criminal Procedure Code—contd.

Before different offences can be said to have been committed 'in the course of the same transaction' by the various persons charged with the same, it must be seen whether such persons had a common purpose resulting in actions which constitute a concatena of events ultimately leading to the commission of such offences. The tests of unity of time and unity of place as regards the offences with which the various accused persons may be charged are not always safe criteria for the purpose of determining whether or not these offences were committed 'in the course of the same transaction'.

A joint trial of several persons charged with offences not committed in the course of the same transaction is not an irregularity which is curable under s. 537, Criminal Procedure Code, but is an illegality which vitiates the whole trial.

A person committing theft was caught and tied down. On hearing of his condition four of his friends came and rescued him and a fight ensued in which injuries were caused. These five persons were jointly tried for offences under ss. 379, 225, 147, 148, 149 325 of the Penal Code:

Held, the joint trial was illegal inasmuch as the theft could not be said to be a part of the same transaction as the assault which subsequently ensued. L MUHAMMADI *v.* EMPEROR, 28 Cr. L. J. 357; A. I. R. 1927 Lah. 274 **965**

——— **ss. 247, 439**—*Summons case—Absence of complainant—Dismissal of complaint—Order, whether of discharge or acquittal—Revision—Interference.*

An order dismissing a complaint in a summons case for default of appearance of the complainant under s. 247 of the Criminal Procedure Code amounts to an order of acquittal and not of discharge and the Magistrate in such a case has no jurisdiction to set aside the order even on good cause being shown for the complainant's non-appearance.

An acquittal under that section does not stand on any different footing from an acquittal under other circumstances and the High Court, will not set aside the order of acquittal in revision except under very rare circumstances.

It is a sound rule of practice not to interfere in revision when there is no error of law on the face of the record. M DEVARAKONDA LAKSHMINARASIMHAM *v.* NALLURI BAPPANNA, 52 M. L. J. 173; 38 M. L. T. 203; 28 Cr. L. J. 270; (1927) M. W. N. 274; A. I. R. 1927 Mad. 473 **238**

——— **s. 250.** *See* CR. P. C., 1898, s. 4 (H) **540**

——— **s. 259**—*Discharge of accused on account of complainant's absence—Magistrate, whether competent to restore complaint or entertain fresh complaint.*

Where a complainant is absent when a case is taken up and the Magistrate discharges the accused under s. 259, Criminal Procedure Code, it is competent to the Magistrate to entertain a fresh complaint or restore the old complaint on satisfactory cause being shown by the complainant for his absence. M AKULA VENKANA, *In re*, 28 Cr. L. J. 304; A. I. R. 1927 Mad. 503 **384**

——— **s. 288.** *See* CR. P. C., 1898, ss. 164; 288 **359**

——— **s. 297**—*Trial by Jury—Charge to Jury, contents of—Failure to explain law applicable—Failure to draw attention to statement of accomplice—Misdirection.*

Criminal Procedure Code--contd.

In the case of a trial by Jury the Judge must put down sufficient in his heads of charge to the Jury for the High Court to ascertain whether he did or did not correctly explain the law to the Jury. A mere statement that the relevant sections have been read out and explained to the Jury is not enough and when the provisions of those sections are such that they require an explanation and it does not appear from the heads of charge what explanation of them was given to the Jury, the trial is vitiated.

Where on the evidence a strong suspicion is raised that a witness for the prosecution is an accomplice, the failure of the Judge to put it to the Jury to consider whether or not the witness is an accomplice and to caution the Jury against accepting his evidence without corroboration, in case they hold that he was an accomplice, amounts to a misdirection and vitiates the trial. **C** E. ST. MOSS *v.* EMPEROR, 28 Cr. L. J. 278; A. I. R. 1927 Cal. 460 **358**

——— **s. 342**—*Duty of Magistrate to examine accused after prosecution case is closed--Specific questions, whether necessary.*

Section 342. Criminal Procedure Code, merely requires that after the witnesses for the prosecution are examined, the accused should be questioned generally on the case. It is not necessary that specific questions should be put to the accused in detail, since the general questioning is followed by the specific charge. **M** RAMASWAMI, *In re*, 28 Cr. L. J. 383; A. I. R. 1927 Mad. 613; 26 L. W. 33 **991**

——— **s. 342**—*Summons case—Non-compliance with s. 342—Illegality.*

Section 342 of the Code of Criminal Procedure applies to summons cases. **C** BECHU LAL KAYASTHA *v.* THE INJURED LADY, 45 C. L. J. 8; A. I. R. 1927 Cal. 250; 28 Cr. L. J. 297; 54 C. 286 **377**

——— **ss. 342, 435**—*Examination of accused—Omission to examine at proper time—Mere irregularity.*

An accused should be questioned under s. 342 Criminal Procedure Code, just before he enters on to his defence and produces his witnesses, that is, after all the prosecution witnesses have been completely done with. But an omission to examine him at the proper time is a mere irregularity coming within the purview of s. 537 of the Code. **A** SUDAMAN *v.* EMPEROR, L. R. 8 A. 51 Cr.; 25 A. L. J. 379; 28 Cr L. J. 399; A. I R. 1927 All. 475 **1055**

——— **ss. 342, 537**—*Omission to examine accused at proper stage, whether vitiates trial.*

Obiter.—Omission to examine the accused under s. 342, Criminal Procedure Code, at the stage indicated by the section is a mere irregularity curable by s. 537 of the Code. **C** TAMEZKHAN *v.* RAJJABALLI MIR, 31 C. W. N. 337; A. I. R. 1927 Cal. 330; 28 Cr. L. J. 347; 45 C. L. J. 591. **827**

——— **s. 344**—*Stay of criminal proceedings pending civil suit.*

Where the facts on which a criminal prosecution is based are in issue in a civil suit filed previously by the complainant himself, and the decision in the civil suit is likely to throw considerable light upon the dispute in the criminal case, the criminal proceedings should be stayed till the decision of the civil suit. **L** LINTON *v.* EMPEROR. 28 P. L. R. 103; 28 Cr. L. J. 326 **710**

——— **s. 346.** *See* CR. P. C., 1898, ss. 202, 346 **992**

Criminal Procedure Code—contd.

——— **ss. 348, 350**—*Trial de novo—Previously recorded evidence, use of.*

It is not competent to a Magistrate to embark upon a trial *de novo* and yet rely upon the evidence recorded previously. **L** KARTAR SINGH *v.* EMPEROR, 28 Cr. L. J. 302; A. I. R. 1927 Lah. 238 **382**

——— **ss. 360, 361.** *See* PRIVY COUNCIL **227**

——— **s. 423**—*Appeal—Appellant not present—Procedure—Duty of Court to decide on merits.*

Under the provisions of s. 423 of the Code of Criminal Procedure a Court is bound to peruse the record and decide an appeal on the merits even if the appellant does not appear. **Pat** KULDIP SINGH *v.* EMPEROR, 6 Pat. 16; A. I. R. 1927 Pat. 176; 28 Cr. L. J. 351; 8 P. L. T. 376 **831**

——— **ss. 424, 476, 476B**—*Civil Procedure Code (Act V of 1908), O. XLI—Complaint by subordinate Court—Appeal—Procedure—Appellate Court, duty of.*

When a complaint has been made under s. 476 of the Criminal Procedure Code, the person affected by the complaint may take an appeal to the Court to which the Court making the complaint is subordinate and the appeal must be dealt with as an ordinary appeal under the Criminal Procedure Code, as is provided for in s 424 of the Code. The Appellate Court has no jurisdiction in such a case to require the Court making the complaint to answer arguments which the Appellate Court must answer itself, nor could the Appellate Court dismiss the appeal in a summary fashion without giving any reasons for such dismissal.

Per *Duval, J.*—Where, in such a case, the order making the complaint is made by a Civil Court, an appeal against such order must be regulated by the provisions of O. XLI of the Civil Procedure Code and not by the provisions of ss. 422 to 424 of the Criminal Procedure Code. **C** HAMID ALI *v.* MADHU SUDAN DAS SARKAR, 31 C. W. N. 281; A. I. R. 1927 Cal. 284; 54 C. 355 **351**

——— **s. 429.** *See* CR. P. C., 1898, ss. 235 ETC. **981**

——— **s. 435**—*Reference to High Court on facts, when proper.*

A case should not be reported to the High Court on the ground that the conviction is bad on the merits unless it is very clear that the conviction is wrong and that there can be no reasonable doubt of the matter. **A** SUDAMAN *v* EMPEROR, L. R. 8 A. 51 Cr.; 25 A. L. J. 379; 28 Cr. L. J. 399; A. I. R. 1927 All. 475 **1055**

——— **s. 435**—*Revision—Further inquiry—Mere wrong view of facts no ground for further inquiry—Substantial justice.*

The fact that the view of the facts taken by the trial Court is questionable is no ground for directing a fresh inquiry to be made under s. 435, Criminal Procedure Code.

Though the judgment of the trial Court be open to criticisms, a Court acting under s. 435 of the Code should see whether the judgment on the whole is fair and sensible or not. **A** JAGANNATH *v.* EMPEROR, L. R. 8 A. 61 Cr.; 28 Cr L. J. 342 **822**

——— **ss. 437, 438.** *See* CR. P. C., 1898, ss. 200 ETC **361**

——— **s. 439.** *See* CR. P. C., 1898, ss. 247, 439 **238**

——— **s. 439, cl. (4)**—*Revision—Finding of acquittal, whether can be converted to conviction—Acquittal, whether must be complete.*

The High Court cannot in revision under s. 439 of the Criminal Procedure Code convert a finding of acquittal into one of conviction except on an appeal by the Local Government.

A finding of acquittal referred to in s. 439, Criminal Procedure Code, need not be a complete acquittal of the accused. It is sufficient if there has been an acquittal of a particular offence, although there has been a conviction for some other offence. M SUBBA CHUKLI, *In re*, 50 M. 259; 52 M. L. J. 707; 28 Cr. L. J. 397; A. I. R. 1927 Mad. 582 **1053**

——— **s. 439 (6)**—*Conviction affirmed by High Court—Revision—Enhancement of sentence, notice as to—Accused, right of, to question conviction—Penal Code (Act XLV of 1860), ss. 307, 325—Attempt to murder—Grievous hurt.*

Where a High Court has given a finding on appeal or in revision as to the guilt of an accused person and subsequently a notice is served upon that person to show cause why his sentence should not be enhanced, the right which he would have had under s. 439 (6) of the Criminal Procedure Code to re-open the question of his guilt had no such finding been given, vanishes because of the inherent incapacity of a Judge of the High Court to re-consider a decision given by another Judge.

Two persons armed with *lathis* made a sudden attack upon a third, beat him to the ground, broke his thigh and ulna bone, struck at nine places and continued to strike after he had fallen on the ground. Only one injury was caused on the head:

Held, that the accused were guilty of an offence under s. 325 of the Penal Code and not of an offence under s. 307 of the Code. L EMPEROR *v.* SHER SINGH, 28 Cr. L. J. 266; A. I. R. 1927 Lah. 217 **234**

——— **s. 476.**

See CR. P. C., 1898, s. 195 **529**

See CR. P. C., 1898, s. 195 (c) ETC **1044**

——— **s. 476**—*False charge to Police—Committal of accused—Sessions Court whether competent to complain for false charge—Offence committed 'in relation to' proceedings, meaning of.*

The words 'in relation to' in s. 476 of the Criminal Procedure Code are sufficiently wide to cover a case where the offence complained of is actually committed before the proceedings began in the complaining Court.

A person making a false charge to the Police commits an offence 'in relation to' the proceedings in the Sessions Court to which the accused is subsequently committed for trial and the Sessions Court is, therefore, competent to make a complaint in respect of such offence under s. 476 of the Criminal Procedure Code. C NAZIR AHMED *v.* EMPEROR, 28 Cr. L. J. 324; A. I. R. 1927 Cal. 478 **708**

——— **s. 476**—*False evidence—Evidence quite immaterial—Complaint not advisable.*

When a false statement made by a witness is clearly immaterial and nothing hinges on it, the case is not a fit one for making a complaint under s. 476, Criminal Procedure Code. C MONOHAR ALI *v.* EMPEROR, 28 Cr. L. J. 310; A. I. R. 1927 Cal. 515 **534**

——— **s. 476**—*Prosecution when to be sanctioned.*

Prosecution should not be sanctioned under s. 476 of the Criminal Procedure Code, where it is bound to end in failure. L SUBE KHAN *v.* EMPEROR, 28 Cr. L. J. 293; A. I. R. 1927 Lah. 352 **373**

——— **ss. 476, 476B.** *See* CR. P. C., 1898, ss. 424 ETC **351**

——— **ss. 476, 476-B**—*Civil Procedure Code (Act V of 1908), s. 115—Complaint, refusal to make, by Civil Court—Appeal—Order directing complaint to be made—Revision, whether competent.*

Where a Civil Court refuses to make a complaint under s. 467 of the Criminal Procedure Code but on appeal the Appellate Court directs the complaint to be made, an application in revision against the order of the Appellate Court can only be maintained if it falls within the purview of s. 115 of the Civil Procedure Code. A ABDUL HAQ *v.* SHEO RAM, 28 Cr. L. J. 296; A. I. R. 1927 All. 334; 25 A. L. J. 569 **376**

——— **s. 488**—*Order for maintenance against husband—Wife rejoining husband and subsequently leaving—Application to enforce original maintenance order, whether maintainable—Procedure.*

It is a general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of some circumstance or set of circumstances, remains in force until it is cancelled; and *prima facie* this rule applies to maintenance orders passed under s. 488, Cr. P. C. In such cases, therefore, until the person against whom the order has been made obtains either the cancellation or a modification of the original order, the original order must be deemed to continue in force.

The mere fact that a wife who has obtained an order for maintenance against her husband has returned to live with him will not have the effect of bringing the order to an end automatically. M KANAGAMMAL *v.* PANDARA NADAR, 25 L. W. 148; 52 M. L. J. 176; (1927) M. W. N. 111; 28 Cr. L. J. 271; A. I. R. 1927 Mad. 376 **239**

——— **ss. 488, 540**—*Application for maintenance of child—Dispute as to legitimacy—Evidence adduced by parties held by Magistrate to be inconclusive—Examination by Magistrate of fresh witnesses without previous notice—Finding of legitimacy based solely on fresh evidence—Procedure, whether legal—Prejudice.*

Section 540, Criminal Procedure Code, confers very wide powers upon the Court to summon any material witness at any stage of a proceeding. The exercise of the powers so conferred is, however, objectionable where the action of the Magistrate in so summoning enables a party to the proceedings to obtain subsequently, to the prejudice of the other party, evidence of persons who might have been included in its list of witnesses.

In proceedings under s. 488, Criminal Procedure Code, for the maintenance of a child, the question of its legitimacy was raised. Witnesses were examined on both sides but the Magistrate found himself unable to arrive at any definite conclusion on their evidence as to the legitimacy of the child. He, accordingly, took the course of going to the village and examining without previous notice certain residents as Court-witnesses. After doing this, he offered to examine any one else in the village whom the counter-petitioner might want; but he did not want to examine any one whom he had not already called. Solely on such new evidence he found that the child was legitimate and awarded maintenance:

Held, on revision that since the finding of the Court was based exclusively on evidence subsequently obtained, the counter-petitioner who had already produced all the evidence at his command was likely to have been prejudiced by such a course of action and the Court in

Criminal Procedure Code—concld.

pursuing it went beyond the reasonable discretion afforded by s. 540, Criminal Procedure Code. M MANIKKATH KULAPPURA VEETTIL BHARGAVI AMMA, *In re*, 25 L. W. 151; 52 M. L. J. 118; 38 M. L. T. 39; 28 Cr. L. J. 251; A. I. R. 1927 Mad. 361 **123**

——— **s. 522**—*Trespass not attended by force—Restoration of possession, legality of.*

When an act of criminal trespass was not attended by criminal force, or show of force or by criminal intimidation, possession of the property trespassed upon cannot be restored to the complainant under s. 522, Criminal Procedure Code. L SHERA *v.* EMPEROR, 28 Cr. L. J. 320; 28 P. L. R. 238 **544**

——— **s. 535.** *See* PRIVY COUNCIL **227**

——— **s. 537.**

See CR. P. C., 1898, ss. 195 (c) ETC **1044**

See CR. P. C., 1898, ss. 239 (D), 537 **965**

See PRIVY COUNCIL **227**

——— **ss. 537, 539B.** *See* CR. P. C., 1898, ss. 133 ETC **371**

——— **s. 540.** *See* CR. P. C., 1898, ss. 488, 540 **123**

——— **s. 562.** *See* CR. P. C., 1898, ss. 439, 562 **127**

——— **s. 562**—*First offender—Power of Second Class Magistrates—Punjab Government Notification No. 431 of 1910.*

By virtue of the Punjab Government Notification No. 431 of 1910 Magistrates of the Second Class in the Punjab are competent to exercise the powers conferred by s. 562 of the Criminal Procedure Code. L EMPEROR *v.* BAKHSHAN, 8 Lah. 38; 28 Cr. L. J. 316; A. I. R. 1927 Lah. 102 **540**

——— **s. 562**, *scope of—Offence under s. 409, Penal Code, whether covered by the section.*

The offence under s 409 of the Penal Code is beyond the purview of s. 562 of the Criminal Procedure Code, and a Magistrate, therefore, acts without jurisdiction in releasing a person convicted of that offence on probation of good conduct. L EMPEROR *v.* RAHMAT KHAN, 28 Cr. L. J. 257 **225**

Criminal trial—*Cross cases—Evidence recorded separately—Judgment, common—Irregularity.*

In the trial of cross cases arising out of the same occurrence the Court ought to keep the evidence in each case entirely distinct and to deliver separate judgments in each case. Where, however, the evidence is separately recorded in each trial, the mere fact that both the cases are decided by one judgment would not vitiate the trial. P C MADAT KHAN *v.* EMPEROR, (1927) M. W. N. 68; A. I. R. 1927 P. C. 26; 31 C. W. N. 393; 28 P. L. R. 167; 52 M. L. J. 441; 28 Cr. L. J. 254; 25 L. W. 724; 29 Bom. L. R. 784; 45 C. L. J. 408; 8 Lah. 193 **126**

——— *Decision of case on special oath of complainant, legality of.*

It is entirely illegal to decide a criminal case in accordance with a statement made by the accused's father agreeing to the disposal of the case upon the special oath of the complainant. A TIRLOKI NATH *v.* EMPEROR, I. R. 8 A. 22 Cr.; 28 Cr. L. J. 301 **381**

——— Defect in procedure—Consent of Advocate, effect of. *See* PRIVY COUNCIL **227**

——— *Duty of prosecution—Prosecution, whether bound to examine all witnesses alleged to know about offence—Omission to examine in Sessions witnesses examined before Committing Court—Trial by Jury—Misdirection—Omission to mention vital points affecting credibility of prosecution witnesses, effect of.*

Criminal trial—concld.

It is not the duty of a prosecution to adopt an attitude of non-committal to any version of the case and to examine all witnesses alleged to have known something about the offence, whether or not they will support the prosecution case and whether or not the prosecution regards them as true or false. The prosecution ought to put forward a definite case and refrain from calling witnesses whom it regards as false or unnecessary.

If witnesses have been examined in the committing Court who have not given what the prosecution regards as true evidence, it is not the duty of the prosecution to examine them in the Sessions Court.

Where in a trial by Jury a point has not been put in evidence before the Jury it is not the duty of the Sessions Judge to comment upon it in his charge.

It is the duty of the prosecution to put forward the earliest information in the case, and if it does not do so the defence is entitled to ask the Jury to draw adverse inference.

Omission to draw the attention of the Jury to matters which vitally affect the trustworthiness of some of the important witnesses amounts to a misdirection of the Jury. M MUTHAYA THEVAN, *In re*, 25 L. W. 487; 28 Cr. L. J. 307; A. I. R. 1927 Mad. 475 **531**

——— *Procedure—Repudiation by prosecution of documents filed and witnesses relied on at earlier stage, propriety of—Filing of documents by prosecution in anticipation of defence, legality of.*

In a criminal case it is not open to the prosecution to put forward documents and witnesses as proving part of their case and then at the last moment to repudiate them all and start a new case altogether.

The prosecution ought to put forward from the beginning its real case and stick to it throughout.

It is not a proper procedure for the prosecution to file documents which the defence relies on for the purpose of discrediting them before the defence has had a chance to file them for itself, inasmuch as such a course is in effect permitting the prosecution to call evidence in rebuttal of the accused's defence, a practice wholly unauthorised and not admitted by the Criminal Procedure Code. M BISWANATH DAS, *In re*, 28 Cr. L. J. 285; A. I. R. 1927 Mad. 533 **365**

Criminal Tribes Act (VI of 1924), ss. 16, 17, 18, 25—*Release on probation—Cancellation of order of release, validity of—Power of Settlement Officer to order return to settlement—Order of Local Government, whether necessary—Refusal to return—Procedure.*

The Criminal Tribes Settlement Officer has power to cancel an order releasing on probation of good conduct a registered member of a criminal tribe.

Where a Settlement Officer cancels such an order special sanction of the Local Government under s. 16 of the Criminal Tribes Act is not necessary for ordering such person to return to his settlement.

A member of a criminal tribe whose release on probation has been cancelled and who has been ordered by the Settlement Officer to return to his settlement is liable to be dealt with under s. 25 of the Criminal Tribes Act if he is found in any part of British India beyond the area of his settlement. B MALHARI LAXMAN *v.* EMPEROR, 29 Bom. L. R. 186; A. I. R. 1927 Bom. 159; 28 Cr. L. J. 394; 51 B. 409 **1050**

Custom—*Existence of custom--Question of law—Second appeal—Civil Procedure Code (Act V of 1908), s. 100*—Abadi—*Tenant's rights—Alienation of house site, validity of.*

The question whether a custom exists or not, is a question of law for purpose of second appeal where the lower Appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish the alleged custom.

Where an agriculturist is allowed to build a house for his occupation in the *abadi* he obtains, in the absence of a special contract to the contrary, merely a right to use that house for himself and his family so long as he maintains the house and so long as he does not abandon the house by leaving the village, and in the absence of a special grant by the *zemindar*, the tenant has no interest which he can sell by private sale or by sale in execution except such interest as he has in the timber, roofing and woodwork of the house.

A tenant in the village of Pali Muqimpur is not entitled by custom to transfer the right of occupancy of the site in the *abadi* on which he has built a house. **A** AISHA BEGAM *v.* DAULAT SINGH, L. R. 8 A. 110 Rev.; A. I. R. 1927 All. 471 **605**

——— **(Central Provinces)**—*Grazing of cattle—Tenant of one* mahal, *whether has right to graze cattle in waste land of another* mahal *of same village.*

A tenant in one of the *mahals* in a village has no right of *nistar, viz.*, right of free grazing of his agricultural cattle, in the waste land situated in another *mahal* though included in the same village. **N** SIDHGOPAL *v.* TARA, A. I. R. 1927 Nag. 199 **785**

——— **(Punjab)**—**Abadi**—*Sale of site by non-proprietor to proprietor, whether binding upon other proprietors—Suit for possession—Relief.*

The sale of a site in the village *abadi* by a non-proprietor in favour of one of the proprietors is not binding on the remaining proprietors.

Where, therefore, in such a case some of the proprietors sue for possession of the site, they are entitled to a decree for joint possession of the site fater removal of the materials, if any, standing upon it **L** SULTAN MUHAMMAD *v.* SURKHRU KHAN, A. I. R. 1927 Lah. 197 **452**

——— **(Punjab)**—**Alienation**—*Antecedent debt, nature of debt, enquiry into.*

Where an alienee, after having satisfied himself as to the existence of the antecedent debt due by the alienor actually discharges that debt, no question of enquiry as to the nature of the debt arises unless it is proved that it is tainted with immorality or that there are suspicious circumstances which should have put the alienee to enquiry. **L** HARI SINGH *v.* SAHIB SINGH, 28 P. L. R. 227; A I. R. 1927 Lah. 371 **733**

——————— *Necessity — Debts due to alienee himself—Alienee's duty to prove necessity—High rate of interest--Necessity for borrowing at high rate—Contract Act (IX of 1872), s. 74—Interest from date of execution of deed in case of default—Penalty.*

Where the alienee himself is the antecedent creditor it is not only incumbent on him to prove the existence of the prior debts due to him but also the necessity for those debts.

Where a mortgage carries a high rate of interest it is incumbent on the mortgagee not only to show that there was necessity for the debt but that there was also necessity to borrow money at the high rate of interest claimed by him.

Custom—contd.

Where a mortgage-deed provides that in case the money is paid by a particular date no interest would be charged but in case of default interest would be payable at a particular rate from the date of the execution of the bond, the provision as to interest must be considered penal within the meaning of s. 74 of the Contract Act. **L** HARI SINGH *v.* HARNAM SINGH, 27 P. L. R. 807; A. I. R. 1927 Lah. 113 **269**

——— **(Punjab)** — **Alienation** — *Necessity — Alienee's duty to enquire into antecedent debts—Money required for purposes of trade, whether for necessity —Punjab Courts Act (VI of 1918), s. 41—Necessity, finding of—Second appeal.*

An alienation by a member of a community usually engaged in trade of a portion of his land to invest the proceeds in trade is one for a necessary purpose even if he be an agriculturist and governed by agricultural custom, where the income of the land is insufficient to meet his wants.

A finding that a particular loan was required for personal necessities is a finding of fact and cannot be agitated in second appeal.

An outsider who pays antecedent debts in consideration of a transfer of property, if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived and is entitled to have the alienation declared binding. **L** KIRPAL SINGH *v.* SOHAN SINGH **943**

——————— *Necessity — Mortgage by daughter-in-law in lieu of father-in-law's debt, validity of.*

A mortgage by a daughter-in-law for her father-in-law's debt is one for necessity and binding on the reversioners. **L** UDHAM SINGH *v.* JOWALA SINGH **803**

——————— *Ordinary debts—Necessity, proof of—Interest on debts, whether, necessity—Father and son living together—Collusion*

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property, strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor does not expect to be sonless.

Interest on a just debt is also a necessity.

The mere fact that the plaintiff is a minor and he and his mother are living with the father does not mean that the suit is collusive. **L** HARNAM SINGH *v.* RAM DITTA, A. I. R. 1927 Lah. 264 **911**

——————— *Payment of antecedent creditor—Necessity—Necessity for small item not proved—Procedure.*

Payment of an antecedent debt constitutes a valid necessity.

A Court will not set aside an alienation merely because necessity for a small item of consideration has not been proved. **L** CHET SINGH *v.* TARLOCHAN, 27 P. L. R. 783; A. I. R 1927 Lah. 53 **773**

——— **(Punjab)**—**Ancestral property** — *Land held by brothers jointly at the time of earliest Settlement—Presumption.*

Where it is found that a certain piece of land was held at the time of the first Settlement jointly by persons who were real brothers the presumption, in the absence of any indication that the land was the self-acquired property of the brothers, is that it was held by their father. **L** PALO *v.* BAWA, 28 P. L. R. 72 **108**

Custom—contd.

——— (**Punjad**) -- Kashmiris *of Jhelum City, whether governed by custom.*

The *Kashmiris* of Jhelum City are governed by custom. L DEVI DAS *v.* NIZAM DIN, A. I. R. 1927 Lah. 278 **949**

——— (**Punjab**)—**Succession**—Got, *sameness of, as ground for succession—Proprietary body's right of succession defined—Sister's rights.*

It is now well-settled that a person is not entitled to succeed to the land of another merely by reason of his belonging to the same *got.*

In the event of a deceased proprietor dying without heirs, his estate would descend to the proprietary body only if the village is a homogeneous one and complete community of interest is maintained. Where no general community of interest between the several land-holders in the village has been preserved the estate of an heirless proprietor escheats to the Crown and does not devolve upon the proprietary body.

Both under custom as well as under Hindu Law sister is entitled to succeed in preference to the proprietary body. L DUNI CHAND *v.* LEKHU, A. I. R. 1927 Lah. 255 **917**

——— ——— *Muhammadan* Gujars *of Kangra Tahsil—Daughter's right of succession—Female heir's right to contest alienation by another female—Widow's estate, nature of.*

Under the Customary Law of the Punjab a female heir is entitled to contest an alienation made by another female heir with a limited estate.

Amongst Muhammadan *Gujars* of Kangra Tahsil, a daughter succeeds to the ancestral property of her father after his son and widow in the absence of any male collateral up to the seventh generation and a widow succeeds only to a life-estate even in cases of collateral succession. L IMAM DIN *v.* KHAMANDI, A. I. R. 1927 Lah. 366 **1014**

——— ——— *Self-acquired property—* Handal Jats *of Amritsar District—Daughters and collaterals*—Riwaj-i-am, *value of, as record of special custom*—Riwaj-i-am *of Amritsar District, reliability of—Evidence Act (I of 1872), s. 30.*

Among *Handal Jats* of the Amritsar District there is a special custom by which the collaterals of a deceased succeed to his self-acquired property to the exclusion of his daughters.

An entry in a *riwaj-i-am* recording a special custom as opposed to a general custom is *prima facie* proof of that custom even if it be unsupported by concrete instances and the onus is on the other side to rebut it.

The principle upon which an entry in a *riwaj-i-am* is admitted as a piece of evidence conclusive of the facts stated unless rebutted, is that it is an official record kept by a person upon whom there is a public duty to make entries in it only after satisfying himself of the truth of those entries, and accordingly the document itself is evidence of the truth of its contents unless and until its falsity can be demonstrated by any of the various methods by which any public book, register or document may be attacked.

The *Riwaj-i-am* of Amritsar District as compiled in 1865 and revised in 1914 is an accurate and reliable record of custom. L LABH SINGH *v.* MANGO, 8 Lah. 281; A. I. R. 1997 Lah. 241 **924**

——— (**U. P.**)—**Abadi**—*Tenant, right of, to use sahan of house.*

A *ryot* in a village is entitled to put the *sahan* of his house to such use as suits his convenience provided that by doing so he does not, in any way, adversely affect the proprietary rights of the *zemindar.*

So long as a person remains a tenant in a village and so long as his house exists, the *zemindar* has no right to possession of the site of the house or to possession of the *sahan* of the house. A RAM PRATAP SINGH *v.* LAL BAHADUR SINGH, A. I. R. 1927 All. 330 **597**

Debtor and creditor—*Mutual current accounts, nature of—Appropriation of payments—Burden of proof—Circumstantial evidence—Interest—Agreement to pay compound interest—Burden of proof.*

A one-sided account of loans made from time to time and payments from time to time in whole or partial discharge of the advances is not a mutual current account.

The burden of proof that payments made by a debtor were towards a particular debt and not towards earlier advances is upon the debtor. But the circumstances of the various payments may imply that they were to be appropriated and were in fact appropriated towards particular advances.

The burden of proving an agreement for compound interest is on the creditor. P C RADHA KISHUN *v.* HIRA LAL SAH, (1927) M. W. N. 73; A. I. R. 1927 P. C. 50; 4 O. W. N. 344; 45 C. L. J. 318; 31 C. W. N. 566; 29 Bom. L. R, 791; 52 M. L. J. 715; 38 M. L. T. 97 **668**

——— Presumption as to payment of interest. *See* MORTGAGE BY CONDITIONAL SALE **5**

Declaratory suit—Fresh cause of action. *See* LIMITATION ACT, 1908, SCH. I, ART. 120

Decree—*Construction—Direction to trustee to make good certain sums to temple—Decree, whether declaratory or executable—Reference to pleadings and judgment.*

Where a decree is ambiguous, it is competent to the Court in executing it to refer to the pleadings and the judgment.

A decree which directs that the defendant shall be liable to make good to another a specified sum of money is an executable decree and not merely a declaratory one. M BALAKRISHNA CHETTIAR *v.* KRISHNA MURTY IYER, 52 M. L. J. 128; (1927) M. W. N. 202; 38 M. L. T. 143; A. I. R. 1927 Mad. 416 **841**

——— *Preliminary decree directing sale of property, whether executable—Execution proceedings—Appeal from final order—Right to challenge interlocutory orders not appealed against.*

An appeal need not be preferred against every order in execution proceedings; it is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of an interlocutory order made in the course of the proceedings.

A decree which contains a clear direction that the judgment-debtors are to pay the sum mentioned therein and that in default of payment by them, the money is recoverable by attachment and sale of certain property is not a mere preliminary decree but is a decree capable of execution. L NATHU MAL *v.* MOHAN SINGH, A. I. R. 1927 Lah. 232 **653**

Defamation—*Statement contained in complaint—Privilege.*

Statements made in a complaint filed in a Court of Justice having reference to the subject-matter of the

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complaint are absolutely privileged and cannot be made the basis of a suit to recover damages for defamation. **A** UDAI RAM *v.* GOBARDHAN 31

——— *Words of abuse—Candidate at election abusing rival candidate as drunkard—Privilege, extent of.*

The plaintiff and the defendant were candidates at an election. At the election meeting the plaintiff called the defendant a rowdy and a suspect. The defendant retorted by saying that the plaintiff was a drunkard and unfit to be a candidate. The defendant was successful at the election. After the election meeting was over, the defendant was asked by some people outside as to what happened inside and defendant said that the plaintiff was a drunkard. In an action for damages by the plaintiff:

Held, that in respect of the abuse at the meeting, defendant who was defending himself against the plaintiff's attack was privileged; but that privilege did not extend to what was said by the defendant outside the meeting and after the election was over, and that, therefore, the word used outside the meeting hall was actionable.

Words of abuse used during the course of a heated quarrel are not actionable inasmuch as the person using them cannot be said to intend to defame the person whom he abuses. **M** SIRIGINEEDI SUBBARAIDU *v.* VENKATASREENIVASA CHARLU, 52 M. L. J. 87; (1927) M. W. N. 83; A. I. R. 1927 Mad. 329; 25 L. W. 770 90

Dependent Judgments. *See* LIMITATION ACT, 1908, s. 14 776

Easement

See LIMITATION ACT, 1908, s. 26 321, 498

——— *Dominant and servient tenements, partition between—Easement to discharge water, creation of—Apparent and continuous easements.*

Where there is no drain either in the dominant tenement or in the servient tenement but the level of the dominant tenement is higher than that of the servient tenement so that the natural drainage would be from the dominant tenement to the servient tenement, then if there is a partition of the dominant from the servient tenement, there will be an easement to discharge rain water but not water of daily use. **L** PALA PARSHAD *v.* CHAND, 9 Lah. L. J. 169; 28 P. L. R 334; A. I. R. 1927 Lah. 383 939

——— *Prescription—Second appeal—Plea of grant or custom, whether can be allowed.*

It is impossible to admit in second appeal a plea raised for the first time which would involve a fresh enquiry into questions of fact.

Where a plaintiff who sets up an easement on the ground of prescription fails to establish his case, he cannot be allowed in second appeal to set up a grant or custom.

A person is entitled to enjoy his own land in the way he chooses to do, unless he interferes with his neighbours and causes them injury or inconvenience. **N** GANPAT *v.* LAXMAN SAO 21

——— *Right to drain includes right to clean and supervise it.*

The right to supervise the drain and to have a right of way to the drain is accessory to the right to a drain and the owner of the dominant tenement is, therefore, entitled to demand reasonable convenience for cleaning and supervising the drain. **L** KIRPA RAM *v.* NOTIFIED AREA COMMITTEE 813

Easements Act (V of 1882), s. 60, *See* LANDLORD AND TENANT 479

Estoppel.

See EVIDENCE ACT, 1872, s. 116 1004

See TRANSFER OF PROPERTY ACT, 1882, s. 54 270

——— Omission to mention charge in proclamation of sale. *See* C. P. C., 1908, O. XXI, R. 13 493

——— Valuation of suits. *See* COURT FEES ACT, 1870, s. 7, cl. v 35

Evidence—Admission of document without objection—Objection whether can be raised subsequently. *See* CR. P. C., 1898, ss. 141, 145 713

——— at late stage—Practice. *See* PRACTICE 77

——— *Death at particular time—Burden of proof—Presumption as to time of death.*

When the question is not merely one of death but of death at a particular time, there is no presumption as to the time of death but the party concerned to make out death on a specified date must prove it by evidence. **N** DESHRANI *v.* KISHORE SINGH, 22 N. L R. 175; A. I. R. 1927 Nag. 104 446

——— Document—Admission without formal proof, effect of. *See* CONTRACT ACT, 1872, ss. 134, 139 922

——— Document not *inter partes*—Admissibility. *See* GRANT 453

Evidence Act (I of 1872), ss. 17, 21—*Self-serving statement in Will, admissibility of.*

A statement in a Will which suggests an inference as to a fact in issue, though relevant under the provisions of s. 17 of the Evidence Act, cannot be proved by or on behalf of the person who made it or his representatives in view of the provisions of s. 21 of the Evidence Act. **P C** NALAM PATTABHIRAMA RAO *v.* MANDAVILLI NARAYANAMOORTHY, 15 L. W. 404; 26 C. W. N. 273; A. I. R. 1922 P. C. 102 835

——— **ss. 17, 115**—*Estoppel—Admission of receipt in deed, whether creates estoppel—Admissions, evidential value of.*

A recital of receipt of consideration in a deed does not operate as an estoppel.

Per *Ashworth, J.*—An admission must be read as it stands and it is not permissible to take one part of an admission and reject another part.

Admissions are of no evidential value once they are proved untrue. **A** BAZ BAHADUR SINGH *v.* RAGHUBIR PRASAD, 25 A. L. J. 572; A. I. R. 1927 All. 385 1037

——— **s. 25**—*Recovery list signed by accused, admissibility of, to prove accused's possession of premises.*

If the putting of signature to the recovery list by the accused is evidence that the house searched belongs to him, this would be an incriminating statement of the nature of a confession and would not be admissible against him under s. 25, Evidence Act. **L** BEHARI LAL *v.* EMPEROR, 28 P. L. R. 119; 28 Cr. L. J. 323; 8 Lah. 326; A. I. R. 1927 Lah. 343 707

——— **s. 27.** *See* CR. P. C, 1898, s. 162 820

——— **s. 30.** *See* CUSTOM (PUNJAB) 924

——— **s. 34**—*Production and proof of account books—Plaintiff's vague statement as to dealings, whether sufficient proof.*

The production and proof of account books and a general statement by the plaintiff that there were dealings between him and the defendant is not sufficient evidence of any particular item charged against the defendant. **L** BUTA *v.* TIRLOK CHAND 862

——— **s. 50.** *See* PENAL CODE, 1860, ss. 497, 498 535

——— **ss. 60, 63**—*Secondary evidence of contents of document—Evidence of person who has not read document, whether admissible.*

Under s. 63 of the Evidence Act oral evidence of the contents of a document must be given by some

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person who has seen those contents, that is to say, who has read the document. Evidence that the witness saw the document and heard it read out by someone else is only hearsay so far as the contents are concerned, and does not fulfil the requirements of s. 60 of the Act. **P C** MA MI *v.* KALANDAR AMMAL, 25 A. L. J. 65; A. I. R. 1927 P. C. 15; (1927) M. W. N. 80; 38 M. L. T. 41; 25 L. W. 342; 28 P. L. R. 109; 5 R 18; 52 M. L. J. 376; 6 Bur. L. J. 40; 45 C. L. J. 263; 8 P. L. T. 280; 31 C. W. N. 621; 29 Bom. L. R. 800 **1**

——— **s. 92.** *See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 46 **332**

——— **s. 92, prov. (1).** *See* VENDOR AND PURCHASER **568**

——— **s. 92, prov. (2).** *See* STAMP ACT, 1899, s. 2 (5) (22) **794**

——— **s. 92, prov. (3)**—*Oral evidence to prove that a deed was not intended to take effect, admissibility of.*

Parties to a sale-deed cannot be allowed to adduce oral evidence to show that they never intended that ownership should pass and that consequently there was no sale notwithstanding the execution of a sale-deed. **A** LACHMAN DAS *v.* RAM PRASAD, 25 A. L. J. 349; A. I. R. 1927 All. 422 **1029**

——— **s. 92, prov. (4)**—*Oral agreement to accept less than mortgage amount in full discharge of mortgage-debt, whether can be proved.*

An oral agreement by a mortgagee to accept a lesser amount than is due on a registered mortgage-deed in full discharge of the mortgage cannot be proved under s. 92 (4) of the Evidence Act. **M** YEGNANARAYANA AYYAR *v.* SUPPAN CHETTY, 52 M. L. J. 224 **54**

——— **s. 108**—*Person not heard of for seven years—No presumption as to time of death—Punjab Limitation Customs Act (I of 1920), Sch. I, Art. 2 (b)—Limitation—Burden of proof.*

Though there is a presumption of a person's death if he has not been heard of for a period of not less than seven years, there is no presumption that he died at any particular date.

In a suit for possession by a collateral of a vendor on the ground of the invalidity of the sale it is for the plaintiff to prove that his suit is within three years from the vendor's death and it is not enough to show that the vendor is dead. **L** FATEH ALI *v.* AHMAD DIN, A. I. R. 1927 Lah. 284 **833**

——— **s. 114, Illus. (g)**—*Witness expected to know not called—Presumption.*

Where a witness of high standing expected to know a party's case is not called to give evidence, the presumption is that if called his evidence will not be favourable to such party. **R** MA GYI *v.* MA ME, 4 R. 522; A. I. R. 1927 Rang. 102 **250**

——— **s. 115.**

See C. P. C., 1908, s. 11 **527**

See EVIDENCE ACT, 1872, ss 17, 115 **1037**

——— **s. 116**—*Landlord and tenant—Estoppel of tenant against denying landlord's title—Mortgage of unrecognised sub-division of* bhag*—Mortgagor continuing in possession under rent-note—Suit by mortgagee on rent-note—Plea of illegality of transaction—Estoppel—Bombay Bhagdari and Narwadari Tenures Act (V of 1862), s. 8.*

The owner of an unrecognised sub-division of a *bhag* who has mortgaged the same but continues to remain in possession by executing rent-notes to the mortgagee from time to time is not estopped from contending, in a suit brought by the mortgagee on the basis of one of such notes, that the rent-note was part of a transaction amounting to an alienation of an unrecognised sub-division of a *bhag* which is expressly prohibited by the Bombay Bhagdari and Narwadari Tenures Act, and consequently illegal. **B** BHAVAN LALLU *v.* UMAR MAHOMED BHAIJI, 29 Bom. L. R. 97; 51 B. 43; A. I. R. 1927 Bom. 129 **1004**

Excise Officer—Report, whether complaint. *See* CR. P. C., 1898, s. 4 (H) **540**

Executing Court—Power to restrict bidders to particular class of people. *See* C. P. C., 1908, s. 60 (1) **1008**

Execution of decree—*Duty of execution Court—Objection to terms of decree, whether can be entertained.*

A Court executing a decree cannot go behind the terms of the decree and must execute it as it stands.

Where a decree declares the personal liability of a judgment-debtor, a Court executing the decree cannot entertain the objection that the judgment-debtor is not personally liable under the decree. **L** DILSUKH RAI *v.* LACHMAN DAS, 9 Lah. L. J. 7; 28 P. L. R. 71 **156**

——— *Payment by judgment-debtor of decree amount into Court—Effect upon other creditors—Amount, whether liable to be attached by another decree-holder—Fraud on creditors, what constitutes.*

Every payment on account of a debt is perfectly lawful payment irrespective of its effect upon other creditors

A payment by a judgment-debtor in satisfaction of the decree against him is a final discharge of his obligations thereunder and the Court is bound to enter satisfaction of the decree. Such money cannot be regarded as lying to the credit of the judgment-debtor so as to be liable to attachment by another decree-holder, nor does such payment constitute a fraud upon other decree-holders, even if there was nothing left for them to proceed against. **M** CHINNAMALU *v.* KUNHIKANNA MENON, A. I. R. 1927 Mad. 625 **24**

Explosives Act (IV of 1884), s. 5, rr. 32, 138—*—License—Breach of condition by servant—Master's liability—Acting 'in the scope of employment,' meaning of.*

The accused held a license under the Explosives Act to manufacture gun-powder, containing a condition that the explosive shall be manufactured in a tent or lightly constructed building exclusively appropriated for the purpose and separated from any dwelling house, highway, street, public thorough fare or public place by a distance of one hundred yards. The accused constructed a building which complied with this condition. One of his servants employed by him to manufacture gun-powder took the necessary ingredients from this building to the accused's house and performed part of the process of manufacture there An explosion occurred and the servant and another were injured. On a trial for breach of the conditions of the license:

Held, per *Fawcett* and *Crump, JJ.* (*Shah, J.* dissenting)—that inasmuch as the servant was acting in the course of her employment and inasmuch as the Statute imposed an absolute liability on the holder of the license the accused was guilty

Per *Shah, J.*—In leaving the licensed building and going to the accused's house the servant acted outside the scope of her employment and the accused was not, therefore, guilty. **B** EMPEROR *v.* MAHADEVAPPA HANMANTAPPA, 29 Bom. L. R. 153; A. I. R. 1927 Bom. 209; 28 Cr. L. J. 364; 51 B. 352 **972**

Factories Act (XII of 1911), ss. 2 (2) (3), 23, 41 —*'Factory,' 'premises,' 'precincts', 'employment'—Drying yard away from main building, whether factory—Sorting ground-nuts by children for decorticating them, whether amounts to employment —Offence—Manager's liability.*

The word 'premises' in s. 2 (3) of the Factories Act means the main building and its appurtenances and the word 'precincts' is intended to include any adjunct thereof.

A factory includes everything, machine, rooms, sheds, godowns and yards, if within the premises or precincts mechanical power is used in aid of any process for altering for transport or sale of any article. The test is whether mechanical power is used in aid of a manufacturing process used in the premises. If it is so used in a particular room, the whole premises are a factory and not merely the room.

A drying yard 5 or 6 yards from the wall of the building in which machinery for decorticating ground-nuts is used is part of a factory within the meaning of s. 2 (3) of the Factories Act and the employment of children therein in contravention of the provisions of s. 23 of the Act is an offence.

The sorting of ground-nuts for use in a ground-nut decorticating machine is work connected with the article, subject of manufacturing process, within the meaning of s. 2 (2) and amounts to *employment* under the Act.

Once it is found that children are employed in a factory in contravention of s. 23 of the Factories Act the occupier or manager is liable under s. 41 of the Act It is immaterial who actually pays them their wages. M RAMANADHAM, *In re*, 25 L. W. 176; 52 M. L. J. 207; 38 M. L. T. 78; 28 Cr. L. J. 267; A. I. R. 1927 Mad. 345 **235**

Foreign Judgment, suit on. *See* C. P. C., 1908, s. 13 (B) **555**

Fraud—*Suit to set aside decree on ground of fraud, when maintainable.*

A decree cannot be challenged in a subsequent suit upon the ground that it is wrong or incorrect or was obtained by means of perjured evidence, false documents or the like. Where, however, the allegation is that the decree was obtained by practising a gross fraud upon the Court, a separate suit to set aside the decree is maintainable. C ABDUL BARI *v.* AMIRJAN **603**

Fraudulent transfer—*Transfer just before attachment, whether can be presumed to be fraudulent—Undue preference.*

The mere fact that a transfer in favour of a creditor is effected after the passing of a decree against the transferor and just before an attachment under that decree is not by itself sufficient to raise a presumption of fraud. R S. R. M. M. NARAYANAN CHETTIAR *v.* MAGANLAL 6 Bur. L J. 8, A. I. R. 1927 Rang. 168 **993**

Gambling. *See* CONTRACT ACT, 1872, s. 23 **345**

Grant—Brahmottar—*Proof of ancient grant—Long possession under definite claim—Presumption of lost grant—Bengal Tenancy Act (VIII of 1885), s. 103B—Entry in Record of Rights—Presumption of correctness, rebuttal of—Evidence—Document not* inter partes, *admissibility of*

A person who claims to hold as a tenant land within the ambit of a *zemindari* must prove his right to hold it without payment of rent by a grant from the *zemindar*; but the production of the grant itself is not the only way to prove a grant.

Grant—concld.

Where there has been long continued possession in assertion of a right, it is a well-settled principle of law that the right should be presumed to have had a legal origin, if such a legal origin was possible and the Court will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title

Whether a presumption of a lost grant should be raised or not depends on the circumstances of each case.

It is only in cases of long possession under a claim of a definite right that the question of presumption of a lost grant arises.

In raising the presumption of lost grant care must always be taken to see that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that in the circumstances it was likely to have attracted the notice of the person or persons whose rights are adversely affected by such a claim.

With regard to the *brahmottar* grants made in ancient days in Bengal by the Rajas and *Zemindars*, long possession by the grantees and their successors under a claim of rent-free *brahmottar* grant is all that can be expected after a long lapse of time in proof of a legal origin of such grants. Where possession under such a claim for a long period is proved by direct evidence, the Court not only might, but ought to presume that the claim was based upon a lost grant.

Although an entry in the Record of Rights must be presumed to be correct unless the contrary is proved yet, where the matter is investigated by the Civil Court and the parties adduce their evidence on the point in controversy, the entry loses its weight when the evidence discloses no foundation for it.

Documents showing the dealing of the property by the descendants of the original grantee, as rent-free *brahmottar* and evidencing the transfer of their interests are admissible in evidence to prove the title of the grantee. C KIRAN CHANDRA ROY *v.* SRINATH CHAKRAVARTI, 31 C. W. N. 135; A. I. R. 1927 Cal. 210 **453**

Guardians and Wards Act (VIII of 1890), ss. 7, 39—*Removal of guardian, principles relating to—Testamentary guardian, when to be removed—Welfare of minor.*

Under s. 7 of the Guardians and Wards Act a Court cannot appoint another person as guardian in place of a testamentary guardian until the powers of such a guardian have ceased under the Act. But, under s. 39 of the Act it is as much the duty of the Court to remove a testamentary guardian as it is to remove a guardian appointed by itself, if any of the grounds mentioned in that section exists.

If there are reasons to suspect that a testamentary guardian is guilty of continued failure to perform the duties of his trust and has ill-treated or neglected to take proper care of the ward, the Court should, acting either on the application of any person interested or *suo motu*, remove him, the paramount consideration for the decision of the Court being always the welfare of the minor. L KISHNO *v.* PARTABO, 28 P. L. R. 127 **738**

——— **ss. 25, 39**—*Application for custody of ward—Guardian too weak to keep minor—Refusal of application, legality of—Court's duty to help guardian in discharging his duties.*

A Court cannot refuse to grant relief under s. 25

Guardians and Wards Act—concld.

of the Guardians and Wards Act for return of the ward to the custody of the guardian on the ground that the guardian is too weak to keep the minor. It is the duty of the Courts to protect the weak against the high-handed acts of the strong and this duty has to be performed with greater vigilance when the aggrieved party is a duly constituted guardian appointed by the Court itself and the victims are minors under its charge.

If the guardian is incompetent or is otherwise an improper person to be allowed to continue as such, proper proceedings must be taken under s. 39 of the Guardians and Wards Act for his removal and the appointment of another guardian. But until this is done it is the duty of the Court to render all assistance to the guardian in the discharge of his duties and to see that the minors remain in his custody.

In order to take action under s. 25 of the Guardians and Wards Act it is immaterial whether a minor leaves the guardian's custody of his own accord or is removed forcibly by others. L AMIR KHAN *v.* TALEH MUHAMMAD, A. I. R. 1927 Lah. 266 **807**

——— **ss. 34, 35, 36, 41 (3)**—*Discharge of guardian—Procedure for scrutiny of accounts—Regular suit.*

Where a guardian appointed by Court under the Guardians and Wards Act has been finally discharged, the Court can, acting under s. 41 (3), direct the accounts in his possession to be delivered, but when the measure of the guardian's liabilities is sought to be put in issue, the proper course is to apply to the Court under s. 35 or s. 36 and then file a regular suit against the guardian. M THIRUVENGADATHA IYENGAR *v.* THIRUVENGADAM IYENGAR, 38 M. L. T. 115; 26 L. W. 44 **600**

——— **s. 39.**

See GUARDIANS AND WARDS ACT, 1890, ss. 7, 39 **738**

See GUARDIANS AND WARDS ACT, 1890, ss. 25, 39 **807**

——— **s. 41 (3).** *See* GUARDIANS AND WARDS ACT, 1890, ss. 34 ETC. **600**

Gwalior State—Custom as to adoption. *See* HINDU LAW—ADOPTION **778**

Hindu Law—*Agreement by father*—Suit for specific performance—Claim for earnest money. *See* C. P. C., 1908, O. VI, R. 17 **56**

——— *Suit by reversioner*—Prima facie *proof of nearest relationship, reversioner's duty to adduce.*

A plaintiff suing as the nearest reversioner after the death of a widow must at least adduce *prima facie* evidence that his claim is superior to that of any other person. It is not enough to rely upon statements in the plaint or in a genealogical table, or merely to prove that a certain relationship existed between the plaintiff and the *propositus* M THOKALA SESHAMMA *v.* YELLATUR VENKATAREDDI, 52 M. L. J. 155; 38 M. L T. 45 **500**

——— *Suit for partition against father, brother and alienees from brother—Debt incurred by father prior to suit—Decree against family property exonerating alienees, effect of—Liability of family property for decree debt—Institution of partition suit, effect of, on antecedent debts of father.*

The purchaser of an undivided share of a Hindu co-parcener gets only an equity to enforce partition and takes the share when partitioned subject to all the liabilities on it in the hands of his vendor.

What is decided in a partition suit is the rights and liabilities of parties on the date of the plaint.

Hindu Law—contd.

The decree refers back to the date of suit, unless the partition suit is based on an antecedent severance of status when the Court will have to decide the rights and liabilities as on that date and pass a decree accordingly. In either case the date to which the decree refers will be the date when the severance took place.

For purposes of partition in a joint Hindu family an account has to be taken of the debts and liabilities binding on the estate. In the case of a managing member of a joint family, all debts which he has incurred for proper legal necessity of the family he is entitled to have paid out of the joint property before the shares are allotted to the several co-parceners; and in the case of a father he can ask all his debts which are neither immoral nor illegal to be so paid out of the joint estate of himself and his sons before partition, whether such debts be shown to be for legal necessity or not.

During the pendency of a suit by a Hindu son for partition against his brother and father and alienees from the brother a creditor filed a suit against all of them on a promissory note executed by the father and obtained a decree against the father personally and against the family property, the alienees being, however, exonerated:

Held, (1) that in the partition suit, the alienees could get their alienor's share only subject to the liability of the debt, notwithstanding that they were exonerated in the creditor's suit;

(2) that inasmuch as on the date of suit for partition the family was joint and the father's power to sell the joint property for his just debts was subsisting, the Court was bound to recognise in the decree the existence of such debts as were payable out of the joint estate and make the necessary provision for their liquidation before directing partition by metes and bounds. M KODURU VENKUREDDI *v.* MAGUNTA VENKU REDDI, 52 M. L. J. 387; (1927) M. W. N. 267; 25 L. W. 784; A. I. R. 1927 Mad. 471; 38 M. L. T. 342 **1018**

——— **Adoption.** *See* TRANSFER OF PROPERTY ACT, 1882, ss. 122, 123 **105**

——— *Adoption of orphan—Custom—Burden of proof—Custom, whether exists in Gwalior State*—'Tawarikh Jagirdaran'—*Recognition of adoption by Government, effect of—Succession to jagirs and to other properties.*

Under the Mitakshara an orphan cannot be validly adopted.

If a custom is proved under which such adoptions do take place, they would have to be held valid.

The burden of proving such a custom lies heavily on the person setting it up.

A custom by which an orphan can be validly adopted does not exist among the common residents of the Gwalior State

The rules contained in the '*Tawarikh Jagirdaran*' (History of the *Jagirdars*) of Gwalior State are rules laid down by the *Darbar* for regulating the succession to *jagirs*. They in no way embody the record of any particular custom which prevails in Gwalior generally. Those rules are restricted to the *jagirs* and *jagirdars* and are not applicable to the people in Gwalior in general.

There is no inconsistency in the succession of an alleged adopted son to a *jagir* being recognised by the State and his not being a valid adopted son regarding other properties, the devolution of which does

not depend on the State's sanction. A SUKHBIR SINGH v. MANGEISAR RAO, 25 A. L. J. 185; A. I. R. 1927 All. 252; 49 A. 302 **778**

——— **Alienation** *by limited owner—High rate of interest—Burden of proof as to reasonableness of rate of interest.*

Those who support a mortgage by a limited owner at a high rate of interest must show not only that there was necessity to borrow, but also that it was not unreasonable to borrow at such rate of interest. O JATAN SINGH v. MAHADEO PRASAD **686**

———(**Bombay School**)—*Powars in C. P.—Widow—Acquisition from income of husband's estate—Accretion—Intention—Test.*

The Powars, settled in the Central Provinces, arrived in these Provinces long before and altogether independently of the Mahrattas.

The Powars, settled in the District of Balaghat, did not migrate from the Bombay Presidency, bringing with them Bombay customs, nor are they governed by the Mayukha School of Hindu Law.

The question whether a Hindu widow who purchased immoveable property out of the profits of the estate inherited by her from her deceased husband, intended to treat the acquisition as an increment to her husband's estate or not, must be judged from her actual conduct in making and dealing with the acquisition in question. N RUKHMABAI v. JAIPAL, A. I. R. 1927 Nag. 122 **457**

——— **Debts**—*Ancestral property, liability of, for debts of father.*

Ancestral property is liable for the debts of a Hindu father unless it can be shown that they were contracted for immoral or illegal purposes. L MADAN MOHAN SINGH v. DAULAT RAM **17**

——— **Guardianship**—*Marriage—Bride, whether must be given away by guardian personally.*

Under the Hindu Law it is not absolutely necessary that the bride should be given away by the legal guardian; what is necessary is that the giving away should be with the knowledge and consent of the guardian. Where, therefore, the bride's father is unavoidably absent from the marriage and the bride is given away by the mother with the knowledge and consent of the father, the marriage is perfectly valid. C BENODINI HOWLDAR v. EMPEROR, 28 Cr. L. J. 327; A. I. R. 1927 Cal. 480 **711**

——————*—Step-mother, whether de jure guardian—Mortgage by step-mother—Antecedent debt.*

A step-mother is not a *de jure* guardian of her step-son under Hindu Law.

Where it is not proved that the step-mother was *in fact* the manager of her step-son's property or the guardian of his person, a mortgage of his property effected by her is not a mortgage by a *de facto* guardian and the debt secured by the mortgage cannot be regarded an antecedent debt. L CHANDU LAL v. MUKANDI LAL, 28 P. L. R. 65; 9 Lah. L. J. 61; A. I. R. 1927 Lah. 133 **53**

——— **Inheritance**—*Exclusion from inheritance—Dumbness, whether should be congenital and incurable.*

Dumbness should be congenital in order to be sufficient to disqualify an heir from inheriting under Hindu Law. It must also be incurable.

Per *Shah, J.*—The rule that congenital deafness and dumbness constitutes a disqualification according to Hindu Law to inherit is not obsolete. B SAVITRIBAI GANESH KHADILKAR v. BHAUBHAT SAKHARAMBHAT, 29 Bom. L. R. 64; 51 B. 50; A. I. R. 1927 Bom. 103 **586**

——— **Inheritance**—*Uncles of the whole blood, whether exclude uncles of the half blood.*

The distinction between the whole blood and the half blood observed in the case of brothers and their sons according to the Hindu Law does not, under the Mitakshara Law as administered in the Bombay Presidency extend to the uncles of the deceased, that is, the sons of his grandfather. Paternal uncles of the whole blood do not, therefore exclude paternal uncles of the half blood in the Bombay Presidency.

The decision in *Vithalrao* v. *Ramrao* is not overruled by the ruling of the Privy Council in *Ganga Sahai* v. *Kesri*. B SHANKAR BAJI JOSHI v. KASHINATH GANESH PURANIK, 29 Bom. L. R. 1; A. I. R. 1927 Bom. 97; 51 B. 191 **430**

——— **Joint family**—*Alienation by co-parcener—Suit for partition by other members—Allotment of property alienated to alienor's share—Equities—Date of ascertaining value of alienor's share.*

Where a member of a joint Hindu family alienates a particular item of property for purposes not binding upon the family and the value of the property so alienated is less than the share of alienor, in the joint family properties, in a suit for partition brought by another member of the family, it is competent to the Court to allot the property so alienated to the alienating member and thereby allow the vendee to retain it.

The value of the share of such alienating member must be determined as at the date of the alienation and not at the date of suit. M SIVANARAYANA PILLAI v. MUTHUKUMARA SITHAPATHIAR, 38 M. L. T. 122 **747**

——————*Alienation by co-parcener—Suit to set aside alienation and for partition—Equities in favour of alienee—Allotment of property alienated to alienor's share—Mortgage with possession by manager without necessity—No suit to set aside mortgage by junior member for over 12 years—Mortgage, binding nature of—Suit for partial partition—Objection as to maintainability of suit, whether can be first raised in second appeal.*

In a suit by a Hindu co-parcener to set aside an alienation by the other two co-parceners and for partition of the properties alienated, it was found that the alienee had spent some money for improvements, that he was entitled to $\frac{2}{3}$rds of the items purchased by him in any event, and as to the remaining $\frac{1}{3}$rd he had the right to be in possession as *othidar* and that the plaintiff could not recover without paying the *othi* amount and compensation for improvements:

Held, that in effecting the partition, the items alienated should, in equity, be allotted to the share of the alienors and the alienee must be allowed to retain them if possible.

An objection to the maintainability of a suit as being bad for partial partition cannot be allowed to be taken for the first time in second appeal when no issue thereupon has been raised in the Courts below.

A usufructuary mortgage executed by a manager of a joint family without necessity is binding upon a junior member thereof who has not sued to se aside it for over 12 years from the date of the mortt gage. M NAGUR PICHAI ROWTHER v. RAKKAPPA, A. I R. 1927 Mad. 528 **202**

Hindu Law-- contd.

——— **Joint family**—*Illegitimate sons and ters daugh of deceased member of family—Right to claim maintenance—Nattukottai Chetties, whether* Sudras.

Under the Hindu Law the illegitimate son of a permanently kept concubine of a deceased *Sudra* is entitled to maintenance from the co-parcenary property of the family of which his father was a member.

The illegitimate daughter, however, has no such right of maintenance. No Hindu Law text makes any provision for her and she cannot be regarded as a member of the joint family of the father.

Nattukottai Chetties are *Sudras*. **M** P. M. A. M. VELLAIYAPPA CHETTY *v.* NATARAJAN, 52 M. L. J. 229; 25 L. W. 493; A. I. R 1927 Mad. 386; 50 M. 340 **655**

——— Manager—Agreement to sell—Liability for damages. *See* CONTRACT ACT, 1872, s. 73 **422**

——— Manager's liability to maintain member. *See* LUNACY ACT, 1912, s. 88 **575**

——— *Partition—Separation of one member—Presumption of separation of other members* inter se—*No presumption of separation of other members from their sons.*

When it is established that in a joint Hindu family consisting of three brothers, one has separated from the other two, there is a presumption that the remaining two brothers have separated *inter se* but there is no presumption that such a brother has separated from his own sons. On the other hand, the presumption is to the effect that such a brother with his descendants will form the members of a joint Hindu family governed by the Mitakshara Law. **O** DEPUTY COMMISSIONER, PARTABGARH *v.* SHEO NATH, 4 O. W. N. 215; A I. R. 1927 Oudh 149 **689**

——— *Presumption of jointness—Alienation by manager—Burden of proving that property alienated is ancestral property—Alienation of joint and self-acquired property—Partial necessity—Procedure—Rights of alienee.*

Although, ordinarily, as between two Hindu brothers there is a presumption of jointness, yet, when a suit is brought for the recovery of possession of a certain property that has passed out of the hands of the family of which the plaintiffs are members, and in that suit it is contended by the defendants, that the property sought to be recovered by the plaintiffs was not the ancestral property of the plaintiffs, the burden of proving that the property was ancestral lies on the plaintiffs.

Where, in the case of an alienation by the manager of a joint Hindu family of properties belonging to the family and his own self-acquisitions, the proportionate amount of the sale consideration found to be for legal necessity is in excess of the proportion that the joint family property bears to the self-acquired property, the members of the joint family impugning such alienation are not entitled to recover any portion of the joint family property from the alienee. **A** LACHMAN DUBE *v.* AMBIKA DUBE, A. I. R. 1927 All. 366 **444**

——— *Property of joint family—Revenue registry in the name of some members—Compromise decree against these members, whether binding on family—Manager, power of, to confess judgment.*

Where a person is entered in the revenue papers representing himself and others of his family he be sued, in a suit calling in question that entry, representative of these other members.

Hindu Law— contd.

It is competent for the persons representing a family in the village *khewat* to confess judgment in a suit brought against the family on the ground that it had no interest in the land.

A compromise decree passed against a manager or representative of a joint Hindu family is binding on the other members of the family in the absence of fraud or collusion. **A** RAM LAL KOERI *v.* PANCHU AHIR, L. R. 8 A. 69 Rev **316**

——— **Joint family**—*Property standing in the name of a member—Presumption—Nucleus, burden of proof.*

There is no presumption that a Hindu family has any joint property and it is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property. **B** DAJI RAMJI PATIL *v.* LAXMAN RAOJI TAGE, 29 Bom. L. R. 122; A. I. R. 1927 Bom. 110 **937**

——— *Sale of ancestral property—Necessity—Duty of vendee—Portion of sale consideration not accounted for, effect of.*

Where a Hindu father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds of the sale is accounted for, the fact that a small part is not accounted for will not invalidate the sale. From this, however, it does not follow that the sale will be invalidated wherever the part of the sale consideration not accounted for cannot be described as small. The true question which falls to be answered in such cases is whether the sale itself was one which was justified by legal necessity.

The purchaser is, in such a case, bound to inquire into the necessity for the sale and to satisfy himself as well as he can, that the vendor is acting in the particular instance for the benefit of the family. If he does inquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the sale, which renders him bound to see to the application of the money.

Where it was found that the sale challenged was made after due inquiry as to the legal necessity by the vendee, that such necessity was proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500 and that the sale was for an adequate consideration:

Held, that the mere fact that after a long interval of time the vendee was not able to establish how the surplus of Rs. 500 was applied was not a sufficient ground in law for setting aside the sale. **P C** SRI KRISHN DAS *v.* NATHU RAM, 25 A. L. J. 80; A. I R. 1927 P. C. 37; (1927) M. W. N. 89; 38 M. L. T. 48; 4 O. W. N. 184; 8 P. L. T. 210; 31 C. W. N. 462; 54 I. A. 79; 49 A. 149; 29 Bom. L. R. 825; 45 C. L. J. 386; 52 M. L. J. 720 **130**

——— *Will, validity of—Insolvency of father—Power to sell son's share in family property, whether vests in Official Receiver.*

Where a Hindu father and his son form a joint Hindu family and continue to be joint until the death of the father, any Will made by the father is inoperative and invalid so far as the joint property is concerned and the son takes his father's estate by survivorship.

The power of a Hindu father to sell his son's share in the joint family property for paying off his just and proper debts vests, on the insolvency of the father, in the Official Receiver. **L** PIAR BAI *v.* TULSI DAS-TARLO-

CHAN MAL, 9 Lah. L. J. 30; 28 P. L. R. 134; A. I. R. 1927 Lah. 152 **110**

——— **Marriage**—Marriage amongst sub-castes, validity of. *See* PENAL CODE, 1860, s. 498 **236**

——— **Minor**—*Mortgage, payment of—Guardian, natural, whether can grant valid discharge.*

The *de facto* and natural guardian of a Hindu minor has full power to collect debts on behalf of the minor and to give a valid discharge in respect thereof. Therefore, in the absence of fraud or collusion a mortgagor who pays the mortgage-money to the *de facto* and natural guardian of the mortgagee, who is a Hindu minor, obtains a valid discharge of the mortgage-debt. **L** LABHU RAM *v.* SAZAWAR, A. I. R. 1927 Lah. 237 **129**

——— **Partition**—*Manager how far liable to render account.*

A member of a joint Hindu family in asking for an account in a partition suit cannot object to the various items of past expenditure by the *karta*, but he can call for an account for the purpose of ascertaining how much was saved each year out of the income in order that it may be at the disposal of the joint family for partition. **Pat** SITA RAM *v.* HANUMAN PRASAD, 8 P. L. T. 145 **632**

——— ——— *Mother's share on division between sons—Arrangement for maintenance of mother—Suit by mother for partition, maintainability of—Actual division by metes and bounds between sons whether necessary.*

A mother cannot maintain a suit for partition and recovery of a share against her sons, where in a partition between the sons after the father's death provision has been made for her maintenance for life, and the arrangement has been accepted by her.

It may be that the word 'dividing' in the text of Hindu Law giving the mother a share when the sons divide after the death of the father does not include a mere expression of an intention to separate but it certainly covers a separation in fact and does not restrict it to a division by metes and bounds where immoveable property is concerned.

The share which the mother receives on partition of the family estate amongst her sons she receives for her lifetime only and the true nature of the estate so received is a provision for maintenance. **O** RAJAU *v.* DHARMRAJ, 4 O. W. N. 168; A. I. R. 1927 Oudh 136 **621**

——— ——— *Separation of one member, effect of—Self-acquired and ancestral property, blending of—Adoption by widow—Authority of husband—Consent of reversioners.*

Order IX, r. 5 of the Civil Procedure Code has no application to appeals.

One member of a joint Hindu family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and the remaining co-parceners, without any special agreement amongst themselves, may continue to be co-parceners and to enjoy as members of a joint family what remains after such a partition of the family property.

Where the head of a joint Hindu family treats certain self-acquired property in exactly the same way as the ancestral property of the family, and keeps no separate account of its income and expenditure, such conduct is sufficient to prove that the self-acquired property is blended with the ancestral property so as to alter it from self-acquisition into ancestral property.

Where a Hindu widow who has no express authority from her deceased husband to make an adoption to him, makes an adoption without the consent of his co-parceners; the adopted son obtains no rights in the joint family property. **B** BABANNA SANGAPPA *v.* PARAVA NINGRASAPPA, 28 Bom. L. R. 1446; 50 B. 815; A. I. R. 1927 Bom 68 **147**

——— **Settlement**—*Estate granted to widow—Life-estate or widow's estate—Construction—Power to alienate for necessity.*

The sole surviving member of a Hindu family who had to provide for a brother's widow, a daughter's son, and the widows of two predeceased sons, under a settlement of his properties during his lifetime made a grant of a share in some villages to his daughter's son and brother's widow and granted the shares in all other villages to his sons' wives in the following terms: "The rest of the shares and the house I have given to my sons' wives on this condition that the said widows should remain in possession of the properties given to them and should maintain themselves with the profits thereof. . . . . My sons' wives and my brother's wife should remain in possession of their shares, which I have given them, for their whole life. . . . . On the death of one of the sons' wives the other shall get her share also. In short, so long as the three *Musammats* are, or any of them is, alive none of my reversioners shall have a claim to their shares:"

Held, that the grant to the sons' widows was a grant of a life-estate with remainder to the settlor and his heirs and not of a widow's estate as recognized by Hindu Law.

One of the necessary incidents of a Hindu widow's estate is the power to transfer the properties absolutely in case of legal necessity. **A** BALBHADAR SINGH *v.* UDAI NARAIN SINGH **516**

——— **Widow**—*Alienation—Surrender to next reversioner—Reversioner's right to sue alienee for possession during life-time of widow—Surrender by daughter succeeding widow, effect of.*

When a reversioner obtains the estate through surrender by the life-estate-holder of her estate he is not entitled to question her alienations during her lifetime but must wait till her death to do so, the reason for the rule being that an alienee for consideration from a widow is reasonably entitled to calculate that the alienation which she has made to him will hold good at least during her life-time.

This rule is equally applicable where the alienation is made by a widow and the daughter who succeeds after her death surrenders the estate to the next reversioner without having questioned the alienation within the period of limitation; in such a case the daughter must be deemed to have acquiesced in the alienation made by her mother and treated it as if it was her own, so as to render the alienation not liable to be questioned during the daughter's life-time also. **M** VENKA RAMAYYA *v.* VENKA NARAYYA, 52 M. L. J. 634; A. I. R. 1927 Mad. 530 **639**

——— ——— *Decree against widow representing her husband's estate, whether binding on reversioner.*

Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir. **O** GANPAT PANDEY *v.* BINDESHARI PARTAB BAHADUR SINGH, 4 O. W. N. 140; 2 Luck 133 **481**

Hindu Law—contd.

——— **Widow**—*Gift in favour of daughter in lieu of dowry, validity of.*

Under the Mitakshara Law, whether a daughter is or is not excluded from succession, it is the duty of her father, and after him of her brothers, if any, and in the absence of brothers, of her mother, to unite her in marriage to a suitable husband before she attains the age of puberty.

The widow of a separated Hindu governed by the Mitakshara Law, is entitled to make an alienation of her husband's property to provide a dowry for her daughter, and such an alienation cannot be questioned by the reversioners of the husband provided it is a reasonable alienation in the circumstances of the case. The question whether it is or is not a reasonable alienation in the circumstances of a particular case is a question of fact. The same rule applies to a gift of immoveable property made by the widow in favour of her daughter immediately after the latter's marriage, in lieu of dowry. For the application of this rule it is immaterial that in any particular family daughters are excluded from succession under custom. O UDAI DAT *v.* AMBIKA PRASAD, 4 O. W. N. 133; A. I. R. 1927 Oudh 110 **503**

——— *Gift—Subsequent surrender to reversioner—Reversioner, whether competent to set aside gift.*

A gift or gratuitous conveyance executed by a Hindu widow is not liable to be avoided during her lifetime by a reversioner to whom she subsequently surrenders the whole estate. M SONAI KARUPPA PILLAI *v.* IRULAYEE, 52 M. L. J. 195; 25 L. W. 303; A. I. R. 1927 Mad. 429 **580**

——— *Re-marriage—Forfeiture of widow's estate—Custom to the contrary—Possession for twelve years after re-marriage—Adverse possession—Hindu Widow's Re-marriage Act (XV of 1856), s. 2.*

The rule enacted by s. 2 of the Hindu Widow's Re-marriage Act of 1856, that a Hindu widow on re-marriage forfeits all her rights and interest in her deceased husband's property does not apply to a Hindu widow who was permitted by custom to re-marry even prior to 1856, and such a widow does not, therefore, acquire ownership of her husband's estate by adverse possession by continuing in possession of the same for more than twelve years after her re-marriage. A MANGAT *v.* BHARTO, 49 A. 203 **734**

——— *Right of maintenance and residence in family house—Bona fide purchaser for value, rights of.*

A Hindu widow's right to maintenance is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value without notice of the widow's claim for maintenance. It is also liable to be defeated by a transfer to a purchaser for value even with notice of the claim, unless the transfer was made with the intention of defeating the widow's right and the purchaser had notice of such intention. A widow's right to receive maintenance is one of an indefinite character which, unless made a charge upon the property, is enforceable only like any other liability in respect of which no charge already exists. But, where maintenance has been made a charge upon the property or it has been agreed that it will be a charge on certain property then the transferee must hold it subject to the charge.

There is a distinction between the right of a widow to continue to live in the ancestral family house and her right over other parts of the property. If she is living in the ancestral family house then any transfer or purchase unless it is for family necessity would be subject to that right. L BELI RAM *v.* PREM KAUR, A. I. R. 1927 Lah. 218 **504**

——— **Widow**—*Surrender of estate to next reversioner—Reversioner's right to challenge improper alienations during widow's lifetime.*

A reversioner to whom a Hindu widow surrenders her estate is not entitled, during the lifetime of the widow, to challenge transfers made by her before surrender which, though not binding on the reversioner, would have been good for the widow's lifetime but for the surrender. A LACHHMI CHAND *v.* LACHHO, A. I. R. 1927 All. 258; 49 A. 334 **764**

——— **Will**, *construction of—Intention of testator—Bequest in favour of two persons—Joint tenancy or tenancy-in-common.*

The intention of the testator is a very important element in the construction of a Will, but where the language of the Will is clear and unambiguous, the question of finding out the intention of the testator does not arise and the Will has to be construed according to its plain language.

When a gift or a Will is in favour of two persons without any definite specification of the extent of their shares, they take as tenants-in-common and not as joint tenants.

The principle of joint tenancy is unknown to the Hindu Law except in connection with the joint family. L JIO *v.* RUKMAN, 28 P. L. R. 78; A. I. R. 1927 Lah. 126; 8 Lah. 219 **54**

——— *, construction of—Trusts, failur, of—Disposal of surplus.*

A Hindu testator directed in his Will that out of the income of his estate a sum of Rs. 650 (subject to the increase mentioned in a subsequent para. of the Will) be remitted monthly by his executors or trustees to the Managers for the time being of a certain temple out of which a sum of Rs. 100 should be paid to certain persons in succession and the residue should be appropriated towards the expenses of performing *puja* at or otherwise maintaining the said temple and of the daily feeding of the poor there. In a subsequent clause of the Will the testator further directed that after making the payments mentioned in the Will the surplus of the income of his estate should be applied in the manner respecting the said monthly sum of Rs. 650, or so much thereof as was not required for the support of the persons mentioned in the earlier clause, towards the performing of *puja* and other religious ceremonies and for the daily feeding of the poor at the temple previously mentioned. The trusts in respect of the sum of Rs. 100 mentioned in the earlier clause failed:

Held, (1) that the latter clause in the Will was a general residuary clause sweeping up all that was not disposed of by the previous clauses and that, therefore, this monthly sum of Rs. 100 fell into the residue of which trusts were declared by the latter clause;

(2) that under the latter clause the residue was applicable for the religious and charitable purposes mentioned in the earlier clause and that, therefore, there was no sum not disposed of by the Will to which the rules of intestacy would apply. P C PURSUTTAMDAS AGARWALA *v.* GOBIND PRASAD, A. I. R. 1926 P. C. 52; 43 C. L. J. 465; 24 A. L. J. 55; 28 Bom. L. R. 917; 51 M. L. J. 6 **254**

Hindu Widow's Re-marriage Act (XV of 1856), s. 2. *See* HINDU LAW 734

Inam grant—*Construction—"Grant to representatives and assigns"—Death of grantee before signature by* Inam *Commissioner—Grant, whether enures to heirs of grantee—Madras Board's Standing Order No. 52 (2), applicability of.*

An *inam* title-deed issued by the Government ran as follows:—"The *inam* is now confirmed to you, your representatives and assigns to hold or dispose of as you or they think proper." The grantee, however, died before the *Inam* Commissioner signed the grant. On a question arising whether the title to the grant enured to the benefit of the heirs of the grantee:

Held, (1) that the words "representatives and assigns" were mere words of limitation intended to express the absolute estate which the Government proposed to confer upon the grantee;

(2) that the title-deed did not, therefore, grant any estate to the heirs of the grantee and, as he was dead before it was actually executed and signed by the *Inam* Commissioner, his heirs did not obtain any rights under it;

(3) that Order No. 52 (2) of the Madras Board's Standing Orders which referred to cases of death of grantee after the actual grant had no application to the case. M CHENDRAMMA *v.* NARASIMHAN, 52 M. L. J. 253; (1927) M. W. N 156; 38 M. L. T. 133; 25 L. W. 546; A. I. R. 1927 Mad. 404 741

Income Tax Act (XI of 1922), s. 4 (3)—*Income from property held in trust—Salary of Professor dedicated to charitable object—Executory trust—Exemption from income-tax.*

The salary of a Professor who, as a condition for holding the office, had agreed to dedicate the whole of it to the benefit of students and who in fact on receipt of it devoted his emoluments for the purpose agreed upon, is not exempt from income-tax under s. 4 (3), Income Tax Act, as the salary cannot be said to be income from property held in trust. R COMMISSIONER OF INCOME-TAX *v.* A. EGGAR, 4 R. 538; A. I. R. 1927 Rang. 95 255

——— **ss. 8, 12, 66**—*Interest on securities hypothecated to Bank as security for overdraft, whether taxable—'Received,' meaning of*—Nimak sair, *whether liable to be taxed—Reference—Finding of fact—Interference.*

Certain Government securities were deposited with a Bank as security for overdraft. Some of them were endorsed over in favour of the Bank A power-of-attorney was also given to the Bank authorising it to transfer any of these securities to itself or to others. The Bank collected the income from the securities and credited the same to the assessee from month to month and the interest on the overdraft was debited similarly. The owner was assessed on the income of the securities It was contended that the income from the securities, at least to the extent of the interest on the overdraft paid to the Bank should be deducted from his taxable income:

Held, (*i*) that the securities in no way ceased to be the property of the assessee and that the income from them was, therefore, a part of the income of the assessee;

(*ii*) that the income was 'received' by the assessee, as it was received by the Bank as his attorney and on his behalf, although the Bank had a charge over it; and

(*iii*) that the assessee was, therefore, liable to be assessed on the whole income.

Income Tax Act—contd.

Nimak sair, that is, income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre, where it is of a recurring nature, is similar to rent and royalties from the letting of coal and other minerals and is liable to be taxed as income from 'other sources' under s. 12 of the Income Tax Act.

A finding of fact arrived at by a Commissioner is binding on the High Court in a reference under the Income Tax Act where it is not vitiated by any improper process or by failure to give effect to some rule of law. Pat MAHADEO ASHRAM PRASAD *v.* COMMISSIONER OF INCOME-TAX, 6 Pat. 29; A. I. R. 1927 Pat. 133; 8 P. L. T. 359 897

——— **ss. 23, 66**—*Assessment under s. 23 (4), legality of—Question of law—Reference to High Court.*

Whether an Income Tax Officer has proceeded legally in assessing a person under s. 23 (4) is a question of law and where this question is involved no appeal lies to the Assistant Commissioner of Income Tax and the High Court will direct the Commissioner to refer the case for the opinion of the High Court under s. 66, Income Tax Act. L KHUSHI RAM-KARAM CHAND *v.* COMMISSIONER OF INCOME TAH, PUNJAB, A. I. R 1927 Lah. 288 774

——— **ss. 33, 34, 35**—*Commissioner's power to review—'Escaped assessment', meaning of—Wrong person assessed—Power to assess right person—Limitation.*

Where an income is assessed in the hands of an assessee to whom it is subsequently found not to belong, it must be held that the income 'escaped' assessment within the meaning of s. 34, Income Tax Act, as regards the person to be really assessed.

Income Tax Commissioner's powers of review under s. 33, Income Tax Act, in respect of an assessment proceeding are subject to the limitation imposed by s 35 of the Act.

Whatever may be the reason for which an Income Tax Officer may fail to assess any income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation. L *In the matter of* ASSESSMENT OF GANESH DAS OF AMRITSAR, A. I. R. 1927 Lah. 248 675

——— **ss. 64, 66**—*Assessment of firm—Business carried on in different places—'Principal place of business'—Tests—Dispute as to principal place of business—Procedure—Assessment before decision of dispute, illegality of—High Court's jurisdiction to require stating of case—Commissioner's power to question jurisdiction—Procedure—Objection, when to be raised—Winding-up of business, effect of, on jurisdiction to assess.*

As a rule it is better in a statement of a case under the Income Tax Act to confine the case to findings of fact, and to the expression of the Commissioner's opinion upon the points raised, and not to burden the case with arguments, or in the case to question the jurisdiction of the Court to require a case to be stated.

An order for a case to be stated, is in the nature of what is known in Calcutta and in England as the issue of Rule *Nisi* to show cause on certain questions indicated in the order made by the High Court. The Commissioner, or other authority, in stating the case in effect shows cause against the contention o

Income Tax Act—contd.

the other side, and in showing cause he is clearly at liberty, when he appears before the Court to argue the case, to take the objection that under the law there was no power to issue the Rule, or to direct the case to be stated, and that, therefore, the High Court had no jurisdiction to decide the question raised in the case.

In strictness the objection as to the jurisdiction of the High Court to require a case to be stated should be taken when the question of whether it was a fit case in which a case ought to be directed to be stated is considered by the Court.

Where a question as to which is the principal place of business of a Company arises, the Income Tax Officer cannot himself decide the question or act as though it had been determined in accordance with the provisions of s. 64 of the Act and if he proceeds to prejudge the issue or to act as though it has been determined and to assess a firm as though their principal place of business was in his own jurisdiction, in spite of the dispute being still undetermined, he acts illegally.

Where the question about the principal place of business is between places in more Provinces than one, it is to be determined by the Commissioners concerned and if they do not agree, by the Board of Inland Revenue. When such a question arises the Income Tax Officer should immediately communicate the fact of such question having arisen to his own Commissioner.

Where there is a total failure on the part of the Income Tax Authorities to apply the plain provisions of s. 64, and on the other hand, an illegal assumption of authority by the Income Tax Officer in one of the places of business to assess the assessee, as though their principal place of business had been determined to be in such place, the existence of an alternative remedy under s. 64 (3) does not affect this case, and cannot be held to be a bar to the right of the appellant to have a case stated, and to the jurisdiction of the High Court to answer those questions in the way in which it holds they ought to be answered.

Ordinarily the principal place of business of a firm or Company is the place at which the persons directing the Company or firm do their business.

The fact that goods are manufactured in one place does not make that place necessarily the principal place of business; nor is the fact that the bulk of the practical business is conducted in a particular place a sole or indeed the important test in considering which is the principal place of business.

If business was being carried on in a particular place, the fact that the business has been stopped would not deprive the Income Tax Authorities of that place of their jurisdiction to assess. A *In the matter of* MESSRS DINA NATH-HEM RAJ, 25 A. L. J. 225; A. I. R. 1927 All. 299 **756**

——— **s. 66.**

See INCOME TAX ACT, 1922, ss. 8 ETC. **897**

See INCOME TAX ACT, 1922, ss. 23, 66 **774**

——— **s. 66**—*Statement of case to High Court—Several assessees—Separate assessment of tax—Same questions involved—Joint application to Commissioner on single fee, whether sufficient—Time for filing application—Commissioner or Court, whether can extend time.*

Different persons who have been separately assessed to income-tax must file separate applications and pay separate fees for the purposes of stating cases to

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the High Court under s. 66 of the Income Tax Act. A single combined application by all of them on one fee is not competent even though a common question arises in all of them.

Where four assessees who were separately assessed to income-tax applied on one single application accompanied by a fee of Rs 100 for stating a case to the High Court and the Commissioner directed them to put in four separate applications with 4 sets of fees or to amend the applications by confining it to one single assessee, but by the time they made their election, the period of one month prescribed by s. 66 (2) had expired:

Held, (1) that the original application was defective and there was no proper application before the Commissioner for taking action in the case of any one of the applicants.

(2) that there was no power in the Commissioner or in the Court to extend the period prescribed by the section. M COMMISSIONER OF INCOME-TAX *v.* MOTHEY GANGA RAJU, 52 M. L. J. 273; 25 L. W. 321; (1927) M. W. N. 171; 38 M. L. T. 109; 50 M. 335; A. I. R. 1927 Mad 545 **291**

——— **66A** *as amended by Act XXIV of 1926, object of—Appeal to Privy Council—Question of great private or public importance.*

The intention of the Legislature in adding s. 66A to the Income Tax Act is to enable an appeal to His Majesty in Council in cases in which the High Court can certify that the question of law involved is one of great private or public importance.

The fact that a decision of a particular question of law may affect not only the parties to the suit but also other persons similarly situated is not by itself a ground for granting leave to appeal to the Privy Council. L DELHI CLOTH & GENERAL MILLS CO. LD. *v.* COMMISSIONER OF INCOME-TAX, DELHI, A. I. R. 1927 Lah. 181; 8 Lah. 269; 28 P. L. R. 443 **97**

Inherent power of Court. *See* ARBITRATION **46**

Insolvency—Insolvency of firm—Procedure. *See* CONTRACT ACT, 1872, ss. 246, 264 **389**

——— Insolvency of Hindu father—Son's share whether vests in receiver. *See* HINDU LAW—JOINT FAMILY **110**

Insurance—Money due under policy · Succession certificate *See* SUCCESSION CERTIFICATE ACT, 1889, s. 4 **484**

Interest—Compound interest—Burden of proof. *See* DEBTOR AND CREDITOR **668**

——— Compound interest—Penalty. *See* CONTRACT ACT, 1872, ss. 16, 74 **679**

——— *Contract rate—Power of Court to reduce.*

A Court cannot arbitrarily reduce the rate of interest which parties have contracted for. L AMAR SINGH-DHUNI MAL *v.* SAT DHARAM PARCHARAK PRESS, DELHI **75**

——— Interest after date of redemption. *See* MORTGAGE **180**

——— Penalty. *See* CUSTOM **269**

——— Presumption. *See* MORTGAGE BY CONDITIONAL SALE **5**

International Law—*Suits in foreign country and in British India between same parties on same subject-matter—Stay of foreign action—Submission to jurisdiction of British Court—Oppressive and vexatious actions—Jurisdiction sparingly exercised—Civil Procedure Code (Act V of 1908), s. 10.*

A non-resident foreigner who enters appearance

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without protest in a suit filed against him in a British Court and files a counter-claim, submits to the jurisdiction of the British Court, and can be restrained by that Court by injunction from proceeding with a suit in a Foreign Court between the same parties and relating to the same subject-matter.

But this jurisdiction is of a delicate character and requires to be exercised with caution.

A Court will not interfere to restrain an action in a Foreign Court unless it is vexatious or oppressive. B V. R NAIK *v.* BALVANT SITARAM MAHINDER, 29 Bom. L. R. 1 8; A. I R. 1927 Bom. 135 **951**

Interpretation of Statutes. *See* RAILWAYS ACT, 1890, s. 135 **280**

——— *Harmonious construction.*

The various sections of an enactment should be so construed as not to render a particular provision in the enactment inconsistent with another provision of the same enactment. A DEBI SAHAI *v.* DAULAT, L. R. 8 A. 104 Rev.; A. I. R. 1927 All. 346 **471**

——— *Marginal notes, value of—Implied repeal.*

Side notes to sections are no real guides to the intention of the Legislature, the safest guide to it being the language of the section itself.

Abrogation of a section by implication is per missible under law N BHAGIA *v.* EMPEROR, 28 Cr. L J. 340; A. I. R. 1927 Nag. 203 **820**

——— *Similar Acts.*

Per *Marten, C. J.*—Where the words of a Statute or a Charter are clear, the interpretation or application of them in any individual case should not be cut down by any arbitrary so-called rules of construction or practice which may have been adopted in essentially different cases B WATKINS *v.* LAXMINARAYAN BASDEODAS, 29 Bom. L. R. 131 **946**

Jats, whether *sudras. See* AGRA TENANCY ACT, 1908, s. 12 **650**

Jurisdiction—*Decree passed in excess of pecuniary jurisdiction of Court*—Mala fide *undervaluation, absence of—Decree, whether nullity—Execution Court, duty of.*

Where in a suit which is properly instituted in a particular Court on its valuation, a decree is passed which is in excess of the pecuniary jurisdiction of the Court, then in the absence of any intentional *mala fide* undervaluation by the plaintiff, the decree cannot be treated as a nullity and the execution Court cannot refuse to execute it. B AMBADAS HARIRAO KARANTE *v.* VISHNU GOVIND BARAMANIKAR, 28 Bom. L. R. 1 61; 50 B. 83 ; A. I R. 1927 Bom. 83 **109**

——— Objection raised at late stage—Duty of Courts. *See* C. P. C., 1908, ss. 100, 115 **37**

Land acquisition—*Valuation of land—Existing advantages and possibilities, whether to be taken into account—Land used in part for residential purposes—Valuation of remaining portion—Cawnpore, value of land in—20 years' purchase.*

In valuing land for the purpose of awarding compensation for acquisition under the Land Acquisition Act, the existing advantages and the possibilities of the land must be taken into account.

Where a substantial portion of an area acquired has been let out for industrial and residential purposes, and there is no reason why the rest of the land might not in the course of time be let in a similar way, the latter portion also ought to be assessed as land fit for industrial and residential purposes and not merely as agricultural land.

Land acquisition—concld.

Having regard to the value of land at Cawnpore, proper compensation for land within the Municipal limits would be at the rate of 20 years' purchase of the rents. A MAKHAN DAS *v.* SECRETARY OF STATE FOR INDIA **508**

Land Acquisition Act (I of 1894), s. 11—*Compensation — Apportionment—Landlord and permanent lessee.*

Where a person granted a permanent lease of his land on receipt of Rs. 150 from the tenant and on condition of payment of Rs. 4 per year reserving to himself the *melwaram* interest in the land and the land was subsequently acquired under the Land Acquisition Act:

Held, (*i*) that the interest of the landlord or *melwaramdar* was not confined to the right to receive the rent and could not, therefore, be valued merely at 20 years' purchase of the rent reserved in the lease;

(*ii*) that the apportionment of the compensation as between the landlord and tenant at $\frac{1}{3}$ and $\frac{2}{3}$ was not erroneous. M NETESA IYER *v.* KAJA MARUF SAHIB, 25 L. W. 291; 52 M. L. J. 295; 38 M. L. T. 128; A. I. R. 1927 Mad. 489 **628**

——— **s. 23**—*Market value, assessment of—Profits prospective, loss of, whether can be taken into consideration.*

In ascertaining the market value of land which is being compulsorily acquired the Court has to ascertain the market value not according to the present disposition of the land but the market value o the land as laid out in the most lucrative and advantageous manner in which the owner can dispose of it. But when once the market value has been assessed by taking every circumstance into consideration the person interested cannot in addition ask for damages on the ground that he might have made profits by engaging in a certain trade or business on the land in question. He is, however, entitled to claim damages for loss of earnings, if he carries on some business on the acquired land and by virtue of the acquisition he is deprived of his profits by reason of the fact that he cannot find any other place where he can carry on the business in which he was engaged on the acquired land. C SURESH CHANDRA BANERJI *v.* SECRETARY OF STATE FOR INDIA, A. I. R. 1927 Cal. 357 **190**

——— **ss. 23 (4), 24 (3)**—*Acquisition for opening market—Loss of profits from adjoining market, whether can be awarded*—Damna absque injuria.

Held, per *Walsh, A. C J.* and *Pullan, J.*- (*Dalal, J.*, dissenting).—An owner whose land has been acquired under the Land Acquisition Act for opening a market is not entitled to receive compensation for loss of profits derived from an existing market on other land.

Section 23 of the Act is limited by s. 24 which lays down certain circumstances which must not be considered in awarding compensation, though presumably the case otherwise falls within the purview of s. 23.

Sub-section (3) of s. 24 refers to claims by persons interested.

Per *Dalal, J.*—Section 24 (3) was enacted to provide against claims by persons other than the owners of the land acquired. A SECRETARY OF STATE FOR INDIA *v.* MOHAMMAD ISMAIL KHAN, 25 A. L. J. 177; A. I R. 1927 All. 246; 49 A. 353 **749**

Landlord and tenant—Denial of title—Estoppel. *See* EVIDENCE ACT, 1872, s. 116 **1004**

——— *Diluvion—Reduction of rent—Re-formation of land—Tenant's rights—Relinquishment of tenancy, what constitutes.*

A tenant obtaining reduction of rent on the ground of diluvion is not a circumstance which, in the absence of an overt act showing an intention to relinquish those lands, would amount to relinquishment of his rights in the diluviated lands for all times so as to debar him from claiming the lands on re-formation. **C** AZIMUDDIN *v.* ALI HOSAN **687**

——— *Dispossession, partial—Rent, suspension of.*

The doctrine of suspension of the payment of rent where the tenant has not been put in possession of, or, has been dispossessed from, part of the subject leased, is applicable only where the rent is a lump sum for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or *bigha*. **C** EBAD ALI *v.* FATIMA BIBI **501**

——— *-Enhancement of rent—Construction of pottah.*

Prima facie the rent of a tenancy is liable to enhancement on the application of the landlord or to reduction on the application of the tenant, unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively.

The word usually employed in creating a fixed rent in perpetuity is *mokurari* but the absence of this word is not conclusive if other words are found in the grant which clearly show that a fixed rent was intended to be created.

A *pottah* contained the following clause: "This *pottah* is granted in respect of the above-mentioned *mouzah* and the aforesaid *jotes* by fixing the annual rent thereof at Rs. 418-9-15 *gundas* in the Company's coin as per details in the schedule, and you also submit a *kabuliyat* of your own accord. You shall pay the rent year after year according to the *kistbundi* given in the schedule below. Should you make default in payment of the *kists*, you shall pay the rents in arrear with interest according to law. You and your sons and grandsons, etc., in succession, will remain in enjoyment and possession by keeping the boundaries intact as they have been from before. All profits and losses shall be yours, and you shall on no account be competent to pray for a reduction of the rent. You shall abide by the Survey and Settlement of rent to be made by me when necessary. If you should make any plea of payment unsupported by *dakhilas*, the same shall be rejected. You shall not do any improper act, and should you do any, you shall be answerable for it. Should any new tax be imposed by Government, you shall pay the same separately in addition to the rent mentioned in the *pottah*":

Held, that on the true construction of the *pottah* there were no terms used in it from which it could be inferred that the landlord had abandoned his right to enhancement of the rent, whilst the express provision that the rent would not be reduced negatived any such construction. **P C** KRISHENDRA NATH SARKAR *v.* KUSUM KAMINI DEBI, (1927) M. W. N. 41; A. I. R. 1927 P. C. 20; 52 M. L. J. 412; 54 C. 166; 31 C. W. N. 514; 25 L. W. 631; 45 C. L. J. 305 **93**

——— *Gilandazi*—Neglect of landlord—Right to enhance rent. *See* BENGAL TENANCY ACT, 1885, ss. 27, ETC. **754**

——— *Homestead tenancy—Transfer, right of—*

Landlord and tenant—contd.

Custom—Abandonment—Landlord's right to take possession.

A tenancy of homestead land created for the purpose of habitation which is in the nature of a village service tenure is not governed by the provisions of the Bengal Tenancy Act or of the Transfer of Property Act. Such a tenancy is not transferable except by usage or custom.

Where there has been an implied surrender of such tenancy and the former tenant has abandoned the land the landlord is entitled to take direct possession of it **C** ADHAR CHANDRA DEY *v.* BIPIN CHANDRA DEY, A. I. R. 1927 Cal. 373 **167**

——— *Lease, construction of—Building lease—Kachha house, erection of—Presumption—Easements Act (V of 1882), s. 60—License for building purposes—Building, erection of—Revocation, whether permissible.*

The nature of a lease granted for building purposes does not depend on the character of the building actually constructed.

If the origin and the nature of a tenancy is not known and it is proved that the land was let for building purposes and a building was actually constructed on it and remained in occupation of the lessee for a long number of years, these facts, in the absence of anything pointing to a contrary conclusion should be enough to lead to the presumption that the tenancy was a permanent one.

A *pucca* building is a building more permanent than a *kachcha* one, but a mere difference in the degree of permanence cannot alter the nature of the tenancy. The fact that a *kachha* house has been in existence for a period of more than sixty years and has passed by succession to the heirs of the lessee who originally built the house, may be enough to lead to the presumption that the lease is a permanent one.

Where a license is granted for erecting buildings and the licensee erects upon the land a work of a permanent nature the license cannot be revoked in view of the provisions of s. 60 of the Easements Act. **A** SITARA SHAHJAHAN BEGAM *v.* MUNNA, A. I. R. 1927 All. 342 **479**

——— *Non-payment of rent—Adverse possession.*

A tenant cannot be said to be in adverse possession simply because he pays no rent. **L** LAL SINGH *v.* WADHAWA **73**

——— Permanent lease—Land acquisition—Apportionment. *See* LAND ACQUISITION ACT, 1894, s. 11 **628**

——— Permanent lessee—Right to cut trees. *See* C P. C., 1908, s. 11 **1033**

——— *Rent, suit for—Tenancy and rate of rent, admission of—Procedure—Question of title, decision of—Appeal, whether lies.*

Where in a suit for rent the tenancy and the rate of rent are admitted and there is no plea of payment, the Court has no option in the matter except to decree the suit. It is not necessary for the Court in such a case to enter into the question as to what lands are comprised in the tenancy. Where, however, an Appellate Court does enter into that question in a suit for rent and dismisses the suit on the ground that the lands described in the plaint as comprised within the tenancy are not the properties of the plaintiff but the properties of the defendant, the decision of such question, although un-

necessary for the purpose of deciding the suit, gives the plaintiff a right of appeal. C JATINDRA NATH ROY *v.* INDU BHUSHAN BASU, A. I. R. 1927 Cal. 410 **525**

——— *Right to cut trees*—Kabuliyat, *covenant in, effect of.*

It is for the person who challenges an entry in the Record of Rights to show that it is incorrect.

Where a *kabuliyat* contains a covenant by the tenant not to cut or appropriate trees, that covenant does not amount to evidence of a custom that the tenants are not entitled to cut or appropriate trees.

Where a tenant covenants not to appropriate trees standing on his holding, he would be bound by that covenant even if there be a custom that the tenants in the locality are entitled to appropriate trees. C LAKHI NATH BERA *v.* NABADWIP CHANDRA NANDI, 31 C. W. N. 192; A. I. R. 1927 Cal. 268 **7**

——— *Tank—Lease for fishing and* singhara *cultivation, whether creates interest in immoveable property —Long user—Presumption of grant—C. P. Land Revenue Act (I of 1917), s. 80*—Siwari *income, entry relating to, whether binding on* malguzar—*Burden of proof.*

A lease of a tank for the double purpose of fishing and for cultivation of *singhara*, creates an interest in immoveable property.

A long continued user of a tank for the purpose of cultivating *singhara* may give rise to the presumption that there was a permanent grant of the tank for cultivation purposes.

An entry in the Settlement papers by the Settlement Officer relating to *siwari* income, is binding upon the *malguzar* and the burden lies on him to prove that the entry was made without enquiry or jurisdiction. N MANYA *v.* SITARAM, 23 N. L. R. 16; A. I. R. 1927 Nag. 147 **438**

——— Transfer of tenancy—Acquiescence. *See* BENGAL TENANCY ACT, 1885, s. 5 **302**

——— *Transfer of tenancy—Acquiescence of landlord—Consent and acquiescence, pleas of, distinction between—Acquiescence during progress of act and after—Delay, when raises presumption of acquiescence.*

A landlord, who, knowing that a transferee from a tenant has entered into possession of a house site and has commenced to expend labour and capital in improving it for his own benefit, keeps quiet over the affair and thereby impliedly encourages him to go on incurring the expenditure, will be deemed to have acquiesced in the transferee's right to occupy the premises.

The extent of time and conduct which will suffice to raise such a bar to the landlord's right to claim possession from the transferee must always depend upon the circumstances of each case.

A plea of consent to a transaction is distinguishable from that of ratification.

Consent imports either an express or implied agreement to waive one's own election to a void a transaction which two or more persons are negotiating or are about to enter into; as such it precedes the transaction and gives strength to it so as to enable the parties to the transaction to complete it on its basis. Whereas ratification is subsequent in point of fact and time to a transaction which is voidable.

In order to sustain a plea of acquiescence and to raise a bar of equitable estoppel, it is incumbent upon the party relying on it to show that the conduct of

the owner whether consisting in abstinence from interfering or active intervention was sufficient to justify the legal inference that he had by plain implication contracted out of his right of ownership.

Acquiescence is a question of legal inference drawn from the facts found.

There is a distinction between a case where the acquiescence occurs while the act acquiesced is in progress and another, where the acquiescence takes place after the act has been completed. In the former case acquiescence is quiescence under such circumstances that assent may be reasonably inferred from it. In the latter when the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter must be determined on very different legal considerations. As a right of action has vested on him a mere delay to take legal proceedings cannot by itself constitute a bar to such proceedings, unless the delay on his part, after he has acquired full knowledge has affected or altered the position of his opponent; but it must count against the person who has shown his quiescence under the circumstances, from which his assent may reasonably be inferred as a matter of legal inference. N GHASIA *v.* RAM SINGH, A. I. R. 1927 Nag. 180 **855**

Lease—*Permanent lease of structure on land—Lessee's right to build on structure.*

A perpetual lessee of a structure on a piece of land as distinguished from a permanent lessee of the land itself is not entitled to build a projection above the structure, which is actually leased to him. L ABDUL RAHIM *v.* MUNICIPAL COMMITTEE, DELHI, A. I. R. 1927 Lah. 225 **834**

Legacy—Death of legatee before testator—Ademption. *See* MUHAMMADAN LAW **673**

Legal practitioners – *Professional ettiquette – Pleader's appearance as Counsel after acting as Commissioner.*

A pleader who has acted as a Commissioner in a case should not accept a brief from a party at a subsequent stage of the same suit. C MAHOMED MALIHA *v.* MAHOMED ISMAIL KHAN, 44 C. L. J. 441; A. I. R 1927 Cal. 203 **309**

Legal Representatives' Suits Act (XII of 1855). *See* PROBATE AND ADMINISTRATION ACT, 1881, s. 89 **286**

Letters Patent (Bom.), cl. 12—*Cause of action arising partly within Bombay—Leave to sue—Discretion of High Court to refuse leave—Agent purchasing bullion in London—Failure to insure according to custom of London market—Loss of bullion—Suit against agent—Cause of action.*

The plaintiff, a bullion dealer in Bombay, sent a cable to the defendants in London to purchase gold bullion. The order was accepted by the defendants at London. The defendants insured the bullion and shipped the same. The ship was lost at sea. The plaintiff sued the defendants for the difference between the amount for which the defendants had insured and that for they ought to have insured according to the custom of the bullion market in London:

Held, (1) that no material part of the cause of action arose in Bombay;

(2) that even if any part of the cause of action arose in Bombay, leave to sue in Bombay should be refused in exercise of the discretion vested in the High Court under cl. 12 of the Letters Patent. B PHILLIP A. WATKINS *v.* LAXMINARAYAN BASDEODAS, 29 Bom. L. R. 131 **946**

Letters Patent (Cal.), 1865, cl. 13—*Probate proceedings, whether 'suit'—Transfer—Jurisdiction of High Court—Order of Single Judge—Appeal.*

Proceedings for the grant of Probate which are contested come within the meaning of the word 'suit' in cl. 13 of the Letters Patent of the Calcutta High Court.

The High Court has, therefore, jurisdiction to order the transfer of such proceedings from a subordinate Court to itself.

An order passed by a Judge of the High Court sitting on the Original Side, for transfer of Probate proceedings from a District Court to the High Court under cl 13 of the Letters Patent, is not appealable. C PRAN KUMAR PAL *v.* DARPAHARI PAL, 31 C. W. N. 254; 54 C. 126; A. I. R. 1927 Cal. 281 **797**

Letters Patent (Mad.), cl. 15—*'Judgment'—Order of Judge on Original Side refusing inspection of documents disclosed in affidavit Appeal.*

An order of a Judge of the High Court sitting on the Original Side refusing to allow inspection of certain accounts disclosed in the affidavit of documents filed by a party to the suit is not a judgment within the meaning of cl. 15, Letters Patent, and no appeal lies against that order. M ASHER *v.* GOPALARATNAM, 52 M. L. J. 192; (1927) M. W. N. 162; 25 L. W. 483; A. I. R. 1927 Mad. 409 **642**

——— **cl. 15**—*'Judgment'—Order of Single Judge of High Court, staying execution of decree pending appeal—Appeal, whether lies—Civil Procedure Code (Act V of 1908), O. XLI, r. 5—Stay of execution—Decree granting injunction, disobedience of—Application for stay of execution, pending appeal, whether maintainable.*

An order of a Single Judge of the High Court staying execution of a decree of a *Mofussil* Court pending the disposal of an appeal therefrom to the High Court is a judgment within the meaning of cl. 15 of the Letters Patent and an appeal therefrom is maintainable under that clause.

Where a defendant has been disobeying a decree for injunction passed against him, he is not entitled, on application pending an appeal against the decree, to have the execution stayed. M GOVINDA RAMANUJA PEDDA JEEYANGARLAVARU *v.* KRISHNAMACHARLU, 52 M. L. J. 161; 38 M. L. T. 51; (1927) M. W. N. 248; 25 L. W. 511; A. I. R. 1927 Mad. 398; 50 M. 380 **157**

Letters Patent (Rang.), cls. 11, 16. *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 3 ETC. **265**

Limitation Act (IX of 1908), s. 5, 12—*Appeal—Time requisite for obtaining copy of first Court's judgment, whether can be excluded.*

In computing the period of limitation for filing a second appeal, the time required for obtaining a copy of the order of the Court of first instance cannot be excluded under s. 12 of the Limitation Act, even though under the rules of the Court a copy of that order has also to be filed along with a memorandum of second appeal. L BABU SINGH *v.* MANGAT RAI, 9 Lah. L. J. 5; A. I. R. 1927 Lah. 192 **854**

——— **s. 5, Sch. I, Art. 158**—*Objections to award—Limitation—Court's power to extend time.*

Objections to an award must be filed within ten days from date on which it is submitted to the Court under Art 158, Limitation Act, and the Court has no power to enlarge this period.

The provisions of s. 5 of the Limitation Act do not apply to applications falling within Art. 158 of Sch. I of the Act. L DEVI DITTA *v.* BABU RAM, 8 Lah. 274; A. I. R. 1927 Lah. 273; 28 P. L. R. 441 **955**

Limitation Act—1908—contd.

——— **s. 5, Sch. I, Art. 164**—*Application for setting aside ex parte decree—Limitation—Court, whether can enlarge time—Illegal exercise of jurisdiction—Revision—Civil Procedure Code (Act V of 1908), s. 115*

Section 5 of the Limitation Act does not apply to applications for setting aside *ex parte* decrees. A Court has, therefore, no discretion to enlarge the thirty days allowed by Art. 164 of the Limitation Act within which a defendant should apply to set aside an *ex parte* decree. Where a Court entertains an application for setting aside an *ex parte* decree after the expiry of the period of limitation it illegally assumes a jurisdiction not vested in it. L PAL SINGH *v.* HARNAM SINGH, A. I. R. 1927 Lah. 342 **936**

——— **s. 5, Sch. I, Art. 173**—*Civil Procedure Code (Act V of 1908), s. 115—Review, application for—Extension of time—Delay, effect of—Review applied for on basis of recent decision of superior Tribunal—Failure to exercise discretion—Revision, whether lies.*

The discretion allowed by s. 5 of the Limitation Act to extend the period within which an application for review must be made, should only be exercised where an application although made after the period of limitation prescribed in the Schedule is made without delay, having regard to the circumstances of the case.

Where review of a judgment is applied for on the ground that in view of a decision of a superior Court the judgment sought to be reviewed cannot stand, an application for review made two months after the publication of the judgment of the superior Court cannot be said to have been made after an unreasonable delay.

Where a Court fails to exercise its discretion upon an insufficient ground, the failure falls within the purview of s. 115 of the Civil Procedure Code. A HARI LAL *v.* PARMESHARI DAS, A. I. R. 1927 All. 386 **727**

——— **s. 6**—*Document taken in name of minor, suit on—Extension of limitation.*

Where on the true construction of a document which is the basis of a suit the Court is of opinion that the document was taken in the name of the plaintiff, who was then a minor, or in the name of the plaintiff, acting by his guardian, then the plaintiff is entitled to the benefit of the provisions of s. 6 of the Limitation Act. But if, on the other hand, the Court is of opinion that the document was taken solely by the guardian of the minor, then the minor would not be entitled to take the benefit of the section. B PANDHARINATH MANIKSHET *v.* AJAMKHA SARDARKHA, 28 Bom. L. R. 1431; 50 B. 831; A. I. R. 1927 Bom. 61 **95**

——— **s. 10.** *See* TRUSTS ACT, 1882, s 6 **506**

——— **s. 12.** *See* LIMITATION ACT, 1908, ss. 5, 12 **854**

——— **s. 14**—*Suit on promissory note—Limitation—Prior suit by defendant to declare note void—Exclusion of time—Equitable grounds for suspension of time, whether can be recognised—Principle of dependent judgments.*

No equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act. So long as there is no legal impediment to the filing of a suit earlier, no time can be excluded.

The pendency of a suit for a declaration that a promissory note is void as having been obtained by

the exercise of undue influence and coercion does not suspend the cause of action for a suit by the payee on the promissory note in the absence of any injunction or order of stay restraining the payee from filing the suit within the period of limitation. M NARAYANA BRAHMAM v. MAGANTI SEETHAYYA, (1927) M. W. N 160; 25 L. W. 426; 52 M. L. J. 396; 50 M. 417; A. I. R. 1927 Mad. 597 **776**

——— **s. 15**—*Agreement not to execute decree, whether saves limitation.*

Where execution of a decree is not stayed by any order of Court, a mere agreement by the decree-holder to desist from executing the decree would not attract the provisions of s. 15, Limitation Act.

It is a mistake to hold that a peculiar equity lies in overriding limitation. M ALAPATI SYAMALADOSS v. DORADLA SUBBAYYA, 52 M. L. J. 137; 38 M. L. T. 42; A. I. R. 1927 Mad. 347 **20**

——— **s. 15, Sch. I, Arts. 181, 182**—*Execution proceedings - 'Striking off' application, legal effect of—Obstruction to proceedings—Application to revive —Limitation—Cause of action—Doctrine of revival, whether swept away by amendment to s. 15.*

An order "striking off" an execution application from the pending file and consigning it to the record room, passed without notice to the parties, is not one sanctioned by law and does not finally dispose of the application.

Where execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings which have been suspended. This doctrine of revival has not been swept away by the amendment to s. 15 of the Limitation Act.

An application for revival is one for which no period of limitation is expressly provided for and, therefore, falls within Art. 181 of Sch I of the Limitation Act requiring to be made within three years of the date on which the right to make it accrued.

The right to make an application for revival of execution proceedings accrues upon the date on which the obstacle to its progress is withdrawn.

Per *Sulaiman, J.*—The principle allowing a right of revival of a previous application is different and distinct from that permitting exclusion of time. The question of exclusion of time can only arise when a fresh application for execution is made, whereas it is only a previous application which has not been properly and finally disposed of which can be revived. An application for revival is not a fresh application for execution. The principle is based on equity and justice, and the decree-holder is merely to request the Court to take up and continue the proceedings which have not finally terminated but which have remained in abeyance for some reason or other beyond his control.

Per *Mukerji, J.*—Whether an application is one for revival or not depends upon the substance of the application and not on its form.

Per *Walsh, Ag C. J.*—An order made by a Judge upon an application which is still pending, that it be "struck off", or "sent to the record room", made either without notice to the decree-holder, or without giving him an opportunity of being heard is a ministerial order, and cannot be regarded, speaking generally as a judicial disposal of the application on the merits, though special circumstances may appear which make it so. Whether an application is in substance a fresh one, or an attempt to revive a former one, is, as a general rule, a question of fact to be decided with reference to all the circumstances of the case.

A final decree for sale was passed on 7th June, 1913. The decree-holders applied for execution on 4th January, 1916, and on 23rd March, 1916, the execution proceedings were forwarded to the Collector for execution as the property sought to be sold was ancestral. On 13th November, 1916, while proceedings were pending before the Collector a suit was brought to obtain a declaration that the property was not liable to be sold and this suit was finally decided on 6th July, 1920, in favour of the decree-holders? The Collector took up the case on 17th August, 1920, and returned the papers to the Civil Court for want of prosecution. The Civil Court received the records on 31st August, 1920, and 'struck off' the application from the pending list of execution applications without notice to the parties. On 10th January, 1923, the decree-holders again applied for execution:

Held, (1) that the application was one to revive the application of 4th January, 1916, which had not been properly disposed of and was not time-barred;

(2) that the application was one for which no period of limitation was prescribed for by the Limitation Act and, therefore, fell within Art. 181 of Sch. I of the Act;

(3) that the right to make the application accrued on 6th July, 1920, when the litigation suspending the sale was finally decided, and that the application in question, being within three years of that date, was not barred by limitation. A CHHATTAR SINGH v. KAMAL SINGH, A. I. R. 1927 All. 16; 25 A. L. J. 201; 49 A. 276 **692**

——— **s. 15, Sch. I, Art. 182, (5)(6)**—*Order giving time for payment of decree amount, whether order staying execution or injunction—'Application in accordance with law'—Execution by one of joint decree-holders, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Issue of notice—Step-in-aid of execution.*

To attract the operation of s. 15 of the Limitation Act it is necessary to show that there was an injunction or order staying execution.

An order merely giving time for payment of the amount due under a decree is not an order staying execution or an injunction within the meaning of s. 15, Limitation Act.

An execution application is in accordance with law within the meaning of Art. 182 (5) of Sch I of the Limitation Act if the particulars required by rr. 11 to 15 of O. XXI of the Civil Procedure Code are mentioned in it, and the mere fact that the application is made by one of several joint decree-holders or one of several transferees from a decree-holder does not take it out of the purview of Art. 182 (5).

Even where an application for execution is not in accordance with law a notice issued under O. XXI, r. 22, Civil Procedure Code, would be a step which would give a fresh start for limitation under Art. 182 (6) of Sch. I of the Limitation Act L AMIN CHAND v. KHIALI, 28 P. L. R. 93; 9 Lah. L. J. 76 A. I. R. 1927 Lah. 106 **475**

——— **s. 19**—*Acknowledgment — Admission in deposition—No denial of continuance of liability, effect of.*

In order that a statement in a deposition may constitute an acknowledgment of a liability so as to save

limitation under s. 19 of the Limitation Act, it need not be express; it may be implied as a matter of inference from the facts and surrounding circumstances of the case

Per *Reilly, J*—An admission of liability in the past with no denial that the liability continues may imply an admission that the liability continues Whether there is such an implied admission is a matter of evidence, not of legal presumption. Before deciding the question whether there is such an implied admission, the Court must examine the context of the admission of a liability in the past and the circumstances in which it was made and consider whether the maker of the admission had any need or incentive in the circumstances to deny the continuance of the liability, if he would do so, and whether he had an opportunity of denying it. **M** SWAMINATHA ODAYAR *v.* SUBBARAMA IYER, 51 M. L. J. 856; A. I. R. 1927 Mad. 219; 25 L. W. 411 **10**

——— **s. 19**—*Acknowledgment of liability—Letter reprimanding creditor for sending bills without deducting them from amount due to debtor—Construction—Denial of liability.*

A letter sent by a debtor to his creditor ran as follows: "I do not understand why you persist in sending me bills when you yourself owe me Rs. 528. Please deduct your bill from the money you owe me and send the balance of Rs. 181-8 at your earliest...Don't send any more bills:"

Held, that the letter did not amount to an acknowledgment of liability within the meaning of s. 19 of the Limitation Act coupled with a claim of set-off, but was one denying liability. **A** JUGAL KISHORE *v.* MR T. CAUL, A. I. R. 1927 All. 317 **189**

——— **S. 19**—*Letter by general agent of debtor at the desire of debtor, whether acknowledgment.*

A letter written by a general agent of the debtor at the desire of the debtor before the period of limitation has expired acknowledging the debt is sufficient to save limitation under s. 19 of the Limitation Act, 1908. **O** RAM PRASAD *v.* SANT DIN, 4 O. W. N.275 **784**

——— **s. 22.** *See* C. P. C., 1908, O. VI, R. 17 **469**

——— **ss. 22**—*Civil Procedure Code (Act V of 1908), O. I, r. 10 (5)—Addition of person as party defendant—Limitation—Order relates back to date of application*—'Actus curiæ neminem gravabit.'

When a person is added as a party defendant on application under O. I, r. 10 (5) of the Civil Procedure Code the addition takes effect from the date of the application. This principle is applicable whether the order adding as party is made by the trial Court, the Appellate or Revisional Court, since otherwise, though application might be made in time, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred.

It is contrary to one of the clear principles of the Law of Limitation that a diligent party who has come to Court with his suit or his application within the period prescribed should be defeated because the Court for some reason cannot or does not give him his relief within that period. **M** SOUTH INDIA INDUSTRIALS *v.* MOTHEY NARASIMHA RAO, 52 M. L. J. 199; 25 L. W. 477; 38 M. L. T. 126; 50 M. 372; A. I. R. 1927 Mad. 468 **680**

——— **s. 26**—*Easement—Right to take water through another person's property, whether easement—Co-sharers—Grant of easement by one co-sharer—Consent of other co-sharers, necessity of.*

In the absence of a custom to the contrary a co-proprietor cannot grant an easement over joint property without the permission of the other co-sharers.

The right to take water through another person's property is an easement within the meaning of s. 26 of the Limitation Act. **L** TUNNAN *v.* TOTA, A. I. R. 1927 Lah. 216 **498**

——— **s. 26**, *object of—'Easement'—Right to bathe in tank—Acquisition of easement otherwise than under Statute—Long user of tank by public—Dedication.*

The object of s. 26 of the Limitation Act is to make more easy the establishment of easement rights, but it is remedial and neither prohibitory nor exhaustive and it does not exclude or interfere with other modes of acquiring easements.

A right to the use of the water of a tank for bathing and for other domestic purposes can be acquired in India by long user.

When one finds that a tank exists from a long time past and the public have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for the public use Such a dedication can be inferred from the manner and the duration of such use.

Per *Pearson, J.*—The word 'easement' as used in s. 26 of the Limitation Act is wider than it is in English Law and includes at least a *profit a prendre.*

Per *Chakravarti, J.*—Section 26 of the Limitation Act does not give an exhaustive description of the rights acquired by long user. **C** BHABADEB CHATTERJEE *v.* BHUSAN CHANDRA MUKHERJEE, 53 C. 1016 **321**

——— **Sch. I, Art. 11**—*Attachment in execution—Objection by mortgagee—Order for proclaiming mortgage—Suit by decree-holder for declaration that mortgage was null and void—Limitation—Civil Procedure Code (Act V of 1908), O. XXI, rr. 58 62, 63.*

The plaintiff attached a house in execution of a decree but on the application of an objector an order was passed by the Court *ex parte* on 28th November, 1921, for proclaiming a mortgage as an incumbrance. The plaintiff objected to this order and an order was passed in his favour on 1st April, 1922, allowing a note of his objection to the application of the objector to be added to the proclamation. The plaintiff sued on 29th March, 1923, for a declaration that the mortgage was null and void:

Held, that the suit being really one under O. XXI, r. 63, Civil Procedure Code, for a declaration that the order of 28th November, 1921, was ineffective, limitation began to run from that order whether it be considered as one under r. 58 or under r 62 of O XXI, and that the suit was, therefore, barred under Art. 11 of Sch. I of the Limitation Act. **A** RAM GOPAL VAISH *v.* MAHANAND LAL, A. I. R 1927 All. 420 **763**

——— ——— **Art. 12**. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, 1913, ss. 7, 23, 37 **997**

——— ——— **Art 12**—*Madras Estates Land Act (I of 1908), s. 118, suit to set aside sale under, whether falls within Art. 12.*

A sale under s. 118 of the Madras Estates Land Act is not by virtue of an order or a decree of a Collector or other officer of revenue within the meaning of Art. 12 of Sch. I of the Limitation Act, inas-

much as in such a case the Collector does nothing more than merely appoint an officer for conducting the sale under s 117 of the Act. M NUKALA SUBBAYYA v. NARAGAM KRISTAYYA, 52 M. L J. 390; A. I. R. 1927 Mad. 488; 38 M. L T. 333 1007

——— Sch. I, Art. 14, *applicability of—Suit incidentally affecting order passed by Government Officer.*

Before Art. 14 of Sch. I to the Limitation Act can apply to a suit, it must be necessary under the law to set aside the order sought to be impeached in the suit. The Article will not apply if the incidental effect merely of the plaintiff's suit will be to nullify an order passed by a Government Officer. N BALA v. GIRDHAR, A. I. R. 1927 Nag. 159 4

——— Art. 36—*Companies Act (VII of 1913), s. 235—Applications for compensation from Director for misfeasance—Limitation.*

The limitation for an application under s. 235, Companies Act, to recover compensation from an ex-Director of a Company in respect of an alleged act of misfeasance is two years under Art. 36, Sch. I of the Limitation Act. L BHIM SINGH v. BASHESHAR NATH GOELA, 8 Lah. 167; 28 P L. R. 363; A. I R. 1927 Lah. 433 907

——— Arts. 64, 83. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 25 874

——— Art. 74—*Bond payable by instalments—Limitation.*

A bond provided that the money due under it would be payable within 18 years by 18 annual instalments. The creditor, on the expiry of the period, brought a suit to recover the entire sum due:

Held, that the plaintiff would be entitled to recover the last three instalments only under Art. 74 of the Limitation Act as the claim in respect of the other instalments was barred by time. O GAURA v. RAM CHARAN, 4 O. W. N. 207 655

——— Art. 85—*Open account, meaning of.*

An open account is one which is continuous or current, uninterrupted or unclosed by a settlement or otherwise, consisting of a series of transactions. Where balance of a particular account is ascertained but deliberately is not carried over and a new account is started, the mere adding later on at the end of the new dealings the old balance would not make it an open account again. L BHAGWAN DAS-KANHAYA LAL v. NAND SINGH-HARI SINGH, 28 P. L. R. 146 815

——— Art. 91—*'Instrument' — Award, whether an instrument—Suit to set aside decree based on award—Limitation.*

An award is an instrument within the meaning of Art. 91 of Sch. I to the Limitation Act and a person cannot impeach a decree incorporating an award unless he can show that a suit to set aside the award was brought within the period prescribed by the Article. L NIDHAN SINGH v E. D. SASSOON & Co., 28 P. L. R. 106; A. I. R. 1927 Lah. 172; 9 Lah L. J. 191 596

——— Art. 97. *See* C. P. C., 1908, s. 11 745

——— Art. 116.

See C. P. C., 1908, ss. 11, 100, O. II, R. 2 40

See MADRAS ESTATES LAND ACT, 1908, SCH. I, ART. 8 241

——— Art. 116—*Sale set aside—Suit to recover purchase-money—Limitation, commencement of—Appeal, dismissal of, effect of.*

An original decree is not suspended by presentation of an appeal against it nor is its operation interrupted where the decree on appeal is one of dismissal.

Where a sale is set aside and an appeal against the decree setting aside the sale is dismissed, limitation for a suit by the vendee to recover the purchase-money from the vendor begins to run from the date of the decree setting aside the sale and not from the date when the appeal against the decree is dismissed. L PIR BAKHSH v. CHANAN DIN, 28 P. L. R. 1 19

——— Sch. I, Art. 120—*Declaratory suit—Limitation—Fresh invasion of right—Fresh cause of action—Entry of joint ownership in revenue records, effect of.*

The plaintiffs and the defendants were entered as joint owners in the revenue records though the defendants were not in possession. In 1897 the plaintiffs attempted to have the entries altered so as to have their names recorded as sole owners, but their application was rejected. In 1921 one of the defendants applied for partition of the land. The plaintiffs pleaded their exclusive title and were referred to the Civil Court. The plaintiffs sued for declaration of their title:

Held, (1) that the plaintiffs' suit was not barred inasmuch as the application for partition was an act of invasion which gave a new cause of action;

(2) that the fact that the entries related to co-ownership and not to sole-ownership did not affect the question. L SMAIL v. BAHAB, 8 Lah. 22; A. I R. 1927 Lah. 119 732

——— Art. 120—*Declaratory suit—Title denied in revenue proceedings—Cause of action.*

Where the title of a person who is seeking to have certain revenue entries corrected is disputed in the revenue proceedings, this furnishes him with a new cause of action to maintain a suit for declaration of title. A BHIKHAM SINGH v. BHARAT INDU, A. I. R. 1927 All. 296 45

——— Art. 120—*Mortgage—Perpetual lease by mortgagor—Suit by mortgagee to set aside lease—Limitation—Cause of action—Transfer of Property Act (IV of 1882), s. 68—Act causing permanent injury.*

Where a mortgagor in possession of the mortgaged property executes a perpetual lease in favour of a third party, a suit by the mortgagee to avoid the lease on the ground that it has the effect of diminishing the security offered for the loan advanced by him under the mortgage, is governed by Art. 120 of the First Schedule of the Indian Limitation Act and the right to sue accrues on the date of the lease.

Where a mortgagor grants a permanent lease of the mortgaged property, his act would amount to 'permanent injury' within the meaning of s. 68 of the Transfer of Property Act, if the security is rendered insufficient by the act. O BANK OF UPPER INDIA, LTD. v. JAGGAN, 4 O. W. N. 228; A. I. R. 1927 Oudh 148 728

——— Art. 125—*Alienation by Hindu or Muhammadan female not governed by Hindu or Muhammadan Law.*

Article 125 of Sch. I of the Limitation Act is not confined in its operation to cases where the female making the alienation is governed by Hindu or Muhammadan Law but covers every case where the female making the alienation is a Hindu or a Muhammadan and the immediate reversioners who bring the suit also profess

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the same faith. L NANDAN v. WAZIRA, 8 Lah. 215; A. I. R. 1927 Lah. 198; 28 P. L. R. 341 84

——— **Sch. I, Arts. 142, 143, 144.** *See* PART PERFORMANCE 866

——— **Arts. 142, 144**—*Ejectment suit—Limitation—Possession and dispossession—Possession proved till certain date, whether can be presumed to continue till dispossession.*

Plaintiff who was the owner of an item of land and was recorded as such was found to have been in possession of the land through his tenant till 1907. In 1910 the Revenue Records showed the defendant as owner holding through the person in actual possession. Plaintiff instituted a suit in 1920 for recovery of possession of the land:

Held, that it must be presumed in the absence of evidence to the contrary that the plaintiff continued to hold possession through his tenant till 1910 and that the suit was not, therefore, barred either under Art. 142 or Art. 144 of Sch. I of the Limitation Act. L DULLAH v. SARDARAN, 9 Lah. L. J. 9; 28 P. L. R 55 336

——— **Arts. 142, 144**—*Suit for possession on allegation of tenancy—Tenancy not proved—Limitation—Burden of proof.*

A suit for possession on the allegation of tenancy, even if the tenancy is not proved is, in the absence of an allegation by the plaintiff or proof that he was ever dispossessed or that he discontinued possession, governed by Art. 144 and not by Art. 142 of Sch. I of the Limitation Act and it is for the defendant to prove adverse possession for over 12 years. L KANSHI RAM v. TAJA, A. I. R. 1927 Lah. 236 477

——— **Arts. 142, 144**—*Waste land—Possession follows title—Adverse possession—Onus of proof.*

Where land is lying waste possession follows title. In a suit for possession of waste land it is for the defendant to prove adverse possession for more than 12 years under Art. 144 and not for the plaintiff to prove his possession within 12 years. L GANGA RAM v. HASSAN SHAH, A. I. R. 1927 Lah. 230 51

——— **Arts. 142, 144, 148.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 59 346

——— **Art. 144.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 52 294

——— **Art. 144**—*Adverse possession—Burden of proof—Adverse possession by Hindu female entitled to maintenance against another in whom inheritance vests—Nature and extent of right acquired—Proof of knowledge, necessity of—Adverse possession against limited owner—Reversioner's rights whether affected.*

Where possession is referable to a lawful origin the presumption is that it is acquired lawfully and the burden is on the party asserting adverse possession to prove his case.

As regards the nature of possession by one Hindu female entitled to maintenance against another Hindu female in whom the inheritance vests for the time being, the quality and extent of right acquired by adverse possession always depends upon the claim accompanying it and upon the nature of the *animus possidendi*. The question whether possession is adverse or not is always a question of one's own intention to hold adversely and knowledge of such intention must be brought home to the real owner so as to extinguish his title.

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No adverse possession can run against a person until he becomes entitled to possession of the property and an adverse possession of any length of time, against a tenant for life is ineffectual against the reversioner or remainderman whose right to possession only accrues on the death of tenant for life.

In such cases the person in adverse possession against the life-estate-holder will acquire the life-estate of such holder, which will come to an end on the death of the latter. N DESHRANI v. KISHORE SINGH 22 N. L. R. 175; A. I. R. 1927 Nag. 104 446

——— **Sch. I, Art. 144**—*Adverse possession—Co-sharers—Assertion of exclusive right by one co-sharer—Limitation—Muhammadan Law—Inheritance—Heirs, whether joint tenants or tenants-in-common.*

On the death of a Muhammadan his estate descends to his heirs not as a joint tenancy but as a tenancy-in-common, each of the heirs becomes entitled to claim his or her share at once and limitation begins to run against each under Art. 144 of Sch. I to the Limitation Act from the date of the death of the deceased.

Obiter.—Where one co-sharer definitely asserts his own right to certain joint property as against his other co-sharers; his possession from that moment becomes adverse to the other co-sharers. L ALLAH JAWAI v. MUHAMMAD BAKHSH 145

——— **Art. 144**—*Landlord and tenant—Suit for rent—Denial of relationship of landlord and tenant—Adverse possession—Ejectment suit—Limitation, commencement of.*

Plaintiff instituted a suit for rent against the defendant and the defendant in his written statement denied the relationship of landlord and tenant. The defence was given effect to by the trial Court and the suit was dismissed and an appeal against the dismissal was unsuccessful. More than twelve years after the date of the written statement filed by the defendant in the suit but within twelve years after the dismissal of the appeal the plaintiff instituted a suit to eject the defendant from the holding of which he had continued in possession throughout:

Held, that the defendant's possession became adverse to the plaintiff from he date of the filing of the written statement in the previous suit and that, therefore, the plaintiff's suit was barred by time. C HACHANUDDI v. ASIMADDI, A. I. R. 1927 Cal. 417 607,

——— **Arts. 152 to 156.** *See* C. P. C. 1908, O. XX, R. 1 909

——— **Art. 158.** *See* LIMITATION ACT, 1908, s. 5 955

——— *as amended by Act (XVIII of 1919), Sch. I, Art. 158—Civil Procedure Code (Act V of 1908), s. 115, Sch. II, para. 14 (c)—Application to set aside award—Limitation—Dismissal of application without advertence to amendment of Art. 158—Revision—Intentional absence of dissenting arbitrators—Validity of award of majority.*

Under Art. 158 of Sch. I of the Limitation Act of 1908 as amended by Act XVIII of 1919 the period of ten days prescribed for filing an application in Court to set aside an award must be computed from the date when the award is filed in Court and notice of the filing has been given to the parties.

The omission of a Court in deciding a point of limitation to have advertence to an amendment of the Article concerned, is not a mere error in the

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decision of a question of law and affords good ground for interfering in revision under s. 115, Civil Procedure Code.

Where a matter is not really heard by all the arbitrators appointed, there is material on which the Court may find the award to be bad on its face. But if the dissenting arbitrators merely absent themselves in order to render infructuous a contemplated award by the majority of the arbitrators, the Court will not set aside the award merely on that ground. **M** TIMMASETTI SANJIVAPPA *v.* PINNU VENKATANARAPPA, 52 M. L. J. 357; A. I. R. 1927 Mad. 436 **634**

——— **Sch. I, Art. 164.** *See* LIMITATION ACT, 1908, s. 5 **936**

——— **Art. 166.**
See C. P. C., 1908, O XXI, RR. 91, 92 **522, 561**

——— **Art. 173.** *See* LIMITATION ACT, 1908 s. 5 **727,**

——— **Art. 181.**
See C. P. C., 1908, O. XXXIV, RR. 4, 5 **22**
See C. P. C., 1908, O. XXXIV, R. 6 **775**
See C. P. C., 1908, O. XXXIV, R. 8 **324**

——— **Arts. 181, 182.** *See* LIMITATION ACT, 1908, s. 15 **692**

——— **Arts. 181, 182**—*Application for execution—Suspension of proceedings—Subsequent application — Revival — Limitation —'Striking off' execution case, effect of.*

An execution case was ordered to be 'struck off,' on 19th March, 1918. On 21st March, 1918, the judgment-debtor filed an application praying that satisfaction of the decree may be recorded. The application was allowed by the First Court but the Court of Appeal on 7th July, 1920, decided in favour of the decree-holder and rejected the application. The judgment-debtor filed a second appeal which was dismissed on 3rd November, 1921. The decree-holder applied for execution on 9th July, 1924:

Held, that the application, having been filed more than three years after 19th March, 1918, and even more than three years after 7th July, 1920, when all bar to the execution of the decree had been removed, was barred by limitation.

An application for revival of former proceedings in execution must be made within 3 years from the date on which those proceedings were suspended. **A** BASANTI *v.* SIRDAR MAL-HARDAT RAI **790**

——— **Art. 182**—*Civil Procedure Code (Act V of 1908), O. XXI, r. (2)—Execution of decree—Application for execution made more than three years after date of previous application—Payments made under decree—Extension of time—Procedure.*

Where an application for execution is made after the expiry of three years from the date of a previous application and limitation is sought to be saved by the fact that payments have been made by the judgment-debtor under the decree during the interval, the decree-holder must show that an application to certify the alleged payments was made by a prior and separate proceeding to the application for execution. The mere mention of such payments in the application for execution itself is not sufficient to operate as an extension of the period of limitation **A** JAWALA SAHAI *v.* BHIM SINGH **574**

——— ——— **Art. 182**—*Decree directing payment of additional Court-fee—Application for execution*

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—Limitation—Time whether runs only from date of paying additional fee.

Where a judgment directs that a party should pay additional Court-fee before taking out execution, the period of limitation for executing the decree runs from the date of the judgment and not from the date on which the additional Court-fee is paid.

Where a decree-holder who has been directed to pay additional Court-fee, applies for execution within 3 years of the decree but pays the additional fee only after the expiry of three years, he is not entitled to recover the same in execution from the judgment-debtor. **A** BUDHU KHAN *v.* A. BONER, A. I. R. 1927 All 335 **476**

——— **Sch. I, Art. 182**—*Partition decree modified in partition proceedings—Limitation for execution, starting point of.*

When a decree in a partition suit is modified in the course of subsequent proceedings, the limitation for its execution begins to run not from the date of the original decree but from the date on which the decree is modified. **L** PAREM CHAND *v.* BUDHA **164**

——— **Art. 182, cl. (5)**—*Oral application for execution—Prayer for issue of warrant of attachment of property—Step-in-aid of execution—Application not strictly necessary, whether in accordance with law—Meaning of Art 182, cl. (5).*

An oral application by a decree-holder to the executing Court that a warrant of attachment should issue against the property of the judgment-debtor is an application made in accordance with law to the proper Court to take a step in aid of execution, and fulfils the conditions laid down in Art. 182, cl. (5) of the First Schedule of the Limitation Act. In considering the meaning of the 5th clause of Art. 182 a Court should look very closely at the words used in the clause and should be loath to look at anything else.

An application which is not strictly necessary may still be an application in accordance with law within the meaning of Art. 182 of the Limitation Act. **O** RAM LAL *v.* UDIT NARAIN SINGH, 4 O. W. N. 175; A. I. R. 1927 Oudh 134 **308**

——— ——— **Art. 182 (5) (6).** *See* LIMITATION ACT, 1908, s. 15 **475**

Lis pendens.
See C. P. C., 1908, s. 50 **582**
See PRE-EMPTION **666**
See TRANSFER OF PROPERTY ACT, 1882, s. 52 **294**

———

The plea of *lis pendens* cannot be allowed to be raised for the first time at the hearing of a second appeal. **C** HARA PRASAD GAIN *v* GOPAL CHANDRA GAIN, 45 C. L. J. 73; 31 C. W. N. 299; A. I. R. 1927 Cal. 315 **997**

Lunacy Act (IV of 1912), s. 33—*Maintenance of lunatic—Manager of joint Hindu family, whether 'Person legally bound to maintain'—Extent of lunatic's share, whether regulates fees leviable for expenses—'Means to maintain'—Hindu Law—Manager's liability to maintain member—Rules under Lunacy Act, r. 18(ii), whether* ultra vires.

Although under Hindu Law, a father is not bound to maintain his adult son, yet, where the son is joint with him and there is joint family property, he is bound as manager of the family to maintain the latter.

A father is 'a person legally bound to maintain'

Lunacy Act—concld.

his lunatic son within the meaning of s. 88 of the Lunacy Act, if the father as manager of the joint family is liable to maintain his son as an undivided member of the family. It does not matter for the purposes of s 88, that under Hindu Law his liability is limited to the extent of the joint family property in his hands.

If a person is legally bound to maintain a lunatic and if he has the means to maintain him with or without reference to joint family property, under the Lunacy Act the Court can make an order for the costs of his maintenance in the asylum. The fees chargeable for expenses have to be determined under the Act and are not dependent on the lunatic's share in the joint family. The word 'means' has no reference to their source.

Rule 18 (*ii*) of the Rules under the Lunacy Act which prescribes the fees for maintenance of a lunatic is not *ultra vires* It is restricted in its scope and applies to the case of a person legally liable to maintain him, only when the lunatic is a member of the family of that person and is actually dependent on him. **B** CHANVIRGAVDA SHIVANGAVDA *v.* DISTRICT MAGISTRATE, DHARWAR, 29 Bom. L. R. 52; 51 B. 120; A. I R. 1927 Bom. 91 **575**

Madras Abkari Act (I of 1886), ss. 34, 40, 55 (a), 56 (b)—*Possession, what constitutes—Possession of illicit quantity of arrack—Offence whether comes under s. 55 (a) or s 56 (b)—Arrest by Abkari Officer—Escape from custody—Offence—Legality of arrest—Procedure.*

A person who carries arrack in excess of the permissible quantity from one place to another is in "possession" of it within the meaning of s. 55 (*a*) of the Madras Abkari Act.

Possession of an illicit quantity of arrack in breach of the license or permit or rule under the Madras Abkari Act comes under s. 55 (*a* and, therefore, does not come under s.56 (*b*) of the Act and s. 34 authorises an Abkari Officer to arrest for such an offence.

Under the provisions of s. 34 of the Madras Abkari Act, an arresting officer is empowered to take an offender to a Police Station within 5 miles where he is not authorised to admit the offender to bail and there is a Police Inspector in such station having such power.

[Need for amendment of the sections of the Madras Abkari Act relating to the procedure for arrest for abkari offences pointed out.] **M** *In re* JAYACHANDRA CHETTY, 25 L. W. 277; 52 M. L. J. 226; (1927) M. W N. 158 38 M. L. T. 116; 28 Cr. L. J. 275; A. I. R. 1927 Mad. 413 **355**

Madras Board's Standing Orders, O. No. 52. *See* INAM GRANT **741**

Madras Court Fees (Amendment) Act (V of 1922). *See* COURT FEES ACT, 1870 **72**

——— **s. 6.** *See* COURT FEES ACT, 1870, s. 7 iv (*c*) **263**

Madras District Municipalities Act (V of 1884), ss. 207, 214—*Power to direct removal of latrine—Notice not specifying place to which it must be removed, whether defective.*

Section 207, Madras District Municipalities Act of 1884, empowers a Municipality to take order with latrines in the interests of the general public and in particular of the neighbouring residents and such alteration need not be in the interests of the owner or occupier of the buildings.

Madras District Municipalities Act -1884—concld.

A notice which requires the owner of a house to remove a latrine from its existing place and construct it in another place leaving to the owner to decide at his own peril whether that other place is or is not equally open to objection, is not beyond the competence of a Municipal Council under s 214 (2) of the Act. **M** CHAIRMAN, MUNICIPAL COUNCIL, MASULIPATAM *v.* CHITTA VENKATA LAKSHMANNA, 52 M. L. J. 335; 25 L. W. 385; 38 M. L. T. 334 **645**

Madras District Municipalities Act (V of 1920), ss. 3 (24), 317 (a), (c)—*Re-construction, definition of—Conviction under s. 317 (a)—Appeal—Conviction, whether can be altered to one under s 317 (c).*

Where the re-construction of a building is partial only, s. 3 (24) of the Madras District Municipalities Act requires that the "re-erection" in order to constitute "re-construction" should be done after more than one-half of the cubical contents of the building have been taken down or burnt down. A Magistrate, therefore, dealing with a case under s. 317 of the Act has no jurisdiction to frame a definition of his own in order to determine whether there has or has not been "re-construction" within the meaning of the section.

The offence defined in s. 317 (*c*) of the Madras District Municipalities Act is of quite a different character from that defined in cl. (*a*) of the section, inasmuch as the essence of an offence under cl. (*c*) is that after re-construction has been commenced an order is passed to prohibit its carrying on or completion except upon certain terms and that that order is disobeyed. Therefore, where a person is charged with an offence under s. 317 (*a*) of the Act and is convicted of it, he cannot, in appeal, be convicted of an offence under cl. (*c*) of the section **M** *In re* VALIVELA VENKATA SIVAYYA, 25 L. W. 475; 38 M. L. T. 118; 28 Cr. L. J. 295; A. I R. 1927 Mad. 442 **375**

——— **s. 81.** *See* RAILWAYS ACT, 1890, s. 135 **280**

——— **s. 317.** *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, ss. 3, 317 **375**

Madras Estates Land Act (I of 1908), s. 118 *See* LIMITATION ACT, 1908, SCH. I, ART. 12 **1007**

——— **ss. 189, 192**—*Civil Procedure Code (Act V of 1908), ss. 47, 96—Decree in suit under s. 77, Estates Land Act—Execution petition, orders on, whether appealable.*

By virtue of s. 192 of the Madras Estates Land Act, the provisions of ss. 2, 47, 96 and 100 of the Civil Procedure Code apply to a petition filed for the execution of a decree given by a Revenue Court in a suit filed under s. 77 of the Madras Estates Land Act, and, therefore, orders passed in execution of such a decree by the Revenue Court are appealable as decrees. **M** YARLAGADDA ANKINEEDU PRASAD *v.* RAVI BASAVAYYA, 52 M. L. J. 332; A. I. R. 1927 Mad. 440 **678**

——— **Sch. I, Art. 8**—*Limitation Act (IX of 1908), Sch I, Art 166—Suit for rent by landholder under registered lease deed - Limitation.*

A suit for rent by a landholder under the Madras Estates Land Act even when based on a registered lease deed is governed by the 3 years' period of limitation under Art. 8, of the first Schedule of the Madras Estates Land Act and not by the 6 years' period under Art. 116 of the Limitation Act **M** KALIBA SAHIB *v.* PERIATHAMBIA PILLAI, A. I. R. 1927 Mad. 439 **241**

Madras Village Courts Act (I of 1889), s. 53—*Court Fees Act (VII of 1870), Sch. II, Art 6—Stamp Act (II of 1899), as amended by Madras Stamp (Amendment) Act (VI of 1922), Sch. IA, Art. 46—Security-bond executed under s. 53 of Madras Village Courts Act—Stamp duty.*

Article 6 of Sch. II to the Court Fees Act as amended applies only to bail-bonds and other instruments of obligation under the Criminal Procedure Code or under the Civil Procedure Code. A security-bond executed by a surety under s. 53 of the Madras Village Courts Act in respect of property attached and which the surety undertakes to return or to pay a sum of money on a certain event, does not come under Art. 6 of Sch. II to the Court Fees Act and is not exempt from payment of Court-fees. Such a document comes under Art. 46 of Sch. IA to the Madras Stamp (Amendment) Act and should bear the same duty as a bottomry bond for the amount secured. M CHEEDELLA CHENCHAYYA *v.* ANNUREDDI PICHIREDDI, 52 M. L. J. 153; 25 L. W. 246; 38 M. L. T. 125; (1927) M. W. N. 281; A. I. R. 1927 Mad. 377 **545**

Malabar Law—Karnavan, *powers and obligations of—Suit for removal of* karnavan *and for accounts—Relief for removal becoming impossible—Accounts, whether can be ordered.*

The *karnavan* of a Malabar *tarwad* is the manager of the family estate. He may administer that estate for the benefit of the family according to his own discretion, and is not bound to render any account or pay to the *tarwad* any surplus he may have in his hands provided he does not devote it to other than *tarwad* purposes. But if it be proved against the *karnavan* of a Malabar *tarwad* that he has abused his discretion and fraudulently misappropriated the family estate, he must account for that transaction. On proof of fraudulent alienation or misappropriation by the *karnavan* the junior members suing on behalf of the *tarwad* will be entitled to recover from the *karnavan* personally the amount of which the *tarwad* has been defrauded.

If it be proved generally that he is a bad manager, he will be liable to removal, unless he gives a good account of his management. But he cannot be compelled actually to render accounts by a threat of removal or for any other reason.

Although a *karnavan* may be made liable to account for each proved defalcation in a separate suit framed for the purpose, yet the prayer for a general rendering of the accounts in a suit for his removal and accounts cannot be granted where the prayer for his removal becomes impossible. M KOZHIKKOT PUTHIA KOVILAGATH MANAVEDAN *v.* KOZHIKKOT PUTHIA KOVILAGATH KIAYATHIN SREEDEVI, 25 L. W. 284; 52 M. L. J. 277; 38 M. L. T. 112; A. I. R. 1927 Mad. 422; 50 M. 431 **607**

Malicious prosecution. *See* CR. P. C., 1898, s. 145 **449**

Markets—Loss of profits—Damages. *See* LAND ACQUISITION ACT, 1894, ss. 23, 24 **749**

Master and servant—Master's liability for crimes of servants. *See* EXPLOSIVES ACT, 1884, s. 5 **972**

Maxims—*Damna absque injuria. See* LAND ACQUISITION ACT, 1894, ss. 23, 24 **749**

Mesne profits—Court-fees. *See* COURT FEES ACT, 1870 **72**

Minor—Guardian—Power to give discharge. *See* HINDU LAW **129**

——— Negligence of guardian—Liability of guardian's legal representatives. *See* PROBATE AND ADMINISTRATION ACT, 1881, s. 89 **286**

Money *lent under contract—Breach of contract—Interest on money lent.*

Where a defendant receives plaintiff's money under a contract and then refuses to carry out the contract, the defendant is liable not only to return the money but also to pay damages for breach of the contract which may be awarded in the shape of interest at the market rate. L ABDULLAH *v.* ALLAH DIYA, 28 P. L. R. 161; 8 Lah. 310; A. I. R. 1927 Lah. 333 **846**

Mortgage *by conditional sale—Interest after default—Presumption.*

In the absence of anything to the contrary in a mortgage-deed, it cannot be presumed that the parties to the deed intended that the debt advanced by the mortgagee should cease to carry interest after a default is made by the mortgagor in discharging the mortgage-debt. The ordinary presumption is that a creditor who has advanced a debt on interest intends that debt to carry interest till the same is paid off. A HANUMAN RAI *v.* DIPAN RAI **5**

——— Final decree—Notice whether necessary. *See* PROCEDURE **18**

——— *Mortgage of entire property by partial owner—Redemption of previous mortgage over entire property by mortgagor—Mortgagor obtaining decree against other co-owners for amount representing share of mortgage redeemed by him—Mortgagee's right to benefit of decree.*

S mortgaged an entire property to *Z*. Subsequently it was found that *S* had acquired a valid title only to three-fourths share and the remaining one-fourth share belonged to *J*. But a mortgage over the entire property created by the original owner had been redeemed by *S* who thus had acquired a mortgagee's lien on *J's* share. *S* then obtained a decree against *J* for a sum representing one-fourth share of the mortgage redeemed by him which was made the first charge on *J's* share. A copy of the decree was handed over by *S* to *Z*. *S* became an insolvent:

Held, that though the making over of a copy of the decree to *Z* did not amount in law to an assignment of the decree, yet on the facts of the case *Z* had a first charge on the decretal amount in equity. R ZOLLIKOFER & Co. *v.* OFFICIAL ASSIGNEE, 4 R. 532; A. I. R. 1927 Rang. 100 **261**

——— Mortgagee's right to eject mortgagor's tenants. *See* C. P. C., 1908, s 11 **1033**

——— Mortgagee, when entitled to possession. *See* C. P. C., 1908, SCH. III, PARA. 11 **863**

——— *Preliminary decree—Deposit of money after six months but before steps are taken by mortgagee—Order absolute for redemption, legality of—Power of Court to extend time.*

Although the money due under a preliminary decree is not deposited by a mortgagor within the period of 6 months provided in the decree, a Court will not order the mortgaged property to be sold or foreclosed, where the money is deposited in Court before any application is made by the mortgagee to enforce his rights under the preliminary decree. B CHATUR BAWA MULJI *v.* POPATLAL NARANDAS, 29 Bom. L. R. 228; A. I. R. 1927 Bom. 175 **1039**

——— *Prior and puisne mortgagees—Agreement by mortgagor extending limitation for suit on prior mortgage, whether binding on puisne mortgagee—Subsequent usufructuary mortgage renewing prior simple mortgage—Dispossession of mortgagee Suit on simple mortgage—Limitation—Enjoyment of usufruct, effect of—Declaration of prior charge in*

puisne mortgagee's suit, whether operates as res judicata—*Limitation, whether extended—Failure to redeem in puisne mortgagee's suit, effect of.*

A executed a simple mortgage of eight villages to *B* in 1898. He subsequently mortgaged the same villages to *C* in the same year. In 1900, *A* executed a usufructuary mortgage of two villages to *B* for the amount due under the first mortgage and other amounts. Under this mortgage *B* was entitled on dispossession to sue for the amount due to him and to recover the same from the villages comprised in the first mortgage. *B* was dispossessed in 1911 and sued in 1922 to enforce his first mortgage. *C* who had in the meanwhile sued on his mortgage impleading *B* also as a party and purchased two of the villages under his decree contested *B*'s right to enforce his charge against the items purchased by him:

Held, (1) that the provision in the usufructuary mortgage giving *B* a fresh right to sue on the simple mortgage from the date of dispossession was not binding on *C*;

(2) that if *B* retained a right to sue at all on the simple mortgage he did so only in accordance with the rule of limitation applicable to that bond and that the suit was, therefore, time-barred;

(3) that the enjoyment of the usufruct under the usufructuary mortgage did not amount to a payment of interest of the debt due under the simple mortgage, within the meaning of s. 20 of the Limitation Act;

(4) that the fact that in *C*'s suit *B*'s charge was declared to have priority did not in any way prevent the suit from being barred by limitation or debar *C* from contending that it was so barred; and

(5) that *B* could not base his suit on the mortgage of 1900 and obtain a decree for sale subject to *C*'s mortgage inasmuch as an opportunity had been given to him in *C*'s suit to redeem *C* and he had refrained from doing so and allowed *C* to purchase in execution. **A** ANPURNA KUNWAR *v.* RAM PADARATH, 25 A. L. J. 353; 49 A. 430; A. I. R. 1927 All. 417 **670**

——— *Redemption—Co-owner, whether can redeem —Other co-owners, whether necessary parties—Tender—Usufruct, account of.*

A person who owns a fractional interest in the equity of redemption is entitled to redeem the whole mortgage.

In a suit for redemption by a person who owns only a fractional interest in the equity of redemption it is not necessary to join the other owners of the equity of redemption as parties to the suit.

In such a suit, however, if the Court directs an account to be taken of the usufruct of the mortgaged property enjoyed by the mortgagee after the date of the tender of the mortgage-money by the plaintiff, the plaintiff should be given credit only for so much of the usufruct as relates to his share of the mortgaged property. **C** CHANDI CHARAN ROY *v.* SIRAJ MIA, A. I. R. 1927 Cal. 479 **521**

——— *Redemption—Covenant to appropriate profits in lieu of interest on portion of mortgage-money and to charge interest on balance—Clog on equity of redemption—Interest, liability to pay after date fixed for redemption.*

Certain property was put in the possession of a mortgagee and the mortgage-deed stated that the profits arising out of the property should be appropriated towards the payment of interest due on the mortgage-money. It was further provided by the deed that the mortgagor would pay interest at a certain rate on another sum of money which was due from him to the mortgagee and that on the expiry of a certain period the property would be redeemed on payment of both the sums of money together with interest on the last-mentioned sum:

Held, (1) that the total of both the sums of money was to be treated as the mortgage-money and that, therefore, every part of it constituted a charge on the mortgaged property;

(2) that the agreement to pay the second sum of money together with interest thereon at the time of redemption did not amount to a clog on the equity of redemption;

(3) that interest would continue to run on the second sum of money even after the expiry of the period fixed for redemption up to the date of payment.

The general principle is that money borrowed on interest will carry interest till the date of re-payment of the principal unless the contract makes provision to the contrary. **O** GOKUL PRASAD PATHAK *v.* GOITRI PRASAD SINGH, 4 O. W. N. 147 **180**

——— *Redemption—Right to redeem and to foreclose, co-extensive—Agreement postponing right to redeem—Clog on redemption.*

The right of redemption is co-extensive with the right of foreclosure and where a mortgagee has power to foreclose at any time the Court would refuse to give effect to a unilateral agreement postponing the mortgagor's right of redemption. **L** RAHMAT ALI *v.* SHADI RAM, 28 P. L. R. 150; A. I. R. 1927 Lah. 226 **625**

——— *Redemption, suit for—Failure to prove mortgage, effect of.*

Where in a suit for redemption of a mortgage the plaintiff fails to prove that the property in dispute was mortgaged to the defendant, the suit must be dismissed. **A** DWARIKA TEWARI *v.* MATA BADAL MALI **633**

——— *Redemption suit—Particulars of mortgage given in plaint, inaccuracy of, effect of—Dismissal of suit.*

Where in a suit for redemption of a mortgage it is found that the description of the mortgage, given in the plaint, the date of the mortgage, the consideration for the mortgage and the area of the mortgaged property are all incorrect, the suit is liable to be dismissed on the ground that the mortgage set up has not been established. **L** JAGAT MAL *v.* KHAZAN CHAND, 27 P. L. R. 765 **58**

——— *Subrogation, doctrine of—Purchaser of mortgaged property paying off prior encumbrance, whether can claim subrogation against puisne encumbrancer.*

Before any person is entitled to claim the benefit of the doctrine of subrogation he must prove that he has *paid up* the mortgage-debt in respect of which he claims that benefit.

Subrogation cannot be permitted in a case where it would work injustice to the rights of those having equal or superior equities.

Where a mortgagor or owner of the equity of redemption or any encumbrancer redeems a prior charge which is his own debt or which by contract, express or implied, he is bound to discharge, he cannot keep such charge alive as against a puisne encumbrancer

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whose encumbrance he is also expressly or impliedly bound to discharge.

Where a purchaser of mortgaged property is bound, expressly or impliedly, under his contract of purchase to discharge the encumbrances to which the property is subject, and he discharges a prior encumbrance upon the property, he cannot, in answer to a suit by a puisne encumbrancer to enforce his encumbrance, avail himself of the doctrine of subrogation in respect of the prior encumbrance paid off by him. **N** MULCHAND *v.* RADHAKISAN, A. I. R. 1927 Nag 150 **272**

——— suit—Abatement after preliminary decree. *See* C. P. C., 1908, O. XXII, RR. 4, 10 **288**

——— *Suit by mortgagee—Part owner of equity of redemption not made party—Sale, effect of—Rights of mortgagee-auction-purchaser and part owner not impleaded—Mortgagee obtaining possession—Ejectment suit, whether lies—Redemption.*

The purchaser of a portion of mortgaged property from the mortgagor subsequent to the mortgage who was not made a party to a suit on the mortgage but who has been ousted from the possession of the mortgaged property by the purchaser in execution of the mortgage-decree is not entitled to recover possession on the basis that the execution purchaser is a trespasser.

The general principle in such cases is that the absent party has a right to redeem and to recover possession on redemption of the mortgage but cannot sue in ejectment. **C** BHAGABAN CHANDRA KUNDU *v.* TARAK CHANDRA BASAK, 45 C. L. J. 4; A. I. R. 1927 Cal. 259 **420**

——— *Usufructuary and simple mortgages in favour of same person—Suit for sale on basis of simple mortgage subject to usufructuary mortgage, whether maintainable—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4.*

A person having a usufructuary mortgage and a subsequent simple mortgage on the same property can maintain a suit for sale of the property on the basis of his simple mortgage subject to his prior usufructuary mortgage. **A** NAZIR-UN-NISA *v.* ASIFA BEGUM, A. I. R. 1927 All. 311 **577**

——— Usufructuary mortgage and lease back—Arrears of rent—Separate suit, whether necessary. *See* TRANSFER OF PROPERTY ACT, 1882, ss. 61, 62 **86**

Motor Vehicles Act (VIII of 1914), s. 16—*Motor car carrying mails, whether exempt from rules—Driving without permit—Offence—Motor car, whether 'public conveyance'—Bombay Public Conveyances Act (VI of 1863), s. 1.*

A person driving a motor car for hire without a driver's permit as required by the rules is guilty of a breach of the rules and liable to be convicted under s. 16 of the Motor Vehicles Act.

A car which carries passengers for hire is not exempt from the operation of the rules under the Motor Vehicles Act regulating the number of passengers merely because it carries mails also.

Per *Patkar, J.*—The definition of a 'public conveyance' in s 1 of Bombay Act VI of 1863 does not include a motor car **B** ABA APPA DHARWADE *v.* EMPEROR, 29 Bom. L. R. 191; A. I R. 1927 Bom. 151; 28 Cr. L. J. 397 **1053**

Muhammadan Law—Administration of estate. *See* RECEIVER **1020**

——— **Divorce**—Iddat—*Residence of wife during period of* iddat *in father's house, effect of.*

Muhammadan Law—contd.

Muhammadan Law does not require that a divorced woman should observe her *iddat* entirely in the house of her husband She may observe the same in the place where she was residing at the time of divorce. **B** USMANBHAI SAMADBHAI *v.* BAI SAKINA, 29 Bom. L. R. 106; A. I. R. 1927 Bom. 176 **1021**

——— **Divorce,** *pronouncement of.*

Under the Muhammadan Law a husband can effect a divorce whenever he desires. He may do so by words without any written document, and no particular form of words is prescribed. If the words used are "express" or well-understood as implying divorce, such as *talak*, no proof of intention is required. If the words used are ambiguous, the intention of the user must be proved. It is not necessary that the repudiation should be pronounced in the presence of the wife, or even addressed to her. **P C** MAMI *v.* KALLANDER AMMAL, 25 A L. J. 65; A. I. R. 1927 P. C. 15; (1927) M. W. N. 80; 38 M. L T. 41; 25 L. W. 342; 28 P. L. R. 109; 5 R. 18; 52 M. L. J. 376; 6 Bur. L. J. 40; 45 C. L. J. 263; 8 P. L. T. 280; 31 C. W. N. 621; 29 Bom. L. R. 800 **1**

——— **Dower**—*Death of husband—Widow retaining possession of properties—Presumption—Possession in lieu of dower.*

Where a Muhammadan dies and his widow remains in possession of his properties after his death it will be presumed that her possession is in lieu of dower. **A** ABDUL SATTAR *v.* AQIDA BIBI, A. I. R. 1927 All. 319 **599**

——— *Marriage of minor—Guardian whether liable for dower.*

Under the Muhammadan Law a father does not, by merely giving his consent to the marriage of his minor son, become automatically a surety for the payment of the dower-debt. **A** MUHAMMAD SIDDIQ *v.* SHAHAB UD-DIN, 25 A. L. J. 466; A. I. R. 1927 All. 364 **636**

——— **Gift**—*Delivery of possession—Donor out of possession—Validity of gift—Doctrine of* musha—*Evasion of the doctrine.*

The mere fact that the donor was out of possession at the time of the gift and that consequently there was no delivery of possession to the donee does not invalidate a gift under Muhammadan Law, provided the donor did all that he could do to perfect the gift.

A gift which is invalid under Muhammadan Law under the doctrine of *musha* becomes a valid gift if the donee obtains possession.

This principle applies not only where the gift is impugned by the donor himself but also as against strangers.

A gift of an undivided portion of a house can be validly effected by the donor selling it first at a fixed price and then absolving the debtor from payment of the price. **A** AHMADI BEGAM *v.* ABDUL AZIZ, 25 A. L. J. 407; A. I R. 1927 All. 345 **644**

——— *Delivery of possession necessity of—Gift by husband to wife—Mutation, effect of—Presumption.*

The rule of Muhammadan Law that a gift must be perfected by delivery of possession is applicable in Burma.

In the case of a gift of immoveable property by a Muhammadan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between the donor and the donee is that the husband's

subsequent acts with reference to the property were done on his wife's behalf and not on his own. **P C** MA MI *v* KALLANDER AMMAL, 25 A. L. J. 69; A. I. R. 1927 P. C. 22; (1927) M. W. N. 76; 38 M. L. T. 53; 5 R. 7; 52 M. L. J. 362; 4 O. W. N. 300; 6 Bur. L. J. 59; 45 C. L. J. 268; 25 L. W. 679; 29 Bom. L. R. 772; 31 C. W. N. 625 **32**

——— **Gift,** *essentials of—Deed of gift, whether compulsorily registrable—Transfer of Property Act (IV of 1882), s. 123—Registration Act (XVI of 1908), ss. 17, 49.*

Section 123, Transfer of Property Act, is not applicable to gifts by Muhammadans

Essentials of a gift under Muhammadan Law are a declaration of *hiba*, an acceptance, express or implied, of the gift by the donee and delivery of possession of the property, the subject-matter of the gift according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift and if a gift is made by writing without delivery of possession, it is invalid in law.

A deed of gift executed by a Muhammadan is not an instrument effecting, creating or making the gift but a mere piece of evidence and does not, therefore, require registration. **C** NASIB ALI *v.* WAJED ALI, 44 C. L. J. 490; A. I. R. 1927 Cal. 197 **296**

——— *Gift to minor in donor's custody—Delivery of possession, whether necessary—Lawful custody, meaning of.*

Under Muhammadan Law delivery of possession is not necessary to render a gift valid, where the donee is a minor in the lawful custody of the donor. Lawful custody for the purposes of this rule includes the custody of a person who has actual control of the minor with the consent of the legal guardian and is not limited to the custody of such persons as come first in the line of succession of those entitled to claim guardianship. **A** MOHAMMAD YUSUF *v.* MOHAMMAD ISMAIL, A. I. R. 1927 All. 414 **1022**

——— *Onerous gift—Discharge of debts and maintenance of donor by donee—Gift, whether revocable—Gift to non-Muhammadan—Muhammadan Law, whether applicable—Delivery of possession, necessity of—Gift of equity of redemption, validity of.*

A gift by a Muhammadan on account of natural love and affection is revocable. But, where the gift is burdened with something to be done by the donee, and if the donee does that which is required by the donor to be done, the gift becomes irrevocable.

Where a donee was directed under a deed of gift to pay off the debts of the donor and look after and maintain the donor and at least for 10 or 12 years the donee so looked after him attending to his creature comforts and maintaining him, and also paid off the debts as required, the gift cannot be revoked by the donor. It is immaterial that the debts were paid out of the property gifted by the donor himself.

Where a gift is made by a Muhammadan, the mere fact that the donee is a person belonging to a different persuasion, by itself, is not sufficient, to take the gift out of the ordinary incidents of the Muhammadan Law relating to gifts.

Under the Muhammadan Law delivery of possession is necessary in order to make a gift valid. By possession in this connection is meant such possession as the nature of the subject of the gift is capable of and the question, whether there has been a complete delivery or not in a particular case is a question of fact to be determined with regard to the intention and the contract of the parties and the nature of the property concerned in each case. It is not necessary in every case that the donor should formally depart from the premises forming the subject of the gift and that there should be a formal entry on the part of the donee.

If the intention of the donor is clear that the donee should have possession of the property, the mere fact that the donor happened to live in the house which was the subject of the gift is not sufficient to make the possession of the house that of the donor.

A gift of the equity of redemption by a Muhammadan is valid in Muhammadan Law, where the donee himself redeems the property.

A deed of gift must be looked at as a whole. The fact that some of the items of gift constitute the equity of redemption in certain properties does not affect the validity of the gift, where delivery of possession is made to the donee in respect of the other items and redemption is effected in respect of the equity of redemption by the donee himself. **M** AJAGAR HAZAR SAHEB *v.* CHEDALAVADA ANNAMMAH, A. I. R. 1927 Mad. 572 **62**

——— **Husband and wife**—*Restitution of conjugal rights—Cruelty and ill-treatment—Suit not instituted* bona fide, *effect of.*

In the case of Muhammadans a suit for restitution of conjugal rights is in the nature of a suit for specific performance, being founded on a contract of marriage, which the Muhammadan Law regards as a civil one. Even therefore, if the validity of the marriage is established, the relief of restitution of conjugal rights may be refused on such grounds as that its enforcement would be prejudicial or dangerous to the health, happiness or life of the wife. There must, however, be either violence of such a character as to endanger the personal health or safety of the wife or a reasonable apprehension of such violence.

Under the Muhammadan Law any reprehensible conduct on the part of the husband if properly proved affords good ground for refusing the assistance of the Court in a case of restitution of conjugal rights. For instance, if it is proved that the suit is not a genuine and *bona fide* one for restitution of conjugal rights but that the real object of the suit is to obtain possession of the wife's property, the suit must be dismissed.

Where a wife is turned out or ill-treated so as to make it impossible for her to live with her husband or where the breach between the husband and wife is irremediable so that it is impossible for the latter to return to the former after many years' separation without leading to fresh trouble and dispute, she is entitled to maintenance by living separate from him. This principle applies equally to the case of a Hindu or a Muhammadan, whether the question arises under s. 488 of the Criminal Procedure Code or in a suit for restitution of conjugal rights. **N** KHURSHID BEGUM *v.* ABDUL RASHID, A. I. R. 1927 Nag. 139 **169**

——— **Inheritance.** *See* LIMITATION ACT, 1908, SCH. I, ART. 144 **145**

——— *Co-heirs—Mortgage by co-heirs in possession, for ancestor's debt—Share of absent co-heir, whether liable—Decree by absent co-heir against other heirs for his share, effect of.*

A mortgage executed by the heirs of a deceased Muhammadan who were in actual possession of his estate, for a debt of the deceased, can be enforced against the whole estate including the share of the co-heirs who were not in possession and who had not joined in the execution of the mortgage.

The fact that in a suit brought by one of the co-heirs against the executants of the mortgage for the recovery of his share in the estate, the question was not raised does not in any way debar the mortgagee from enforcing his charge against the entire estate. A ABDUL AZIZ KHAN *v.* MUHAMMAD HUSAIN, A. I. R. 1927 All. 415 **661**

——— **Pre-emption**—*First and second demands—Witnesses, presence of—Procedure.*

Where a pre-emptor under the Muhammadan Law makes the first demand in the presence of witnesses and asks the witnesses to accompany him to the vendee in order that a second demand might be made in their presence and the second demand is in fact made in the presence of the witnesses and their attention is attracted to it, the mere omission of the pre-emptor to ask the witnesses in express terms to bear testimony to the fact of the demand having been made would not be fatal to his right to enforce pre-emption. A AHMAD HAKIMULLAH *v* MOHAMMAD HIKMAT ULLAH, 25 A. L. J. 312; A. I. R. 1927 All 289; 49 A. 385 **39**

——— **Waqf**, *creation of—Property dedicated for upkeep of* khanqah, *whether* waqf—*Dedication of income, effect of—Grant in name of* sajjadanashin, *effect of—Government, whether can create* waqf—*Decree against* sajjadanashin—Waqf *property, whether can be attached.*

A *khanqah* is a religious institution like a monastery where disciples live and religious instruction is imparted to them.

Under the Muhammadan Law the moment a *waqf* is created all rights of property pass out of the *waqif* and vest in God. The curator, whether called a *mutawalli* or *sajjadanashin* or by any other name, is merely a manager of the property and not a "trustee" as understood in the English system of law.

Where property is given to the *sajjadanashin* of a *khanqah* for the purposes of the maintenance of the *khanqah*, it cannot be said that the property is given to the *sajjadanashin* personally and not to the institution. The gift is virtually according to the spirit of the Muhammadan Law, to God Almighty for the purpose of the upkeep of the institution and the property must, therefore, be regarded as *waqf*.

Where the income of any specified property is to be permanently devoted to certain religious and charitable objects, such a permanent dedication is termed *waqf*, and it is not absolutely necessary in order to create a *waqf* that this term should be used in the instrument creating it.

Just as a private person can create a *waqf* by dedicating the income of certain property to the maintenance of a religious or charitable object, so Government may create a *waqf* by directing that the income of the property should go towards the upkeep of a religious institution.

Where property has been gifted or devised to a trustee with the object of providing for certain religious duties, neither the whole nor any portion of the corpus can be sold in execution of a decree obtained against the trustee personally.

Certain property had been granted by the Kings of Oudh to the *sajjadanashin* of a *khanqah* for the upkeep of the *khanqah*. After the introduction of the British Administration into the Province of Oudh the Chief Commissioner of Oudh, under the authority of the Governor-General-in-Council, confirmed the grant and stated expressly in the *sanad* that the tenure granted by the former Government was maintained. It was, however, further stated that in certain conditions the grant would be resumed:

Held, (1) that the property comprised in the original grant had become *wakf* under the Muhammadan Law;

(2) that the British Government had restored to the *sajjadanashin* the same tenure which he was in possession of, prior to Lord Canning's Proclamation and that the property, therefore, continued to be *wakf* in spite of the terms of the Proclamation;

(3) that inasmuch as it was expressly provided by the Crown Grants Act that it was open to the Crown to impose limitations and restrictions upon grants made by it or under its authority and that such conditions and limitations were to be valid notwithstanding any rule of law to the contrary, the condition laid down in the *sanad* that the grant would be resumed in certain events did not operate to take away from the property the character of *wakf*.

(4) that, therefore, the property was not liable to attachment and sale in execution of a decree obtained against the *sajjadanashin* personally. O SHAH MOHAMMAD NAIM ATA *v.* MOHAMMAD SHAMSH-UD-DIN, 4 O. W. N. 116; A. I. R. 1927 Oudh 113; 2 Luck. 109 **241**

——— **Waqf**—*User—Question of fact—Appeal, second—Interference by High Court.*

A *waqf* may be presumed by user, but the question whether such user has been established is a question of fact to be decided upon the evidence adduced in the case on either side. Where it is found that such user is not established and the finding is based upon legal evidence, it cannot be interfered with in second appeal. A IRSHAD HUSAIN *v.* MAKUT MANOHAR, A. I. R. 1927 All. 377 **626**

——— **Will**—*Bequest in excess of one-third—Shia Law - Consent of heirs, whether should be obtained after testator's death—Death of legatee before testator's death—Legacy, whether descends to legatee's heirs.*

The consent of the heirs required under Shia Law to validate a bequest of more than one-third of the testator's estate may be obtained before the death of the testator.

If a legacy is not adeemed by the testator, the death of the legatee before the death of the testator does not cause a lapse. It descends to the legatee's heirs. A HUSENI BEGAM *v.* MOHAMMAD MEHDI, 25 A. L. J. 382; A. I. R 1927 All. 340 **673**

Mutation, effect of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 54 **270**

——— *proceedings, nature of—Title to immoveable property, whether affected—Adverse entries in revenue papers, effect of.*

Adverse entry in revenue papers does not debar a person from setting up his ownership and title in a civil suit. Mutation proceedings in Revenue Courts are not proceedings in which the title to and proprietary rights in immoveable property are determined. A NARAIN SINGH *v.* DESRAJ, L. R. 8 A. 45 Rev. **687**

Nattukottai Chettiles. *See* HINDU LAW **655**

Negligence—*Fire—Emission of sparks from Railway engine—Liability of Company for damages—Burden of proof of want of negligence.*

Where fire is caused by a spark from a Railway engine, the Company will be liable for damages caused by such fire in the absence of evidence to show that the Company had taken all reasonable precautions to avoid the emission of such sparks as are likely to destroy the adjoining property. In such cases it is not on the injured party to prove negligence on the part of the Company, but the onus is on the Railway Company to prove that it had taken the necessary precautions. A SECRETARY OF STATE FOR INDIA *v.* DWARKA PRASAD, 25 A. L. J. 336; A. I. R. 1927 All. 349 **640**

Negotiable Instruments Act (XXVI of 1881), ss. 8, 78—*Provincial Small Cause Courts Act (IX of 1887), s. 25—Promissory note—Payment to real lender, plea of, whether can be entertained—Mistake of law—Revision—Interference by High Court.*

There should be no interference under s. 25 of the Provincial Small Cause Courts Act unless it clearly appears that some substantial injustice to a party has directly resulted from a material mis-application or mis-apprehension of law or material error in procedure committed by the lower Court. Any decree passed on a wrong view of law must cause substantial injury to some party in the suit but every such injury is not necessarily an injustice inviting interference under s. 25.

The effect of s. 78 of the Negotiable Instruments Act read with s. 8 of the Act is that a promissory note can only be discharged by payment made to the holder of the note and, therefore, in a suit upon such note evidence cannot be allowed to be given to show that the note was not really executed in the plaintiff's favour or that it had been discharged by payment to the person who was the real payee of the note. Where, however, such evidence is admitted by a Small Cause Court and the suit is dismissed on the finding that the defendant took nothing from the plaintiff and has paid off the amount of the note to the real lender, the High Court will not interfere with the decree in revision under s. 25 of the Provincial Small Cause Courts Act, inasmuch as no substantial injustice is caused to the plaintiff by reason of the erroneous view of law adopted by the trial Court. A MADAN LAL *v.* LAL CHAND, 25 A. L. J. 402; A. I. R. 1927 All. 463 **703**

——— **s. 13, Expl. 1.** *See* STAMP ACT, 1899, s. 2 (5) (B) **630**

——— **ss. 27, 82**—*Bill of Exchange—Renewal by drawer without acceptor's consent—Acceptor, whether discharged.*

The renewal of a Bill of Exchange without the consent of the acceptor does not discharge the acceptor from his liability.

When a cause of action for money is once complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always, as a rule, sue for the original consideration provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. A PUNJAB NATIONAL BANK *v.* TAJAMMUL HUSAIN-BISHESHAR NATH, 25 A. L. J. 102; A. I. R. 1927 All. 236; 49 A. 257 **341**

——— **s. 28**—*Pro-note executed on behalf of firm—Personal liability of executants—Partnership—Adjudication of partner as insolvent—Liability of other partners on pro-note executed on behalf of firm but signed by all individually—Composition by insolvent partner, effect of.*

Where a promissory note executed on behalf of a firm is signed by all the partners without any indication that they signed it as agents, all the partners are personally liable.

The adjudication of a partner of a firm in his firm's name as insolvent and his composition with the creditors of the firm does not absolve the other partners who are not parties either to the insolvency proceedings or composition, of their personal liability under a promissory note executed on behalf of the firm but signed by all of them individually to the extent to which it remains unsatisfied. R FATIMA BIBI *v.* MOHIDEEN, 4 R. 551; A. I. R. 1927 Rang. 99 **277**

——— **s. 46**—*Evidence Act (I of 1872), s. 92—Promissory note, suit on—Oral evidence to show that note can be enforced only in certain contingencies, admissibility of.*

The liability in relation to a promissory note, or negotiable instrument, attaches by or from delivery, and s. 46 of the Negotiable Instruments Act provides that as between the immediate parties to an instrument it may be shown that the instrument was delivered conditionally, or for a special purpose only and not for the purpose of transferring absolutely the property therein.

In answer to a suit on a promissory note it is open to the defendant to lead evidence to show that the promissory note was given merely as a security for the plaintiff's share of the capital advanced towards a partnership and that the promissory note can be enforced only when such capital becomes payable to the plaintiff. A SHEO PRASAD-RAM PRASAD *v.* GOBIND PRASAD, 25 A. L. J. 305; A. I. R. 1927 All. 292 **332**

——— **s. 78.** *See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 8, 78 **703**

——— **s. 82.** *See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 27, 82 **341**

Oaths Act (X of 1873), ss. 9 to 11—*Agreement to abide by oath—Application for withdrawal—Duty of Court—Summary dismissal of application, whether proper—Party's right to withdraw for proper reasons—Discretion to administer oath.*

Although there is nothing in the Oaths Act which allows a party to retract after his opponent has accepted a proposal to abide by an oath, the Act gives the Court a discretion to administer the oath or not. Where a party, after agreeing to an oath applies to resile from the agreement, the proper course, therefore, for the Court is to examine the grounds upon which it desires to withdraw from the reference and to satisfy itself whether the reasons given are satisfactory or not. If the Court is satisfied that there are good reasons for withdrawing, it should refuse to administer the oath and if, on the other hand, it is satisfied that the grounds are not good it should administer the oath and decide the case in accordance with the agreement. A summary dismissal of the application to withdraw from the reference on the ground that a party could not resile from such an agreement is illegal. A SALIK RAM *v.* WALI AHMAD, 25 A. L. J. 297; 49 A. 388 **473**

Opium Act (I of 1878), ss. 14, 15—*Criminal Procedure Code (Act V of 1898), s. 103—Search—Procedure—Non-compliance with provisions of s. 103, whether vitiates conviction.*

The provisions of s. 103 of the Code of Criminal

Opium Act—concld.

Procedure are applicable to searches made under s. 14 of the Opium Act, but where a person is searched in an open place under s. 15 of the Act compliance with the provisions of s. 103 is not obligatory. **R** KALI KUMAR DE *v.* EMPEROR. 6 Bur. L. J. 11; 28 Cr. L. J. 372; A. I. R. 1927 Rang. 170 **980**

Orissa Tenancy Act (II of 1913), s. 117. *See* BENGAL TENANCY ACT, 1885, s. 103 **701**

Oudh Courts Act (IV of 1925), s. 12. *See* UNDER-PROPRIETARY RIGHTS **851**

Oudh Estates Act (I of 1869), ss. 3, 8, 10, 22, 23—*Entry of name of grantee in List 3—Conclusive evidence of primogeniture grant—Succession.*

By virtue of the provisions of s. 10 of the Oudh Estates Act Courts are bound to take judicial notice of the Lists prepared under the Act and to regard them as conclusive evidence of the facts they record.

The inclusion of a grantee's name in List 3, is, therefore, in the absence of evidence to show that the name was wrongly inserted, conclusive evidence that the *sanad* obtained by him was a primogeniture grant.

On the death of a *taluqdar* holding under a primogeniture *sanad* without lineal male descendants, the *taluq* devolves under cl. 6 of s. 22 to his brothers. **P C** NAND RANI KUNWAR *v* INDAR KUNWAR, A. I. R. 1927 P. C. 8; (1927) M. W. N. 21; 4 O. W. N. 80; 31 C. W. N. 485; 52 M. L. J. 497; 25 L. W. 751; 45 C. L. J. 282; 1 Luck. 583 **485**

——— **s. 33**—*Award of British Indian Association—Construction—Provision for maintenance of relatives—Title not affected.*

The awards of "the British Indian Association," whether strictly falling within the purview of s. 33 of the Oudh Estates Act of 1869 or not, must be construed as making provision for the maintenance of the relatives of *taluqdars* and not deciding questions of title in lands. **O** MANESHUAR BUKSH *v.* RAM NATH, 4 O. W. N. 209; A. I. R. 1927 Oudh 142 **805**

Oudh Laws Act (XVIII of 1876), s. 9. *See* PRE-EMPTION **637**

——— **s. 10**—*Pre-emption—Transfer not amounting to sale—Device to evade pre-emption, effect of.*

Unless it is established that there has been a sale or the foreclosure of a mortgage no right of pre-emption arises under s. 10 of the Oudh Laws Act, and in each individual case the document of transfer is to be construed by the Court in order to determine whether there has been a sale or foreclosure of a mortgage.

The law does not say that a right of pre-emption arises when a person transfers property after a manner which produces the same results as a sale without being a sale. The law says that the property must be transferred by sale.

It is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which falls short of a sale but which may eventually have the same effect as a sale.

A transfer of a limited right in immoveable property, reserving to the transferor an annual payment of rent, does not amount to a sale so as to give rise to a right of pre-emption under s. 10 of the Oudh Laws Act, even if the amount of rent reserved is so small that the Court is able to find that the transfer is intended for all practical purposes to operate as a sale. **O** AJODHYA *v.* SHEO SHANKAR, 4 O. W. N. 137 **193**

Oudh Rent Act (XXII of 1886), s. 108 (10)—*Jurisdiction of Civil and Revenue Courts—Suit by tenant to recover holding against landlord or person in illegal possession—Tenant not previously in actual possession—Suit, whether cognizable by Revenue Court—Person other than landlord taking illegal possession—Payment of rent to and acceptance by the landlord, whether proof of actual possession.*

Where a tenant has never been in possession of his holding but merely tries to recover that holding whether from the landlord or from any other person whom he alleges to be in illegal possession thereof, the suit cannot be considered to be one cognizable by the Revenue Court. In order that a suit should be cognizable by the Revenue Court as falling within the provisions of s. 108 (10) of the Oudh Rent Act, it must be alleged and found that the plaintiff was at some time previous to the institution of the suit in actual possession of the land whether himself or through his sub-tenants and had subsequently been ejected by the landlord. If somebody else besides the landlord has illegally taken possession of the holding the remedy must be sought in the Civil Court and not in the Revenue Court. The mere fact that the plaintiff paid the rent and the landlord accepted it does not, in any way, show that the plaintiff actually had at any time obtained possession of the holding which had been let out to him by the landlord.

In order to have a suit cognizable by the Revenue Court under s. 108 (10) of the Oudh Rent Act it must be one where the tenant must have been previously in possession and where his ejectment must have subsequently taken place owing to an act of the landlord. Unless these two elements are established a suit cannot be considered to fulfil the description of a suit covered by s. 108, cl. (10), Oudh Rent Act, which would be cognizable by the Revenue Court and Revenue Court alone.

The heading "suits by an under-proprietor or a tenant" in s. 108 of the Oudh Rent Act refers to suits brought either by an under-proprietor or a tenant against the superior proprietor or the landlord and if a suit has been brought by a person alleging himself to be a tenant against another person who has prevented him from taking possession of the holding, having himself taken possession of the same forcibly and illegally, the suit is not one contemplated to be cognizable by the Revenue Court under s. 108 of the Oudh Rent Act.

The words "recovery of the occupancy" in s. 108, cl. (10), of the Oudh Rent Act indicate recovery of actual possession of the land as distinguished from merely constructive possession and the words "illegally ejected" in the said clause imply that the tenant was previously in possession and had subsequently been ejected. **O** GAYADIN *v.* LODHI, 4 O. W. N. 109; A. I. R. 1927 Oudh 108; L. R. 8 A. (O.) 145 Rev.; 2 Luck. 137 **199**

——— **s. 140**—*Settlement Court decree—Decree for under-proprietary rights—Cash allowance granted to under-proprietor from* zemindar—*Suit for rent—Plea of payment by under-proprietor in shape of cash allowance—Set-off.*

A decree of a Settlement Court granted under-proprietary rights to the defendant on payment of a rent of Rs. 32 per annum and at the same time allowed him an annual cash allowance of Rs. 33 and odd in the same rights against the *zemindar*. In a suit by the *zemindar* for rent the defendant pleaded payment of the rent inasmuch as the plaintiff had not paid the *nankar* due to him:

Held, (1) that the decree for cash allowance and for

Oudh Rent Act—concld.

the lands being interdependent and the cash allowance having practically reduced the rent of the under-proprietary tenure, the *zemindar* was not entitled to recover rent;

(2) that the plea of the defendant was not one of set-off and was not, therefore, barred by s. 140 of the Oudh Rent Act. O GANDA PRASHAD *v.* MAHADEO BUX, A. I. R. 1927 Oudh 181 **788**

Oudh Sub-Settlement Act (XXVI of 1866), r. 10. *See* UNDER-PROPRIETARY RIGHTS **851**

Pacca adatia. *See* CONTRACT ACT, 1872, ss. 30, 45 **993**

Panchayat—*Suit by self-constituted* panchayat, *frame of—Substitution of parties after limitation, effect of—Promissory note—Right to sue.*

If a necessary party is joined as plaintiff or defendant after the time for the suit has run out the entire suit must be dismissed. Therefore, where in a suit brought in the name of a self-constituted *panchayat* without any legal powers, the members of the *panchayat* are substituted as plaintiffs by way of amendment after the expiry of the period of limitation for the suit, the suit must be dismissed as time-barred.

The members of a *panchayat* cannot institute a suit upon a promissory note which is executed in favour of the *Sirkar Daulatmadar* through one of its members. L DEVI DAYAL *v.* NARAIN SINGH **859**

Parti land—*Sale of tree by sub-tenant—Purchaser's rights.*

Although the sale of a tree standing on *parti* land by a sub-tenant is of no avail as against the *zemindar*, yet the purchaser acquires a possessory title to the tree, and is, therefore, entitled to recover damages from a person who wrongfully cuts and misappropriates the tree. A JAWAHIR GIR *v.* JAGARNATH PRASAD **315**

Parties—*Impleading of party at one stage, effect of.*

An introduction of a plaintiff or defendant for one stage of a suit is an introduction for all stages. M SUNDARAMMAL *v.* SUNDARA REDDI; 38 M. L. T. 148; A. I. R. 1927 Mad. 560 **338**

——— Mortgage suit. *See* C. P. C., 1908, O. XXXIV, R. 1 **195**

——— Mortgage suit—Non-joinder of necessary parties—Dismissal- Appellate Court—Interference. *See* C. P. C., 1908, O. I, R. 9 **198**

——— Probate appeal. *See* WILL **162**

Partition—Partial partition—Objection, whether can be raised in a appeal. *See* HINDU LAW—JOINT FAMILY **202**

———, *suit for—Plaintiffs claiming share for themselves and some defendants—Procedure.*

Where in a suit for partition the plaintiffs claim along with some of the defendants a certain definite share in the property in dispute and those defendants do not object to that share being assigned to the plaintiffs, the share may be assigned to the plaintiffs jointly along with the defendants who are entitled to such share. A MOHENDRA DUBE *v.* RAM BHAJAN **52**

——— **suit**—Court-fees—Necessary parties. *See* COURT FEES ACT, 1870 **17**

Partnership—Illegal partnership. *See* CONTRACT ACT, 1872, ss. 23, 239 **846**

——— Illegal partnership—Suit for partition of property, whether maintainable. *See* PUBLIC POLICY **50**

——— Insolvency—Liability of partner. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 42 **550**

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——— Insolvency of partner—Liability of other partners. *See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 28 **277**

——— Pro-note—Liability of partner. *See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 28 **277**

——— Surviving partners—Right to sue. *See* CONTRACT ACT, 1872, ss. 30, 45 **993**

Part performance.

See PLEADINGS AND PRACTICE **566**

See VENDOR AND PURCHASER **568**

——— *Applicability of the doctrine—Right to specific performance, whether should be subsisting—Doctrine, whether creates title—Exchange of lands—Delivery of possession—Subsequent dispossession—Absence of registered deed—Transfer of Property Act (IV of 1882), s. 54—Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit, effect of—Limitation Act (IX of 1908), Sch. I, Arts. 142, 143, 144*

The defendant took forcible possession of a portion of plot A belonging to the plaintiffs. The latter sued for recovery of possession. The defendant agreed to give plot B in exchange and the plaintiffs withdrew their suit in 1916. The plaintiffs were put in possession of plot B but no deed of exchange was drawn up. The defendant wanted the remaining portion also of plot A and on his agreeing to pay for the same the plaintiffs put him in possession of this portion. In 1918, the defendant dispossessed the plaintiffs of plot B and refused to pay for the portion of plot A as agreed upon. The plaintiffs, in 1921, sued for recovery of possession of (1) the first portion of plot A on declaring their title thereto or for plot B in exchange with a duly executed conveyance of the same, and (2) for the remaining portion of plot A after demolition of the structures built by the defendant:

Held, (1) that the prayer for execution of a conveyance relating to plot B was barred by limitation;

(2) that the prayer for recovery of possession of the same on declaration of title came within Art. 142 of the Limitation Act and was not, therefore, barred;

(3) that the plaintiffs had no right to recover plot B as there was no registered instrument of exchange;

(4) that the claim to recover the first portion of plot A was barred under O. XXIII, r. 1, Civil Procedure Code, inasmuch as the plaintiffs had not obtained leave to institute a fresh suit;

(5) that the order of dismissal passed in on withdrawal did not affect their right to recover the second portion of plot A;

(6) that the claim to recover the second portion of plot A was not barred by limitation nor by the fact that the defendant had built structures thereon.

The doctrine of part performance is applicable only in those cases where specific performance can be obtained.

Estoppel arising out of the equitable doctrine of part performance will not create a title in persons in whom it does not otherwise exist. C KALIPADA BASU *v.* FORT GLOSTER JUTE MANUFACTURING CO. LTD., 31 C. W. N. 348; A. I. R. 1927 Cal. 365 **886**

——— Principle whether applicable to void sales. *See* C P. C., 1908, SCH. III, PARA. 11 **863**

Penal acts—Strict construction—Benefit of doubt to subject. *See* PUBLIC GAMBLING ACT, 1867, ss. 4, 5 **716**

Penal Code (Act XLV of 1860), ss. 34, 35, 96, 304—*Section 34, whether applies to s. 304, Part II—Offence under s. 304, Part II, essentials of—Right*

of private defence, accused's duty to plead—Charge to Jury.

Although to constitute an offence under s. 304, Part II of the Penal Code there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death.

Section 34 of the Penal Code can be applied to a case under the second part of s. 304 of the Code.

A Judge is not bound to explain to the Jury the law of the right of private defence, where the accused themselves have never pleaded that they acted in the exercise of the right of private defence.

If a person raises the defence that he acted in the exercise of the right of private defence he must prove it. He must set forth the exact circumstances in which he acted to show that he was justified in what he did. **C** ADAM ALI TALUQDAR *v.* EMPEROR, 31 C. W. N. 314; 45 C. L. J. 131; A. I. R. 1927 Cal. 324; 28 Cr. L. J. 334 **718**

——— **ss. 75, 379, 419**—*Previous conviction for theft—Subsequent conviction for false personation—Enhancement of sentence.*

Previous convictions for theft and burglary cannot be taken into account for enhancing the sentence, under s. 75, Penal Code, where the subsequent offence committed by the accused is cheating by personation falling under s. 419, Penal Code. **L** QAIMI *v.* EMPEROR, 28 Cr. L. J. 312, A. I. R. 1927 Lah. 220 **536**

——— **s. 96.** *See* PENAL CODE, 1860, ss. 34 ETC. **718**

——— **s. 97**—*Right of private defence of property—Possession, affirmative evidence of, whether necessary—Presumption of possession.*

In order to establish the right of private defence of property it is not necessary for the accused to prove his possession affirmatively; he can rely on the presumption of continuance of possession arising in his favour from the circumstances of the case. **Pat** JAINATH *v.* EMPEROR, 28 Cr. L. J. 303; A. I. R. 1927 Pat. 181 **383**

——— **ss. 97, 99**—*Right of private defence—Importance of the plea—Magistrates, duty of.*

In the excitement and confusion of the moment it is not to be expected that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though the counter-attack should not be out of all proportion to the force employed in the original attack.

A Magistrate should not in his zeal to suppress crimes of violence overlook the importance of the provisions of law as regards the right of private defence. **L** AHMAD DIN *v.* EMPEROR, 28 Cr. L. J. 252; A. I. R. 1927 Lah. 194 **124**

——— **ss. 97, 147**—*Unlawful assembly—Common object, proof of—Execution of decree—Possession delivered to decree-holder—Judgment-debtor allowed to collect crops—Entry by decree-holder—Private defence of property, right of.*

In order to establish the common object of an unlawful assembly it is not necessary to prove that its members actually met and conspired to commit an offence; such intention can be inferred from the circumstances of the case. In the case of a concerted attack by five or more persons upon another it is a perfectly valid and reasonable inference that they all had a common object and were, therefore, members of an unlawful assembly.

Where in execution of a decree for possession of land, possession is given to the decree-holder, but the judgment-debtor is not actually ejected from the land by reason of the fact that his crops are standing on the land and he is allowed to collect the crops when they mature, the decree-holder is entitled to enter upon the land after the crops have been collected and if such entry is resisted by the judgment-debtor it cannot be held that the decree-holder was an aggressor and that the judgment-debtor had any right of private defence of property against the action of the decree-holder. **L** LAJJA *v.* EMPEROR, 28 Cr. L. J. 264; 9 Lah. L. J. 209; 28 P. L. R. 273; A. I. R. 1927 Lah. 193 **232**

——— **ss. 114, 330**—*Stimulating commission of offence by remarks and suggestions—Abetment—'Instigation'.*

While some persons were voluntarily causing hurt to another, the accused who was standing by expressed his approval of the conduct of the assailants and suggested that the victim should be given a sound beating. It was found that blows were inflicted after the accused's remarks:

Held, that the accused stimulated the commission of the offence and, therefore, was guilty of abetment.

Instigation necessarily connotes some active suggestion or support or stimulation to the commission of the act itself. **A** NAZIR AHMAD *v.* EMPEROR, L. R. 8 A. 28 Cr.; 28 Cr. L. J. 313 **537**

——— **s. 120-B**—*Arms Act (XI of 1878), ss. 19 (f), 22—Conspiracy, what amounts to—Conspiracy to possess fire-arms without license—Fire-arms not in existence—Offence.*

Section 22 of the Arms Act deals with persons without license dealing with licensed vendors or purchasers, or with persons with license dealing with unlicensed vendors or purchasers.

An offence under s. 120-B of the Penal Code consists in the conspiracy without a reference to the subject-matter of the conspiracy.

Criminal conspiracy consists in the agreement of two or more persons to commit an offence punishable by law. It is true that the law does not take notice of the intention or the state of mind of the offender and there must be an overt act to give expression to that intention. The overt act in a case of conspiracy, however, consists in the agreement of the parties and in the case of an agreement to commit an offence it is not necessary in order to constitute the offence of conspiracy that the agreement should be followed by some act.

A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means.

Where two or more persons conspire to possess fire-arms without a license, they are guilty of an offence under s. 120-B of the Penal Code read with s. 19 (*f*) of the Arms Act and it is not necessary for the prosecution in such a case to specify in the charge or to prove that the accused conspired to possess any particular arms or that any such fire-arms were actually in existence. **C** NIRMAL CHANDRA DE *v.* EMPEROR, 31 C. W. N. 239; 28 Cr. L. J. 241; A. I. R. 1927 Cal. 265 **113**

——— **ss. 143, 147**—*Unlawful assembly—Members, when guilty of rioting—Use of force by some members, necessity of—Identity of assembly—Question of fact—Mere common object, whether sufficient.*

Where it is found that the accused were member

Penal Code—contd.

of an unlawful assembly having a common object and made an assault or preparation to use force or violence, in the absence of proof that some members of the unlawful assembly which they joined used force or violence in prosecution of their common object, they cannot be convicted of rioting under s. 147 of the Indian Penal Code, but can be convicted only of being members of an unlawful assembly under s. 143 of the Code.

Where members of two assemblies do not mingle together at any time or place, the mere fact that they have a common intention will not make them one assembly. The question whether two groups of men do or do not form one "assembly" is a question of fact in each case.

Where two mobs start from different localities and operate independently and never come close to each other, they cannot be considered to be members of one assembly, though their object be the same. **O** WAJID ALI *v.* EMPEROR, 4 O. W. N. 240; A. I. R. 1927 Oudh 151; 28 Cr. L. J. 337 **817**

——— **s. 147.** *See* PENAL CODE, 1860, ss. 97, 147 **232**

——— **s. 188**—*Order under s. 144—Disobedience—Knowledge of accused, evidence of—Promulgation of order, whether sufficient for conviction.*

It is not sufficient in order to affect a person with the knowledge of an order under s. 144 and to render him liable to conviction under s. 188 to show that the order had been duly promulgated. It is necessary to prove by positive evidence that he has the knowledge that the order has been made. **C** SHEIKH ABDUL *v.* EMPEROR, 31 C. W. N. 340; 45 C. L. J. 202; A. I. R. 1927 Cal. 306; 28 Cr. L. J. 350 **830**

——— **s. 193.** *See* CR. P. C., 1898, s. 195 **529**

——— **s. 199**—*Written statement of party, whether 'a declaration which any Court of Justice is bound or authorised to receive'—False statement in written statement—Offence.*

A written statemant filed by a party under O. VIII, r. 1, of the Civil Procedure Code, is not a declaration which any Court of Justice is bound or authorised by law to receive within the meaning of s. 199 of the Penal Code, and a person who makes a false declaration in a written statement does not, therefore, commit an offence under the section. **A** JANKI RAI *v.* EMPEROR, 25 A. L. J. 327; L. R. 8 A. 62 Cr.; 28 Cr. L. J. 323; A. I. R. 1927 All. 383 **707**

——— **s. 224**—*Arrest—Escape from custody—Acquittal of accused—Conviction for escape from custody, legality of—'Charged,' meaning of.*

An accused person legally arrested for an offence must submit to be tried and dealt with according to law and if he gains his liberty before he is delivered by due course of law he commits the offence of escaping from lawful custody under s. 224 of the Penal Code.

It would be an offence for a man to escape from custody after he has been lawfully arrested on a charge of having committed an offence although he may not have been subsequently convicted of such latter offence.

The word 'charged' is used in s. 224 of the Penal Code in the popular sense as implying inculpation of an alleged offence as distinguished from a charge formulated after trial. **B** KALIA AMRA *v.* EMPEROR, 29 Bom. L. R. 168; A. I. R. 1927 Bom. 96; 28 Cr. L. J. 380 **988**

——— **s. 235**—*Counterfeiting of coins—Sentence.*

A deterrent sentence should be passed for an offence connected with counterfeiting of coins. **L** EMPEROR *v.* SARDARA SINGH, 28 Cr. L. J. 305; A. I. R. 1927 Lah. 220 **529**

——— **s. 302**—*Murder—Motive, inadequacy of, effect of.*

Where the evidence of the accused having committed the offence of murder is clear it is immaterial whether the motive alleged for the offence is or is not adequate. **L** SHERA *v.* EMPEROR, 28 Cr. L. J. 258 **226**

——— **s. 302**—*Murder—Person discovered near dead body immediately after murder holding weapon with which offence could have been committed, whether guilty.*

Immediately after the commission of a murder a half-witted brother of the deceased was discovered sitting in a corner of the room in which the murder was committed holding in his hand a weapon with which the injuries found on the person of the deceased could have been caused. The weapon was, however, not bloodstained and there was no other evidence connecting the brother with the murder of the deceased:

Held, that under the circumstances of the case it would not be safe to convict the brother of the murder of the deceased. **M** *In re* KARUPANA PILLAI, 28 Cr. L. J. 279 **359**

——— **s. 304.** *See* PENAL CODE, 1860, ss. 34 ETC. **718**

——— **ss. 307, 325.** *See* CR. P. C., 1898, s. 439 (6) **234**

——— **s. 330.** *See* PENAL CODE, 1860, s. 114 **537**

——— **s. 338**—*Rash driving of motor car—Contributory negligence, effect of—Motor driving—Driver's duty—Sentence.*

In a prosecution for rash and negligent driving, though contributory negligence is no defence entitling the accused to an acquittal, it is yet a fact or which should be taken into consideration in determining the sentence.

A person driving a car should always keep it in a state of control sufficient to enable him to avoid running into any passenger who may fail to step off the road, however annoying the dilatoriness of the foot passenger may be to him. **L** KANSHI *v.* EMPEROR, 28 P. L. R 99; A. I. R. 1927 Lah. 165; 28 Cr. L. J. 351 **831**

——— **s. 339**—*Restraining horse on which person is riding—Wrongful restraint.*

Restraining a horse on which a person is riding so as to prevent him from proceeding at the moment of restraint is wrongful restraint within the meaning of s. 339 of the Penal Code. **M** *In re* PERIA PONNUSWAMI GOUNDAN, 28 Cr. L. J. 320; A. I. R. 1927 Mad. 506 **544**

——— **ss. 354, 376, 511**—*Indecent assault—Attempt to commit rape—Hymen, rupture of, whether necessary to constitute rape.*

Though rupture of the hymen is by no means necessary in law to constitute the offence of rape, the Courts are reluctant to believe that there could have been penetration without that which is so very near to the entrance having been ruptured.

A female child aged 5½ years was discovered seated on the naked thighs of the accused who was a lad of eighteen years. The accused had taken off his own trousers and that of the girl. On medical examination of the girl it was found that with the exception of fresh redness at the entrance to the vagina, the girl bore no other mark of injury and her hymen was intact. There were no marks of blood or semen

on her person and she did not complain of having felt any pain as the result of the accused's assault upon her:

Held, that under the circumstances the accused was guilty of an attempt to commit rape and not merely of an indecent assault. L MEHRAJ DIN *v.* EMPEROR, 28 Cr. L. J. 244; A. I. R. 1927 Lah. 222 **116**

——— **s. 366** — *Abduction—Evidence — Woman abducted, a material witness.*

The most important witness in an abduction case is generally the abducted woman herself and where she is not forthcoming and the other witnesses are not of a very reliable type, the prosecution evidence must be carefully scrutinised and weighed. L GHULAM *v.* EMPEROR, 27 P. L. R. 747; 28 Cr. L. J. 277 **357**

——— **s. 376**—*Rape—Unchastity of girl—Sentence.*

Where in a case of rape it is found that the girl is of unchaste character, a very severe sentence is not called for. L IBRAHIM *v.* EMPRROR, 28 Cr. L. J. 256 **128**

——— **ss. 376, 511**—*Rape —Partial penetration—Hymen not injured—Rape or attempt to commit rape.*

Partial penetration which does not result in any injury to the hymen is sufficient to constitute the offence of rape. L ABDUL MAJID *v.* EMPEROR **113**

——— **ss. 378, 380, 441, 447, 454**—*"Building," meaning of—Cattle pound fenced without roofing, whether constitutes building—Rescue of impounded cattle from cattle pound—Offence, nature of.*

An open plot of land with a mere boundary fence, even with a masonry wall, cannot, for purposes of either s. 380 or s. 454, Indian Penal Code, be regarded as a building or a house.

The expression 'building', more especially having regard to the expressions 'tent' and 'vessel' that follow, must be regarded as indicating some structure intended for affording some sort of protection to the persons dwelling inside it or for the property placed there for custody. Any structure which does not afford any such protection by itself but merely serves as a fencing or other means of merely preventing ingress or egress cannot make the place a building or a house within the meaning of either of those two sections.

Where the owner of a buffalo which was impounded in an open plot with a mere boundary fence rescued it after opening a door of the pound by slipping the chain over the lock :

Held, that he committed an offence under s. 24, Cattle Trespass Act, and under ss. 378 and 441, Penal Code, but that he cannot be convicted either under s. 380 or s. 454, Penal Code. M *In re* LAKSHMANA GOUNDAN, 52 M. L. J. 143; 38 M. L. T. 163; 28 Cr. L. J. 248; A. I. R. 1927 Mad. 343 **120**

——— **s. 379.** *See* PENAL CODE, 1860, s. 75 **536**

——— **s. 405**—*Contract Act (IX of 1872), s. 30—Betting business—Undertaking by owner of business to forward money to race centres—Omission to forward money, whether constitutes criminal breach of trust—Contract being void, effect of.*

The accused started a betting business, the principal object of which was to provide facilities to constituents to back horses at various race meetings in India. He was to remit sums furnished by customers for this purpose to some person present at the race meeting, who would put them on the selected horses either through the totalizator or otherwise. Certain sums of money were placed in his hands as bets on horses running in the Poona races then taking place and on a charge against the accused of criminal breach of trust, under s. 405, Penal Code, in that he failed to forward the money to Poona as he was bound to do under the terms of the contract:

Held, that the contract being one of wager, within the meaning of s. 30 of the Contract Act, was void and there was, therefore, no violation of a legal contract within cl. (*b*) of s. 405, Indian Penal Code, and that the accused was not guilty of criminal breach of trust. M *In re* K. R. UPPASINI, 52 M. L. J. 179; A. I. R. 1927 Mad. 425; 28 Cr L. J. 381 **989**

——— **s. 409.** *See* CR. P. C., 1898, s. 562 **225**

——— **s. 409**—*Criminal breach of trust—Irregular drawing of public funds by public servant—Dishonest intention, absence of—Offence.*

The President of a Taluk Board drew out certain money from Taluk Board Funds, due in respect of certain works that were being carried on, on contingent bills with the object of preventing the moneys from lapsing at the end of the financial year. It was, however, against the Local Fund Rules to draw money on contingent bills before the work was actually completed and without a contract certificate bill after the work was check measured and passed. But the moneys though drawn out prematurely were ultimately used for the purpose for which they were drawn:

Held, that these facts did not import any dishonest or criminal intention and that the president could not be convicted of the offence of criminal breach of trust. M *In re* BISWANATH DAS, 28 Cr. L. J. 285; A. I. R. 1927 Mad, 533 **365**

——— **s. 419.** *See* PENAL CODE, 1860, s. 75 **536**

——— **s. 441**—*Criminal trespass—Intention, an essential ingredient.*

In order to constitute criminal trespass, it is necessary for the prosecution to prove that the accused either unlawfully entered upon property of another or having lawfully entered thereon continued to remain unlawfully *with intent* thereby to intimidate, insult or annoy the person in possession of such property or with intent to commit an offence.

Unlike several sections of the Penal Code, where *mens rea* consists in intention *or* knowledge, under s. 441, it is not sufficient to prove mere knowledge on the part of an accused person that he was likely to cause annoyance unless the evidence of such knowledge coupled with other facts is such as to lead the Court to infer therefrom the requisite intent. S KHURSETJI NANABHOY *v.* EMPEROR, 28 Cr. L. J. 349; A. I. R. 1927 Sind 159 **829**

——— **ss. 497, 498**—*Enticing married woman—Marriage, nature of evidence necessary to prove—Precedents as to sufficiency of evidence, value of —Evidence Act (I of 1872), s. 50.*

A Court, under the provisions of s. 50 of the Evidence Act, while not directed to exclude evidence of opinion as expressed by conduct to prove a legal marriage is directed not to base a finding that such a marriage has taken place upon the evidence of opinion alone. Outside that, a Court is at perfect liberty to arrive at a decision as to whether a legal marriage is in existence upon all relevant and admissible evidence, which is placed before it in the due course of law, and will decide upon such evidence whether such a marriage is or is not proved, when after considering the matter before it, it either believes it to exist or considers existence so probable that a prudent man ought, in the circumstances

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of a particular case, to act upon the supposition that it does exist.

It is not usually profitable for a Court in dealing with evidence in one case to endeavour to obtain much in the way of guidance from the way in which another Court dealt with different evidence in another case. **O** RAGHUPAT SINGH *v.* EMPEROR, 4 O. W. N. 172; 28 Cr. L. J. 311; A. I. R. 1927 Oudh 140 **535**

——— **s. 498**—*Hindu Law—Marriage among sub-castes, legality of—Offence relating to marriage—Necessity of strict proof of marriage.*

In proving an offence in which marriage is an essential ingredient it is necessary that the factum of marriage must be strictly proved.

It is doubtful whether there could be a valid marriage under Hindu Law between an Oriya male and Telegu female. **R** RAMANATHAN *v.* EMPEROR, 5 Bur. L. J. 190; 28 Cr. L. J. 268 **236**

——— **s. 499, Excep. 9**—*Defamation—Privilege of Advocate—Presumption of good faith—Malice, effect of.*

When a lawyer is acting in the course of his professional duties and is thus compelled, subject to the disciplinary action of the Court, to put forward everything which may assist his client, good faith is to be presumed; bad faith is not to be assumed merely because a statement by him is *prima facie* defamatory, but there must be some independent allegation and proof of private malice from which in the circumstances of the case the Court considers itself justified in inferring that the statement was not made because it was necessary in the interests of the client but that the occasion was wantonly seized as an opportunity to vent private malice.

Even in cases where some private malice is gratified by the publication of the statement, if such publication was imperatively called for in the interests of his duty to his client, the presence of such malice will not negative the presumption of good faith.

A Vakil appearing for the defence in an action for defamation, in the course of his argument made statements in Court, oral and written, to the effect that the defamatory statement was in substance true and had been set out as a fact in a reported judgment of the High Court in certain proceedings for professional misconduct against the Advocate. On a charge of defamation against the Vakil and his client:

Held (1) that, in the absence of anything to show that the client instructed the Vakil in the definite terms used by him in his argument, the client was not guilty of any offence;

(2) that the Vakil made the statement in good faith and came within the 9th Exception to s. 499, Penal Code, inasmuch as the truth of the statement was an essential element of the defence and the Vakil would have been gravely lacking in his duty to his client if, when he had its truth definitely set out in a public law report, he omitted to bring that to the notice of the Court before whom he was arguing **M** ANWARUDDIN *v.* FATHIM BAI ABIDIN, 25 L. W. 295; 52 M. L. J. 269; (1927) M. W. N. 164; 38 M. L. T. 130; 28 Cr. L J. 313; A. I. R. 1927 Mad. 379 **537**

——— **s. 511.** *See* PENAL CODE, 1860, ss. 376, 511 **113**

Pensions Act (XXIII of 1871), s. 4—*Suit between private parties relating to grant of land revenue, whether maintainable—Certificate, whether necessary.*

Section 4 of the Pensions Act is applicable to a suit between private parties to which the Government is not a party provided the suit relates to a grant of land-revenue. Therefore, a suit by a plaintiff to recover a share of the revenue of an *Inam* village from the defendant who has recovered the whole of such revenue, is not maintainable without a certificate from the Collector under s. 4 of the Pensions Act. **B** SADASHIV ATMARAM *v.* ANNABHAT VENKANBHAT KAVATHEKAR, 28 Bom. L. R. 1477; A. I. R. 1927 Bom. 81 **138**

Permanent Settlement, *land whether included in—Finding of fact—Appeal, second—Interference by High Court.*

In every case the question what lands were included in the Permanent Settlement of 1793, is a question of fact and not of law and where on the facts found the lower Appellate Court draws an inference that certain lands formed part of a particular estate at the time of the Permanent Settlement, the finding is one of fact which cannot be interfered with in second appeal. **C** MAYEUDDI *v.* MAHAMMAD RAZZAB ALI, A. I. R. 1927 Cal. 457 **507**

Permanent tenancy, proof of. *See* BENGAL TENANCY ACT, 1885, s. 182 **584**

Perpetuities.
See SPECIFIC RELIEF ACT, 1877, ss. 21, 23 (B) **399**
See TRANSFER OF PROPERTY ACT, 1882, ss. 14, 40 **683**

Pleadings—*Suit to recover rent on basis of lease—Lease not proved—Appeal, second—Part performance, doctrine of, whether can be relied upon.*

Plaintiff instituted a suit to recover rent of certain shops from the defendant on the basis of a lease. The suit was dismissed on the ground that a valid contract of lease had not been proved. In second appeal it was contended that the suit should be decreed in spite of the absence of a valid contract of lease on the basis of the doctrine of part performance:

Held, that the original ground on which the suit was based having failed the plaintiff could not be allowed, in second appeal, to set up a new case. **A** GANGA PRASAD *v.* SUKHDEO SAHU, A. I. R. 1927 All. 344 **566**

Possession—*Possessory title to be maintained against trespassers.*

Possession lawfully attained in the sense that it was not procured by force or fraud but peaceably, no one interested opposing, is entitled to be maintained against all comers except such as can plead a preferential title.

In a suit for confirmation of possession, therefore, where it is found that the plaintiff has title to a portion of the property in dispute and is in possession and that the defendant is a trespasser, the former is entitled to a decree. **C** GIRIBALA DASI *v* PROBHASH CHANDRA BATABYAL, 45 C. L. J. 126 **278**

———, *suit for—Title, proof of—Presumption.*

Where in a suit for possession title is found with the plaintiff and the evidence of possession is equally balanced on both sides, possession must be presumed to follow the title. **C** PRAMATHA NATH MALLIA *v.* RADHA KISHORE MUKHERJEE, A. I. R. 1927 Cal 344 **197**

Possessory title.
A possessory title is good against the entire world except the true owner. **A** JAWAHIR GIR *v.* JAGARNATH PRASAD 315

Mere previous possession, though peaceful and lawful, for less than the statutory period will not entitle a plaintiff to recover possession of land even though the person who has dispossessed him is not able to establish any title over the disputed land. **C** KALIPADA BASU *v.* FORT GLOSTER JUTE MANUFACTURING CO., LTD., 31 C. W. N. 348; A. I. R. 1927 Cal. 365 886

Powars. *See* HINDU LAW 457

Practice—*Admission of fresh evidence at late stage —Applicant's duty to prove diligence.*
When application is made at a late stage of a case to put in fresh evidence, one of the primary duties of the applicant is to show that it was owing to no want of diligence on his part that the matter was not discovered before **P C** KACHIREDDI NAGIREDDI *v.* SAKIREDDI CHINNA NARAYANAREDDI, A. I. R. 1927 P. C. 27; 31 C. W. N. 245; (1927) M. W N. 190; 38 M. L. T. 57; 25 L. W. 400; 52 M. L. J. 492; 45 C. L. J. 308; 29 Bom. L. R. 786 77

——— *Omission to raise clear issue—Parties not prejudiced—Procedure.*
The omission of a clear issue on a point is not very material when the parties have adduced evidence on the point and have not in any way been prejudiced thereby. **A** MEWA RAM *v.* LAL SAHAI, A. I. R. 1927 All. 410 650

——— *Person impleaded party during pendency of suit—Date of institution of suit against him.*
Where a person is impleaded a party to a suit during its pendency, the suit against such a party can be considered to have been instituted only on the date when he is made a party. **C** ASHRAFANNESSA KHATUN *v.* HEM CHANDRA CHAUDHURY, 44 C. L. J. 467; A. I. R. 1927 Cal. 216; 54 C. 114 293

——— *Second appeal—Reference to Full Bench—Full Bench of opinion that question referred does not arise—Procedure—Remand for disposal by Division Bench.*
When the reference is in a second appeal and the question, which has been referred to the Full Bench is decided by the Full Bench, then the Full Bench disposes of the second appeal. But, when the Full Bench considers that the point which has been referred does not arise, the matter is referred to the Division Bench for disposal. **C** HARIDAS MAJUMDAR *v.* GOLAM MAHIUDDIN FARUQI, 53 C. 955; A. I. R. 1927 Cal. 256 289

——— *Second appeal*—Res judicata, *question of, not pressed in Court below, whether can be raised.*
The question whether or not a plea not pressed in the first Appellate Court should be permitted in second appeal, is largely a question of the nature of the plea. Although the general rule may be that a plea once abandoned may not be revived in second appeal, such fundamental issues as limitation and *res judicata* which go to the root of the case, are exceptions to the rule and may be raised in second appeal even though not urged in the Courts below. **M** PATTRACHARIAR *v.* ALAMELUMANGALAMMAL, 25 L. W. 11; A. I. R. 1927 Mad. 273 40

——— *Suit based on false averments—Dismissal, whether legal—New plea of fact, whether allowable in appeal.*
A suit is not liable to be dismissed merely because it is based on false averments.

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A plea about which there were no pleadings in the trial Court should not be allowed to be raised at the stage of appeal at the instance of an unsuccessful litigant. **N** DESHRANI *v.* THAKAR KISHORE SINGH, 22 N. L. R. 175; A. I. R. 1927 Nag. 104; 10 N. L. J. 5 446

Precedent, value of. *See* PENAL CODE, 1860, ss. 497, 498 535

———, *value of.*
In a matter which is open to divergence of view a High Court should follow its own *cursus curiæ* unless it is of opinion that the former decisions of the Court are clearly wrong. **M** SATYANARAYANA *v.* CHINA VENKATARAO, 23 L. W. 277; 49 M. 302; A. I. R. 1926 Mad. 530; 50 M. L. J. 674 385

———, *value of—Construction of document whether question of law.*
Every judgment must be read as applicable to the particular facts proved or assumed to be proved in the case in which the judgment was delivered, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case. The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him.
The effect, however, of a document is a matter of construction and is a question of law and once this question has been decided in a certain way by the highest tribunal, its decision is binding upon subordinate Courts in any subsequent proceeding in which the construction of that document may be in dispute. **C** JANAKI NATH ROY *v.* HABIBULLAH SAHEB, 45 C. L. J. 151; A. I. R. 1927 Cal. 359 413

Pre-emption *See* MUHAMMADAN LAW 39

——— Contract for pre-emption—Liability of legal representatives. *See* TRANSFER OF PROPERTY ACT, 1882, ss. 14, 40 683

——— *Hindu widow—Alienation—Transfer by reversioner for costs of litigation, whether pre-emptible—'Sale', meaning of—Transfer of Property Act (IV of 1882), s. 54.*
A transfer by a reversioner of properties in the possession of alienees of a Hindu widow, in consideration of the vendee undertaking to find funds for conducting a litigation against the alienees and recovering possession of the properties, is not pre-emptible.
Per *Lindsay*, J.—Such a transfer is not a sale but a transfer of a share of the chance of success in a suit to be subsequently brought.
Per *Sulaiman*, J.—A transfer of property which has become vested in a reversioner on the death of a Hindu widow passes the proprietary title in it even though a suit may have to be instituted to recover actual possession. The vesting of such title is not postponed till the passing of a decree on which delivery of possession would be dependent. On the other hand, there may be cases where the cash price paid or promised is not the sole consideration for the transfer but in addition thereto there is an undertaking by the vendee to fight out a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is other than the cash price is not capable of exact valuation. A pre-emptor cannot be given a decree for pre-emption of

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the property sold in such a way. A KALYAN v. DESRANI, 25 A. L. J. 322; A. I. R. 1927 All. 361 610

——— *Pre-emptor, whether can put vendee to proof of title of vendor in respect of portion of property sold.*

In a suit for pre-emption it is open to the plaintiff to allege that the vendors have included in the sale-deed a share larger than that owned by them in the property sold in order to inflate the price and thus to defeat pre-emption. In such a case, the plaintiff is entitled to put the vendees to proof of the vendors' title in respect of the excess share sold by them. A IHSAN ULLAH v. FARHAT ALI, A. I. R. 1927 All. 374 456

——— Qabzadari *rights, whether under-proprietary rights—Under-proprietary rights, sale of—Pre-emption—Rival suits, dismissal of—Appeal in one suit—Appeal against decree in other suit, whether necessary.*

The word "*qabzadari*" may in some cases mean under-proprietary rights.

Where *qabzadari* rights in certain property were granted and the holders of those rights were described in the revenue papers as under-proprietors and were continuously treated as such:

Held, that the grant must be taken to be of under-proprietary rights and that the sale of such rights was open to pre-emption.

Two suits were instituted by two different persons to pre-empt the same sale and the plaintiff in each suit was impleaded as a defendant in the other suit. Both suits were dismissed and one of the plaintiffs appealed against the dismissal of his suit:

Held, that it was not necessary for him to file an appeal against the decree in the other suit. O BAHRAICHI v. TIRBENI SINGH, 4 O. W. N. 143; A. I. R. 1927 Oudh 106 450

——— *Transfer of land by Crown—Right of pre-emption—Oudh Laws Act (XVIII of 1876), s. 9.*

Where the Crown 'grants and transfers' land to an officer the transfer is not a sale pure and simple but there is an outstanding element of grant and no right of pre-emption arises under the Oudh Laws Act. O MATA GHULAM SINGH v. KALI DIN SINGH, A. I. R. 1927 Oudh 207 637

——— *Transfer pending pre-emption suit*—Lis pendens—*Withdrawal of suit by rival pre-emptor, effect of.*

The doctrine of *lis pendens* applies to pre-emption suits.

A and *B* who had equal right to pre-empt instituted separate suits for pre-emption. *B* got a transfer of the property from the original vendee and withdrew his suit. *A* impleaded *B* as a party to his suit and claimed to pre-empt the entire property:

Held, that *A* was entitled to pre-empt one half and one-half only of the property. A BHAGWAN SAHAI v. NANAK CHAND, A. I. R. 1927 All. 336; 25 A. L. J. 479 666

——— Wajib-ul-arz — *Construction* — 'Intiqal', *meaning of—Perpetual lease, whether can be pre-empted.*

The word '*intiqal*' used with reference to the custom of pre-emption in a *wajib-ul-arz*, is a word of wide import and includes a transfer by way of perpetual lease. A ABDUL KARIM v. GRURI SHANKAR 652

Presidency Towns Insolvency Act (III of 1909), ss. 3, 75, 90—*Provincial Insolvency Act (V of 1920), ss. 2, 3, 5 (2)—Civil Procedure Code (Act V of 1908), s. 24—High Court's power on Original Side to transfer insolvency case—Letters Patent (Rangoon High Court), cls. 11, 16—Power of High Court to transfer an insolvency case to its own file as a Court of Extraordinary Original Jurisdiction.*

The Original Side of the High Court has no jurisdiction to transfer an insolvency case from a Court exercising jurisdiction under the Provincial Insolvency Act to another such Court or to itself. This power can be exercised by the High Court on its Appellate Side only.

Under cl. 16, Letters Patent of the Rangoon High Court, the High Court can, in respect of insolvency matters, exercise only such jurisdiction as is given by the Law of Insolvency prevailing in the Province of Burma. Therefore, the powers conferred by s. 5 of the Provincial Insolvency Act, which are made subject to the other provisions of the Act cannot be exercised in such a way as to give the Original Side of the High Court jurisdiction from which it is expressly excluded by the terms of ss. 2 and 3 of the Act whether s. 5 is read with s. 24, Civil Procedure Code, or cl. 11 of the Letters Patent. R *In the matter of* THE ESTATE OF OOMER AHMED BROTHERS, 4 R. 554; A. I. R. 1927 Rang. 105 265

——— **s. 52 (2)**—*Reputed ownership, doctrine of—Goods received as agent.*

Certain goods in the possession of an insolvent were claimed by the Official Assignee under the doctrine of reputed ownership. There was evidence to show that the insolvent had received the goods as an agent and not as an owner. The insolvent had further held himself out, in his note-paper, merely as a commission agent:

Held, that the Official Assignee was not entitled to claim the goods under s. 52 (2) of the Presidency Towns Insolvency Act. R OFFICIAL ASSIGNEE v. ZOLLIKOFFER & Co., 6 Bur. L. J. 9; A. I. R. 1927 Rang. 133 1017

Principal and agent—Power of attorney—Construction. *See* BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION, 1806 329

Principal and surety. *See* C. P. C., 1908, s. 145 185

Privy Council—Appeal—Question of great private or public importance. *See* INCOME TAX ACT, 1922, s. 66A 97

——— *Criminal appeal, when entertained—Criminal Procedure Code (Act V of 1898), ss. 190, 360, 361, 535, 537—Complaint—Cognizance of offence not mentioned in complaint—Procedure—Deposition, interpretation and reading of—Procedure—Irregularity.*

The Privy Council will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the Advocate of the accused.

Where a Magistrate who takes cognizance of an offence on complaint discovers that there is a *prima facie* case against the accused person which would support a charge in respect of an offence not mention-

ed in the complaint, and he frames such charge, he cannot be held to have taken cognizance of the latter offence under cl. (c) of s. 190 of the Criminal Procedure Code. The case must still be treated as being one falling within the purview of cl. (a) of the section.

The object of reading over a deposition to a witness is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his Advocate to suggest corrections. No doubt, the evidence has to be read over in the presence of the accused or of his Pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But he is not necessarily entitled to the opportunity of suggesting corrections.

At the same time, it would be a better course if depositions other than mere formal ones were read over so that the accused or his Pleader could hear them and give their undivided attention to them. Care would, of course, have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence, but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his Pleader. Still it should be remembered that the primary object is to fix the witness and to enable him to protect himself against inaccuracy in the words taken down from his lips.

The distinction between s. 360 and s. 361 of the Criminal Procedure Code is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his Pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused.

Section 360 of the Criminal Procedure Code lays down that the deposition is to be read over to the witness. This provision is not complied with in terms by giving the witness an opportunity of reading the deposition over to himself and except in cases where reading over to the witness would be absurd, as for example, with a stone-deaf person, the provision should be complied with.

The bare fact of an omission to comply strictly with the provisions of s. 360 or s. 361 of the Criminal Procedure Code unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction which may be supported by the curative provisions of ss. 535 and 537 of the Code. **P C** ABDUL RAHMAN *v.* EMPEROR, A. I. R. 1927 P. C. 44; 31 C. W. N. 271; 25 A. L. J. 117; (1927) M. W. N. 102; 38 M. L. T 64; 8 P. L. T. 155; 4 O. W. N. 283; 28 Cr. L. J. 259; 6 Bur. L. J. 65; 5 R. 53; 52 M. L J. 585; 29 Bom. L. R. 813; 45 C. L. J. 441 **227**

Probate and Administration Act (V of 1881), s. 23. *See* COURT FEES ACT, 1870, s. 19-I (1), SCH. III **111**

——— **s. 89**—*Legal Representatives' Suits Act (XII of 1855)*—Actio personalis moritur cum persona, *doctrine of, whether applicable to India—Suit by ward against legal representatives of guardian for negligence, maintainability of.*

In India the doctrine *actio personalis moritur cum persona* does not form part of the law. Claims by and against the representatives of a deceased person are regulated by s. 89 of the Probate and Administration Act and also by Legal Representatives' Suits Act of 1855, so far as the latter enactment is not inconsistent with the former.

Under s 89 of the Probate and Administration Act a suit can be maintained by a ward against the legal representatives of his deceased guardian for damage caused by the negligence of the guardian in allowing a claim under a promissory note to become time-barred. **C** BHUPENDRA NARAYAN SINHA *v.* CHANDRAMONI GUPTA, 53 C. 987; A. I. R. 1927 Cal. 277 **286**

Procedure—*Preliminary decree,* ex parte—*Final decree—Notice, whether necessary.*

Where a preliminary decree is passed in the absence of the opposite party, notice ought to be issued to him before the final decree is passed. **A** RAM CHANDRA BANSAL *v* LALMAN, 25 A. L. J. 296; A. I. R. 1927 All. 329; 49 A. 396 **18**

Provincial Insolvency Act (V of 1920), ss. 2, 3, 5 (2). *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 3 ETC. **265**

——— **s. 6.** *See* CONTRACT ACT, 1872, ss. 246, 264 **389**

——— **s. 24**—*Application for insolvency—Inability to pay debts—Debtor's evidence, whether sufficient.*

An application for adjudication of insolvency should not be dismissed on the ground that the applicant has not produced witnesses to prove his inability to pay his debts, where he has himself deposed to his inability to pay his debts and this evidence is not disbelieved by the Court. **R** BHOLAI KARIM *v.* D. D. DESAI, 6 Bur. L J. 14 **1004**

——— **s. 27**—*Civil Procedure Code (Act V of 1908), s. 148—Insolvency—Discharge, application for—Extension of time—Power of Court.*

An Insolvency Court has power to extend the time fixed by it within which an insolvent is directed to apply for his discharge and it is not a fatal defect in the application for extension of time that it is made after the expiry of the fixed period. **L** FATEH MUHAMMAD *v.* MAYA DAS **134**

——— **ss. 27, 28, 31, 43**—*Adjudication order—Arrest of insolvent in execution whether prohibited—Expiry of time for applying for discharge—Automatic discharge.*

Without an order of the Insolvency Court an insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge. The provisions of s. 43 of the Provincial Insolvency Act do not contemplate any automatic discharge.

The mere adjudication of a judgment-debtor as an insolvent does not prevent his arrest in execution of a decree obtained against him. **A** HARI RAM *v.* SRI KRISHAN RAM, 49 A. 201; A. I. R. 1927 All. 418 **320**

——— **ss. 27, 43**—*Application for discharge—Power of Court to extend time—Petitioning creditor, whether may apply for extension of time.*

An insolvency Court has power to extend the time for making an application for discharge.

There is nothing in law incompatible with the extension of the period within which a debtor should apply for his discharge at the instance of and on cause shown by the petitioning creditor. **R** K. K. S. A. R. A. CHETTIAR *v.* MAUNG MYAT THA, 6 Bur. L J. 5; A. I. R. 1927 Rang. 136 **921**

——— **s. 28 (2)**—*Insolvency of firm—Suit against partner—Leave of Court, whether necessary.*

Provincial Insolvency Act—contd.

A firm is not a legal entity; nor is it a person. A firm-name is merely a short-hand form for collectively designating all the partners in a firm. Therefore, an order of adjudication passed against the firm is an order against individual partners who constitute the firm and after such an order has been passed a suit cannot be instituted against any of the partners without the leave of the Insolvency Court under s. 28 (2) of the Provincial Insolvency Act. L HONDA RAM *v.* CHIMAN LAL DURBEJA, A. I. R. 1927 Lah. 234 112

——— **s. 31.** *See* PROVINCIAL INSOLVENCY ACT, 1920, ss. 27, ETC. 320

——— **ss. 37, 43, 75**—*Discharge, failure to apply for—Annulment of adjudication—Procedure—Appeal, whether lies.*

Under s. 75 (3) of the Provincial Insolvency Act no appeal lies from an order annulling an adjudication under the provisions of s. 43 of the Act, without the leave of the Court.

Where an insolvent fails to apply for an order of discharge within the time specified by the Court, the Court has no option but to annul the adjudication, but with a view to protect the creditors the Court should pass an order under s. 37 of the Provincial Insolvency Act vesting the property of the debtor in a person appointed by it.

An appeal lies from an order passed under s. 37 of the Provincial Insolvency Act. L SHO IDAN LACHHMI NARAIN *v.* BAHADUR CHAND 137

——— **ss. 42, 69**—*Prosecution for offences under the Act—Procedure—Framing of charge—Fraudulent concealment—False accounts—Liability of partner for acts of other partners—S. 69 wider than English Law—Sentence—*Quasi *penalty under s. 42.*

Partners are often responsible in law under the Insolvency Act, for acts of other members of the partnership. It may be proved that, in spite of the fact that business is carried on by the head of a firm and that he is dead, nonetheless, the other partners were so deeply involved, that they must be held equally responsible for his acts, even though he was the moving spirit.

Although circumstances could be proved in a business concern, where the method of keeping books is such that even though the absence of the principal person is shown, the subordinate might be equally guilty, yet, where it is sought to establish the charge of keeping false accounts against any particular partners of a firm, it must be proved as a fact who were the persons actually responsible for keeping such books.

Some of the offences under the Insolvency Act are in their nature special, and directed against offences specially committed with a view to defeat the objects of the Act, and require to be dealt with some care.

It is desirable in a prosecution for an offence under the Insolvency Acts to frame the charges strictly in the language of the section which defines the offence, together with the particulars of the conduct of the insolvent relied upon to establish the charges, just as is done in a formal charge of an offence, particularly an offence of embezzlement or falsification of books under the Penal Code.

Section 69 of the Provincial Insolvency Act, which deals with penalties, is peculiar to India inasmuch as it embraces acts 'whether before or after making an order of adjudication.' Under English Law these penalties are confined to conduct after presentation of the petition.

It must be borne in mind in a prosecution under the Insolvency Act for falsification of accounts, even where they are false, or so badly kept, as to amount not merely to negligence, but to a suggestion of dishonesty, that s. 42 itself provides and defines a *quasi* offence, with regard to the keeping of books, which if established, is a ground for a kind of penal order, postponing the absolute discharge of the insolvent when he applies for it. A GANGA PRASAD *v.* MADHURI SARAN, 25 A. L. J. 331; A. I. R. 1927 All. 352 550

——— **s. 43.**

See PROVINCIAL INSOLVENCY ACT, 1920, ss. 27 ETC. 320

See PROVINCIAL INSOLVENCY ACT, 1920, ss. 27, 43 921

See PROVINCIAL INSOLVENCY ACT, 1920, ss. 37 ETC. 137

——— **ss. 63, 64**—*Declaration of dividend—Claims subsequently proved, priority of—Final dividend, declaration of—Notice, form of.*

Creditors who prove their claims after declaration and payment of any dividends, do not rank *pari passu* as between themselves, but, are, under the provisions of s. 63 of the Provincial Insolvency Act, entitled to payment in full in the order of their proving their respective claims so long as there are funds left in the hands of the Official Receiver liable for distribution. The claim of any such creditor cannot, therefore, be held up until the claims of all such creditors are decided.

The notice under s. 64 of the Provincial Insolvency Act for the declaration of the final dividend should be one not calling upon the public to notify claims but one calling upon such of the creditors as have already notified their claims to prove their claims within a fixed time. S HIRANAND MULCHAND *v.* OFFICIAL RECEIVER 791

——— **s. 69.** *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 42 550

——— **s. 75.** *See* PROVINCIAL INSOLVENCY ACT, 1920, ss. 37 ETC 137

Provincial Small Cause Courts Act (IX of 1887), s. 16. *See* C. P. C., 1908, ss. 100, 115 37

——— **s. 25.**

See CONTRACT ACT, 1872, ss. 134, 139 922

See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 8, 78 703

——— **s. 25**—*Duty of Small Cause Court—Revision.*

A Judge of a Small Cause Court fills a very important position of responsibility and owes a duty to the litigant world to dispose of cases in a proper and judicial manner disclosing a proper appreciation of the evidence, much of which is heard rather than recorded by him. It is on this account that a Court of Revision is reluctant to interfere with his findings unless they are based on a misinterpretation of evidence. Where, however, he fails to properly appreciate the evidence and to give sufficient attention to matters apparent upon the record the High Court has no alternative in revision but to ignore his findings and to decide the case for itself on the material on record. N HARAKCHAND BHATEY *v.* G. I. P. RAILWAY CO., A. I. R. 1927 Nag. 77 406

——— **s. 25**—*Perverse decision of fact—Wrong view of limitation—Revision—Limitation Act (IX of 1908), Sch. I, Arts 64, 83—Suit by commission agent—Account stated and balance struck—Limitation.*

Provincial Small Cause Courts Act—concld.

A wrong decision on a question of limitation is not a ground for interference in revision under s. 25 of the Provincial Small Cause Courts Act.

Even where a suit is brought by a commission agent if the account was stated and a balance struck the suit is governed by Art. 64 and not by Art. 83 of the Limitation Act.

A perverse decision on a question of fact can be set aside in revision under s. 25 of the Provincial Small Cause Courts Act. L KARAM CHAND SANT RAM v. DAYA NAND DAMODAR DAS 874

——— **s. 25**—*Revision—Perverse finding of fact—Interference.*

Although it is not the practice of the High Court in cases under s. 25 of the Provincial Small Cause Courts Act, to interfere with findings of fact, it will interfere where they are absolutely perverse. A SECRETARY OF STATE FOR INDIA v. MANAK CHAND & SONS, A. I. R. 1927 All. 393 1032

——— **Sch. II, Art. 15.** *See* CONTRACT ACT, 1872, s. 20 327

——— ——— **Art. 35 (ii)**—*Suit based on act which may or may not be criminal, whether cognizable by Small Cause Court.*

Article 35 (*ii*) of Sch. II to the Provincial Small Cause Courts Act applies only to those acts which by the circumstances of the case are clearly alleged or are clearly shown to be punishable under Ch. XVII of the Penal Code.

Merely because the facts stated in a plaint are ambiguous and are, therefore, consistent with *bona fides* as well as *mala fides*, it does not follow that the suit falls within the purview of Art. 35 (*ii*) and is excluded from the cognizance of a Small Cause Court. Where the plaint discloses no allegation of a crime the Article does not apply. A RAGHUBAR DAYAL v. MULWA, 25 A. L. J. 267; A. I. R. 1927 All. 268; 49 A. 440 38

——— ——— **Art. 35 (ii)**—*Suit for damages for wrongfully cutting and appropriating tree, whether of Small Cause nature—Second appeal—Unnecessary prayer for declaration, effect of.*

The mere addition of a prayer for a declaration cannot prevent a suit from being of the nature cognizable by a Court of Small Causes provided it is really a suit of that nature.

[The question whether a suit for damages for wrongfully cutting away and misappropriating a tree falls within Art. 35 (*ii*) of Sch. II of the Provincial Small Cause Courts Act considered but not decided.] A JAWAHIR GIR v. JAGARNATH PRASAD 315

——— **Art. 35 (ii)**—*Suit for damages for wrongfully cutting trees—Assertion of acts amounting to mischief—Suit, whether of Small Cause nature.*

A suit for recovery of damages for wrongfully cutting and misappropriating a tree falls within the purview of Art. 35 (*ii*) of Sch. II of the Provincial Small Cause Courts Act and is consequently exempted from the cognizance of a Small Cause Court where the allegations in the plaint amount to an assertion that the defendants have committed acts which, if proved against them in a Criminal Court, would render them liable to conviction on a charge of mischief. A KHUDA BAX v. RAGHUNANDAN LAL, A. I. R. 1927 All. 381 623

Public Gambling Act (III of 1867), ss. 4, 5—*Forfeiture of money found on person—Construction of penal Statutes—Benefit of doubt.*

Section 5 of the Gambling Act does not authorise the seizing and forfeiting of money found on the person of a man arrested in a gaming house.

A penal Act should be construed strictly and where there is any doubt the benefit of the same should be given to the subject. L MISRI LAL v. EMPEROR, 28 Cr. L. J. 332; 8 Lah. 320; A. I. R. 1927 Lah. 338 716

Public policy—*Partnership, illegal—Suit for partition of partnership property, whether maintainable.*

A suit for the partition of the property of a partnership, which consists of more than twenty persons and is consequently illegal, cannot be maintained. A MADAN LAL v. JANKI PRASAD, 49 A. 319; A. I. R. 1927 All. 487 50

Punjab Courts Act (VI of 1918), s. 41. *See* CUSTOM (PUNJAB) 943

——— **s. 41.** *See* PUNJAB TENANCY ACT, 1887, s. 77 (J) (P) 849

——— **s. 41**—*Construction of material document—Question of law.*

Where the point for determination in a case is the construction to be placed upon a document on which a suit is to a large extent based the question is one of law, and a second appeal is competent. L QAMAR UD-DIN v. RAHMAT ALI SHAH, 9 Lah. L. J. 197; A. I. R. 1927 Lah. 221 577

——— **s, 41**—*First Appellate Court lacking pecuniary jurisdiction—Second appeal, whether lies.*

Want of pecuniary jurisdiction on the part of the first Appellate Court is a good ground for second appeal. L TUMAN SINGH v. BIJA, A. I. R. 1927 Lah. 187 92

——— **s. 44**—*Error of law—Revision.*

An error of law is not a good ground for revision. L RAM BILAS v. SHEO NATH 3

——— **s. 44**—*Revision—Interference, when another remedy open.*

Though as a general rule a High Court does not interfere on the revision side when the petitioner has another remedy open to him, it will do so in exceptional circumstances. L FIRM GURANTITTA RAM-RAM KISHAN v. SUKHU RAM, 9 Lah. L. J. 19; 28 P. L. R. 136 595

Punjab Government Notification No 431 of 1910. *See* CR. P. C., 1898, s. 562 540

——— **No. 27909 of 1920.** *See* PUNJAB MUNICIPAL ACT, 1911, ss. 61, 62, 242 426

Punjab Limitation (Customs) Act (I of 1920), Sch. I, Art. 2 (b). *See* EVIDENCE ACT, 1872, s. 108 833

Punjab Municipal Act (III of 1911), ss. 61, 62, 242—*Punjab Government Notification No. 27909 of 1922—Imposition of taxes described in s. 61 (3)—Sanction of Governor-General in Council, necessity of—Presumption under s. 62 (9), whether applies to Notified Areas.*

Sanction of the Governor-General in Council is an indispensable preliminary condition for the imposition of taxes described in s. 61 (3) of the Punjab Municipal Act.

The provision contained in s. 62 (9) of the Punjab Municipal Act to the effect that a notification of the imposition of tax under the Act shall be conclusive evidence that the tax has been imposed does not apply to the notified areas in view of the express provision in the Punjab Government Notification No. 27909 of 1922 extending only sub-ss. (1) to (4) of s. 62 to such areas. L ISHAR DAS v. MUNICIPAL COMMITTEE

Punjab Municipal Act—concld.

NOTIFIED AREA, 9 Lah. L. J. 22; 28 P. L. R. 57; A. I. R. 1927 Lah. 140 **426**

—— — **s. 152**—*Evidence Act (I of 1872), s. 106—Suit for injunction by alleged public prostitute against Municipality for restraining it from taking action against plaintiff—Burden of proof—Jurisdiction of Civil Courts to restrain action of Municipal bodies.*

In a suit by alleged public prostitutes for a perpetual injunction restraining a Municipal Committee from taking any action against the plaintiffs under s. 152, Municipal Act, on the ground that they are not public prostitutes, the burden of proving that the plaintiffs are not public prostitutes lies on them.

In such a suit a Civil Court has jurisdiction to decide the question whether or not the plaintiffs are public prostitutes and, if this issue is found in their favour, to issue the injunction prayed for.

When a Municipal Committee acts *bona fide*, reasonably and in conformity with and strictly within the powers conferred by the law then it can escape the exercise of the restraining powers of the Civil Courts. But if its requisitions go beyond the powers conferred upon it, the Civil Courts have jurisdiction to restrain it from enforcing them. Courts have no jurisdiction to interfere with the mode in which the powers of Municipal bodies are exercised but they are competent to restrain such bodies if they act *ultra vires*.

Where a Municipal Committee takes action against certain persons under s. 152, Municipal Act on the ground that they are public prostitutes while in fact they are not, the action of the Committee is *ultra vires*. L MUNICIPAL COMMITTEE, LAHORE *v.* ALLAH RAKHI, A. I. R. 1927 Lah. 358 **1010**

——— **ss. 189, 193**—*Sanction to build—Revocation of sanction, legality of.*

When once a Municipal Committee has given sanction to build, the Committee cannot revoke that sanction. L KIRPA RAM *v.* NOTIFIED AREA COMMITTEE, PINDI BHATTIAN **813**

——— **s. 242.** *See* PUNJAB MUNICIPAL ACT, 1911, ss. 61, 62, 242 **426**

Punjab Pre-emption Act (I of 1913), s. 5—*'Shop' definition of—House wherein carpenter resides and works, whether shop or business premises.*

A shop is primarily a place where goods are bought and sold, it is not synonymous with "business premises" in the general sense of the word. The fact that a carpenter works in the place where he resides does not turn the building into business premises or a shop. L SANDHI *v.* KHAIR-UD-DIN, A. I. R. 1927 Lah. 328 **910**

——— **s. 6**—*Sale of building in village* abadi—*Pre-emption—Immoveable property, what is—Consent of proprietors—Sale by major brother of minor brother's share—Major brother's right to sell, question of—Necessary parties in pre-emption suit.*

The sale of a house by a *kamin* in the village *abadi*, the site of which belongs to the proprietary body is pre-emptible as what is sold is immoveable property for purposes of pre-emption, and the question of consent by the proprietors does not arise in such a case.

In a suit for pre-emption where the sale is by a major on his own behalf and on behalf of his minor

Punjab Pre-emption Act—concld.

brother, the question of major brother's right to sell the minor's share does not arise as the necessary parties to such a suit are the pre-emptor and the vendee. L BUTA SINGH *v.* RAHIM BAKHSH, A. I. R. 1927 Lah. 283 **901**

——— **s. 15**—*Sale by female—Agnate of husband, whether entitled to pre-empt—Plaintiff's failure to establish case set up in trial Court—Appeal—New case, whether can be made.*

The Explanation to s. 15 of the Punjab Pre-emption Act applies only in the case of a sale by a female of land to which she has succeeded on a life-tenure through her husband, son, brother or father.

A female who was the absolute owner of certain land sold such land and an agnate of her husband instituted a suit to pre-empt the sale. The trial Court dismissed the suit on the ground that the only evidence produced by the plaintiff was that he was an agnate of the vendor's husband and that that did not prove that he was an heir of the vendor. On appeal the District Judge agreed with this finding of the trial Court but as it was contended before him, that the parties who were Muhammadan *Khojas* followed Hindu Law in matters of succession and that, therefore, the heirs of the vendor's husband were her heirs, he accepted the appeal and remanded the suit under O. XLI, r. 23 for re-decision on the merits after giving the plaintiff a further opportunity to establish the contention raised on his behalf in appeal:

Held, (1) that the plaintiff's suit had been rightly dismissed by the trial Court;

(2) that the contention that the parties followed Hindu Law in matters of succession having been raised for the first time in appeal, the District Judge should not have entertained it and that, therefore, his order of remand must be set aside and the suit must be dismissed. L FATTEH *v* NABI BAKSH, 9 Lah. L. J. 12; 28 P. L. R. 90; A. I. R. 1927 Lah. 105 **168**

Punjab Tenancy Act (XVI of 1887), s. 60—*Transfer of tenancy—Suit by landlord to declare invalidity of transfer—Decree—Rights of tenant and his transferee, how far affected.*

Where a landlord has obtained a declaration that a transfer is void under s. 60, Punjab Tenancy Act, such transfer must be held to be void completely even as between the vendor and the vendee. L SHAM SINGH *v.* HARDIT SINGH **916**

——— **ss. 77 (3) (d), 100 (3)**—*Suit for declaration of occupancy rights—High Court's power to order registration of a civil decree in a Revenue Court.*

A suit for a declaration that the plaintiffs are occupancy tenants of a particular land is exclusively cognizable by a Revenue Court.

Where a suit exclusively cognizable by a Revenue Court has been decided by a Civil Court, if no prejudice has been caused thereby, it is competent to the High Court in second appeal to set aside the decree of the lower Appellate Court and to order that the decree of the Trial Judge be registered in a Revenue Court and that the memorandum of appeal in the lower Appellate Court be returned for presentation to a Revenue Court of competent jurisdiction. L GANGA RAM *v.* BAM SUKH **165**

——— **s. 77 (j), (p)**—*Suit for recovery of dues payable by inferior to superior proprietor—Civil Courts, jurisdiction of—Punjab Courts Act (VI of 1918), s. 41—Question of nature of dues, whether*

Punjab Tenancy Act—concld.

of law—Civil Procedure Code (Act V of 1908), s. 11—Additional parties in second case—Res judicata—Obiter, *definition of.*

The share of produce recoverable by the Brahmans of Pohlian Prohitan village from the Rajputs of the village with respect to lands in the cultivating possession of the latter is either dues recoverable by a superior land-owner from an inferior land-owner or is a village cess and in either case a suit for recovery of the same is not cognizable by a Civil Court.

The question as to the nature of dues is one of law and not of fact and can be considered in second appeal.

Where in a subsequent suit in addition to all the parties in the previous suit there are some additional defendants, the decision in the previous suit cannot operate as *res judicata* in the subsequent suit.

A decision on a point which is not in issue but the decision of which is necessary for the decision of the point in issue is not an *obiter.* **L** DILA RAM *v.* BIDHYA DHAR, A. I. R. 1927 Lah. 259 **849**

Railway—*Reservation of right of re-measurement, re-weighment, etc., effect of—Goods accepted at owner's risk at lower rate—Right to charge higher rate at place of destination.*

The reservation by the Railway of their right of re-measurement, re-weighment, re-classification and re-calculation of rate on arrival of goods at the place of destination cannot be so interpreted as to permit any basic alteration in the terms of the contract.

Where, therefore, goods are offered to and accepted by the Railway for being carried to a certain place at owner's risk and a lower rate of freight is charged, it is not open to the Railway to claim at the place of destination a higher rate on the ground that the goods carried on a certain section of the Railway should have been charged at a higher rate and that the booking clerk made a mistake in charging them at a lower rate. **O** SECRETARY OF STATE FOR INDIA *v.* MURLI DHAR VARMA, 4 O. W. N. 203; A. I. R. 1927 Oudh 145; 2 Luck. 152 **663**

Railways Act (IX of 1890), s. 47 (1) (g)—*Change of freight rates between maximum and minimum rates—Publication of change, whether necessary.*

Section 47 (1) (*g*) of the Railways Act and its related provisions require only the publication of a general rule governing the maximum and minimum rates of freight. As regards a change of rates between the maximum and the minimum provided for in the general rule, publication is not necessary in order to bind the public by that change. **A** SECRETARY OF STATE FOR INDIA *v.* THAKUR DAS-RAM SAHAI, A. I. R. 1927 All. 316 **260**

——— **s. 54**—*Rule prescribing particular mode of packing for consignments to be carried at Railway risk, validity of.*

A Railway Company is a common carrier and is bound to accept consignments of goods for despatch, but if the consignments are despatched at Railway risk it is entitled to take reasonable precautions to protect itself from loss. If the conditions laid down by a Railway for despatch of goods at Railway risk are not complied with by the consignor, the Railway can refuse to accept the consignment at its own risk.

The test for determining as to whether a particular rule made by a Railway Administration is or is not valid is to see whether the rule is a reasonable one and is not inconsistent with the Railways Act.

Railways Act—contd..

There is nothing in the Railways Act that prohibits a Railway Administration from insisting on a particular mode of packing in the case of consignments despatched at Railway risk. The fact that another mode of packing is as secure as the one enjoined by a rule framed by the Railway Administration is irrelevant for the purpose of determining the validity of such rule. **A** SECRETARY OF STATE FOR INDIA *v.* ANANT RAM CHOPRA, A. I. R. 1927 All. 400 **571**

——— **ss. 54, 55, 77**—*Undercharge or overcharge of freight—Re-weighing, right to—Refusal to re-weigh, effect of—Loss, liability for.*

A Railway Company is entitled to re-weigh a consignment carried by it and collect excess charges for excess weight at the destination and sell the goods if the excess charge is not paid and credit the sale-proceeds thereof towards the excess charge and demurrage, if any, due from the defaulter. As a necessary counter-part of such right of the Company is the right of the consignor or consignee of the goods to claim a refund of any over-charge recovered from him by the Company, and as in the case of determining and collecting an under-charge, so in the case of refunding an over-charge, a right to re-measure, re-weighment or re-calculation must necessarily be implied.

Where a consignee has *prima facie* good reasons to think that an incorrect weight has been entered in the Railway receipt and he demands, before taking delivery of the goods, that the goods should be re-weighed, the failure of the Railway Company to comply with such demand amounts to misconduct and if as the result of such failure delivery is delayed and loss is caused to the consignee, the Railway Company is liable for such loss. **N** HARAKCHAND BHATEY *v.* G. I. P. Railway Co., A. I. R. 1927 Nag. 77 **406**

——— **s. 72**—*Risk Note B—Theft of heavy merchandise—Want of efficient patrol—'Wilful neglect.'*

Three bales of piece-goods weighing five maunds each were stolen from a sealed wagon in the Howrah goods yard between dark and 11 o'clock of a particular night. Nothing further was known about the circumstances under which the theft took place, except that the goods yard was large in extent and that the public was not ordinarily allowed free access thereto :

Held, that it was impossible to conceive that if there had been anything approaching an efficient patrol of the yard, a theft of such bulky merchandise could have been carried through successfully, and that the Company could, therefore, be held guilty of wilful neglect within the meaning of Risk Note B. **A** IDRIS *v.* EAST INDIAN RAILWAY CO., A. I. R. 1927 All. 348 **553**

——— **s. 77.** *See* RAILWAYS ACT, 1890, ss. 54, 55, 77 **406**

——— **s. 80**—*Through booking—Non-delivery of goods—Liability of Company to which goods are not delivered.*

Where goods are booked through over the Railways of two or more Railway Companies, a Company other than the one to which the goods are delivered cannot alone be made liable for compensation for non-delivery of goods in the absence of a finding that the goods were lost in course of transit on the Railway of the Company sought to be made liable. **Pat**

Railways Act—contd.

EAST INDIAN RAILWAY CO. *v.* KEDARNATH SETH, 6 Pat. 105; 8 P. L. T. 358 **889**

——— **s. 135**—*Madras District Municipalities Act (V of 1920), s. 81—Property tax—Notification by Governor-General in Council declaring Railway Company liable to house, land and water taxes—Levy of property tax, legality of—Interpretation of Statutes.*

Under s. 135 (2) of the Railways Act a notification was issued by the Governor-General in Council declaring the Administration of the Madras and Southern Mahratta Railway Company liable to pay certain house, land and water taxes to the Cuddappah Municipal Council in accordance with s. 47 of the Madras District Municipalities Act of 1884. In 1920, the Madras District Municipalities Act was re-enacted and no tax called house, land or water tax was imposed thereunder but a new tax called property tax was substituted instead. There was no new notification issued by the Governor-General in Council after the new Act declaring the liability of the Railway Company to pay such tax:

Held, that it was not competent to the Municipal Council to levy the new property tax under the Act of 1920 from the Railway Company and that under s. 135 (1) of the Railways Act, the Railway Company was exempt from local taxes in the absence of a notification under cl (2) of the section.

When the Legislature has declared the liability of a person to a tax called by a particular name, that person is not liable to any tax which is called by the Legislature itself by a different name in re-enacting a Statute and it is not open to the Court to launch upon any inquiry with regard to the real or substantial identity of the two.

The house and land taxes imposed under s. 47 of the Madras District Municipalities Act of 1884, cannot be regarded as substantially or really identical with the property tax imposed under s. 81 of the Madras District Municipalities Act of 1920.

When dealing with enactments of the Legislature and notifications thereunder, the names under which the declaration of persons in respect of liability for taxation is made cannot be dismissed altogether. **M** M. & S. M. Railway Co., LD. *v.* MUNICIPAL COUNCIL, CUDDAPPAH, 52 M. L. J. 108; A. I R. 1927 Mad. 363; 38 M. L. T. 263 **280**

Rangoon High Court Rules and Orders, Ch. V, r. 3—*Advocate's fees, assessment of, in miscellaneous appeal.*

Though a Court has a discretion in the matter yet it is not customary to assess Advocate's fees in a miscellaneous appeal on a scale in excess of that fixed in r. 3 of Ch. V of the Rules and Orders of the Rangoon High Court. **R** V. ZOLLIKOFER & CO. *v.* OFFICIAL ASSIGNEE, 4 R. 532; A. I. R. 1927 Rang. 100 **261**

Reasonable care, what constitutes. *See* TRANSFER OF PROPERTY ACT, 1882, s. 41 **665**

Receiver—*Appointment of Receiver—Discretion—Appellate Court, when interferes—Administration of estate of Muhammadan.*

The law allows the Court wide discretion in the appointment of Receivers and it is settled law that the Appellate Court will not interfere lightly with such appointment.

There is not the same reason why the appointment by a Muhammadan testator of an executor should receive the same consideration as the appointment of an executor by an English testator in England. **R** EMANJAN *v.* EMANJAN, 6 Bur. L. J. 13; A. I. R. 1927 Rang. 135 **1020**

Registration, whether notice. *See* SPECIFIC RELIEF ACT, 1877, s. 27 (B) **595**

Registration Act (XVI of 1908), s. 17—*Agreement to lease—Memorandum containing proposed terms—Registration—Verbal lease, validity of—Transfer of Property Act (IV of 1882), ss. 105, 107.*

The terms of an agreement relating to a lease having been settled by the parties they repaired to an assistant of the plaintiff's Solicitor who drew up a letter addressed to the plaintiff's Solicitor containing the terms agreed upon by the parties. The letter was taken by the parties to the plaintiff's Solicitor who, after explaining it to them added a few more clauses and took the defendant's signature to the same:

Held, that the letter was not an embodiment of an agreement between the parties but only a letter of instruction written by the defendant to the plaintiff's Solicitor as to the terms on which a formal lease was to be executed, and was not, therefore, compulsorily registrable.

A verbal agreement of lease notwithstanding the fact that the parties were intending to execute a formal lease-deed does not contravene the provisions of ss. 105 and 107 of the Transfer of Property Act and is not, therefore, a nullity. **C** CHUNI LAL DUTT *v.* GOPIRAM BHOTICA, 45 C. L. J. 32 at p. 38; A. I. R. 1927 Cal. 275 **404**

——— **s. 17**—*Endorsement of payment on back of mortgage-deed—Registration, whether necessary—Oral evidence of payment, whether admissible.*

Where the fact of the payment of the mortgage-money is endorsed on the back of the mortgage-deed but a sentence is added that the mortgage has been extinguished, the endorsement, if unregistered, is not admissible in evidence but oral evidence is admissible in such a case to prove the payment of the mortgage-money. **L** LABU RAM *v.* SAZAWAR, A. I. R. 1927 Lah. 237 **129**

——— **ss. 17, 49.** *See* MUHAMMADAN LAW **296**

——— **ss. 17, 49**—*Partition deed, unregistered—Oral evidence of possession, whether admissible.*

Where a document embodying the terms of a partition of immoveable property is not admitted in evidence as being unstamped and unregistered, oral evidence to prove the details of the partition cannot be given as the terms of the partition are embodied in an inadmissible document. Nevertheless, however, the fact whether a party to the deed is in possession of certain property dealt with by the deed may be proved by oral evidence and the deed may be relied upon to determine the nature of such possession. **L** HARI RAM *v.* SHEO KARN **153**

——— **s. 17 (2) (vi)**—*Compromise of suit—Dismissal of suit in pursuance of compromise—Compromise not recorded—Registration of deed, necessity of—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.*

Even though a suit is dismissed in accordance with the terms of a deed of compromise, if that compromise has not been recorded under the provisions of O. XXIII, r. 3 of the Civil Procedure Code, the deed is not exempt from registration under s. 17 (2) (*vi*) of the Registration Act. **L** LABH SINGH *v.* GURBAKHSH SINGH, 28 P. L. R. 143 **783**

Registration Act—concld.

——— s. 28—*Place of registration—Fictitious item of property included in deed in order to give jurisdiction to particular Sub-Registrar, effect of—Fraud.*

The inclusion in a deed of conveyance of an item of property which does not exist purely for the purpose of making the deed available for registration in a particular place, amounts to a fraud upon the Registration Law and the registration of the deed at such place cannot be held to be valid. **A** RAGHUNATH TEWARI *v.* SITA RAM SINGH **25**

——— s. 28—*Sale of item for purposes of evading proper registry office—Sale and registration, validity of.*

There is nothing in law to render invalid a sale of property by one person to another for the sole reason that the object of the sale was to give that other person a right to register a mortgage-deed in respect of other property in a particular registry office. **A** LACHMAN DAS *v.* RAM PRASAD, 25 A. L. J. 349; A. I. R. 1927 All. 422 **1029**

——— s. 47. *See* TRANSFER OF PROPERTY ACT, 1882, ss. 122, 123 **105**

——— s. 49. *See* VENDOR AND PURCHASER **568**

——— s. 77—*Registration, refusal of, by party—Failure to sue for compulsory registration—Specific performance of agreement to sell, suit for, whether maintainable.*

Where after execution of a document, the executant refuses to get it registered, and the other party does not avail himself of the remedy provided by s. 77 of the Registration Act by bringing a suit for compulsory registration of the document, he is not entitled afterwards to treat the unregistered sale-deed as an agreement to sell and bring a separate suit for specific performance of the same.

A man who has failed to adopt a remedy expressly provided by the Statute cannot come to Court and ask for an exercise in his favour of a discretionary and equitable remedy.

Although in India the remedy of specific performance is a statutory remedy, it nevertheless is simply a crystallisation into statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. **M** KOMIRISETTI SATYANARAYANA *v.* YEERANKI CHINA VENKATARAO, 23 L. W. 277; 49 M. 302; A. I. R. 1926 Mad. 530; 50 M. L. J. 674 **385**

Res judicata.

See BENGAL TENANCY ACT, 1885, ss. 102, 106 **293**

See C. P. C., 1908, s. 11.

See MORTGANE **670**

See UNDER-PROPRIETARY RIGHTS **851**

——— Cross-suits—Failure to appeal. *See* PREEMPTION **450**

——— Execution proceedings. *See* C. P. C., 1908, s. 47 **23**

Restitution of conjugal rights. *See* MUHAMMADAN LAW **169**

Sale of goods—*Acceptance of goods by purchaser—Goods not according to contract—Suit for refund of sale price, maintainability of—Conditions precedent—Purchaser, when entitled to reject goods.*

Where a purchaser has accepted delivery of goods he cannot sue for the recovery of the sale price on the ground that the goods do not answer the description contracted for, his only remedy being a suit for damages for breach of the contract.

The mere fact that the numbers on the bales of the goods supplied do not correspond to the numbers given in the invoice or that the goods were not shipped direct to a particular port, but only *via* another port, does not entitle a buyer to reject the goods where these terms are not expressly made conditions precedent. **L** ISHAR DAS DHARAM CHAND *v.* KANNU MAL-GHAMANDI LAL, 9 Lah. L. J. 180; 8 Lah. 276; 28 P. L. R. 446; A. I. R. 1927 Lah. 443 **548**

Second appeal—New plea. *See* EASEMENT **21**

Sikh Gurdwaras Act (VIII of 1925), ss. 7 (3), 8, 9, 10, 16, 31 (2)—*Notification under s. 7 (3), effect of, when no petition is filed under s. 8 or s. 10—Government's power to declare Gurdwara not a Sikh Gurdwara—Notification under s. 10—Stay of proceedings in relation to Gurdwara in Civil Courts after notification under s. 7 (3).*

Where a notification has been issued by the Local Government under s. 7 (3) of the Sikh Gurdwaras Act and no petition has been presented under s. 8 of the Act by the Secretary of State or by any private individual alleging that the Gurdwara is not a Sikh Gurdwara, the Government have no option but to issue a notification under s. 9 declaring the Gurdwara to be a Sikh Gurdwara.

Similarly, where there is no petition under s. 10 of the Gurdwaras Act by any person claiming a right, title or interest in any property in the list published under s. 7 (3) of the Act, the Government are bound to publish a notification under the same section specifying the rights, title or interest in the property in respect of which no claim has been made and such a notification is conclusive proof of the fact that no claim has been made.

After the issue of a notification under s. 7 (3) of the Gurdwaras Act all proceedings in the Civil Courts of the nature mentioned in s. 31 (2) of the Act must be stayed unless the Tribunal appointed under the Act decides under s. 16 that the alleged Gurdwara is not a Sikh Gurdwara. **L** KHAZAN SINGH *v.* SECRETARY OF STATE FOR INDIA, A. I. R. 1927 Lah. 380 **70**

Sir rights. *See* UNDER-PROPRIETARY RIGHTS **851**

Solicitors, whether a trading firm. *See* CONTRACT ACT, 1872, s. 239 **1025**

Specific performance.

See C. P. C., 1908, O. VI, R. 17 **56**

See REGISTRATION ACT, 1908, s. 77 **385**

——— *Sale with agreement to reconvey—Payment, of money into Court before date fixed for payment, effect of.*

Plaintiff sold certain property to the defendant and one of the conditions of the sale-deed was that if the plaintiff paid to the defendant the amount of the sale consideration on or before a certain date the defendant would reconvey the property to the plaintiff free from encumbrances. Before the date fixed plaintiff instituted a suit against the defendant to compel him to reconvey the property to him on receipt of the amount mentioned in the deed and the amount mentioned in the deed was tendered in Court before the date fixed. The Court directed that the amount should be deposited in the Imperial Bank of India and it was so deposited two days afterwards, which date was beyond the date fixed in the deed:

Held, that the payment of the amount into Court had the same legal effect as payment made into a Bank in which the defendant had an account to the account of the defendant and that, therefore, the

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plaintiff had fulfilled the condition of the deed and was entitled to a decree. O MOHAMMAD YAWAR HUSAIN v. WAZIR HASAN, 4 O. W. N. 150; A. I. R. 1927 Oudh 159 **494**

——— *Suit for directing execution of fresh deed, when maintainable—Non-registration due o plaintiff's negligence, effect of.*

A suit for directing the execution of a fresh document does not lie where the document originally executed is neither lost, destroyed or fraudulently suppressed by the defendant, but was in the possession of the plaintiff and it was open to him to have applied in time to get it registered. M SUBBARAYA PILLAI v. DEVASAHAYAM PILLAI, (1922) M. W. N. 70 **344**

Specific Relief Act (I of 1877), s. 14. *See* CONTRACT ACT, 1872, s. 20 **327**

——— **ss. 21, 23 (b)**—*Specific performance—Agreement by vendee to re-convey on fixed date—Vendor's option to repurchase, assignability of—Right of option, whether mere standing offer or completed contract—Suit for specific performance by assignee from vendor's legal representative—Provision as to option, validity of—Rule as to perpetuities.*

A purchaser executed, on the date of sale, a counterpart by which he agreed to reconvey the properties sold on receipt of the same price thirty years from the date of the sale. After the death of the vendor, his son assigned his interest under this agreement. In a suit by the assignee for specific performance of the agreement to reconvey:

Held, (1) that what was assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immoveable property at a certain price, and not merely the benefit of a standing offer which had not ripened into a completed agreement;

(2) that the right was capable of being assigned;

(3) that there was no personal element in the transaction which would make the contract incapable of being specifically enforced under s. 21 (*b*) of the Specific Relief Act.

Per *Ramesam, J.*—The term of 30 years made it clear that the option to repurchase given to the vendor was not intended to be personal.

Where a right can be transmitted by a man to his heirs, it is equally assignable, and an option to re-purchase can be assigned even before it matures into an agreement to sell and purchase.

An interest under a contract for re-purchase of land is assignable as a right *ex contractu* if not as a right *in rem.*

Such a right intended to be exercised at a stated time by the optionees or their representatives and assigns does not tie up the land and cannot, therefore, offend the rule against perpetuities. M CHINNA MUNUSWAMI NAYUDU v. SAGALAGUNA NAYUDU, 49 M. 387; A. I. R. 1926 Mad. 699; 51 M. L. J. 229 **399**

——— **s. 27 (b)**—*Contract to sell immoveable property—Subsequent mortgage with notice of contract—Specific performance—Registration, whether notice—Mortgagee, duty of, to search registers.*

A contract to sell immoveable property can be specifically enforced against a subsequent mortgagee with notice of the contract.

The question whether registration amounts to notice depends on the circumstances of each case.

A mortgagee is liable to pay all prior incumbrances and so it is his duty to search the registers of the

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Registration Department and discover the prior charges. A NASIR KHAN v. TARA CHAND, 25 A. L. J. 294; A. I. R. 1927 All. 357 **595**

——— **s. 35.** *See* CONTRACT ACT, 1872, ss. 19, 19A ETC. **932**

——— **42**—*Declaration granted to reversioner—Alienor dying during pendency of appeal—Reversioner becoming entitled to possession—Decree for mere declaration, whether should be set aside—Appellate Court, discretion of.*

Where a reversioner has obtained a decree for declaration to the effect that a gift will not affect his reversionary rights after the donor's death, the Appellate Court, on appeal by the donee, cannot set aside that decree on the mere ground that, by the death of the donor during the pendency of appeal the reversioner has become entitled to immediate possession. L NANDAN v. WAZIRA, 8 Lah. 215; A. I. R. 1927 Lah. 198; 28. P. L. R. 341 **84**

——— **s. 42**—*Sale of property by Insolvency Court—Suit by claimant for mere declaration, maintainability of—Consequential relief.*

An Insolvency Court ordered certain property to be sold as that of the insolvent. Plaintiff applied to that Court for determination of his title to the property but the Court upheld its order for sale. Plaintiff sued for declaration of title. In the course of the suit the properties were sold by the Insolvency Court and purchased by a third party:

Held, that the plaintiff was bound to get rid of the sale of the property as belonging to the insolvent and could not maintain a suit for a mere declaration of title. C RAJANI KANTA SHAHA BANIK v. RAMANI MOHAN GOSWAMI **641**

Stamp Act (II of 1899), s. 2 (5) (22)—*Instrument attested and not payable to order or bearer, whether bond or promissory note—Oral evidence as to interest, whether admissible—Evidence Act (I of 1872), s. 92, proviso 2.*

If an instrument whereby a person obliges himself to pay money to another is attested by a witness and the amount due thereunder is not payable to order or bearer, it is a bond as defined in s. 2 (5) of the Stamp Act, and not a promissory note as defined in s. 2 (22) of the Act.

In the absence of any stipulation as to interest in a bond, oral evidence is admissible to prove a separate agreement about it under s. 92, proviso 2, of the Evidence Act; the evidence must, however, be very satisfactory and strong in order to establish such a separate oral agreement when the bond is silent about it. N ROZARIO v. HARBALLABH ONKARJEE, A. I. R. 1927 Nag. 195; 10 N. L. J. 43 **794**

——— **ss. 2 (5) (b), 35**—*'Bond'—Negotiable Instruments Act (XXVI of 1881), as amended by Act VIII of 1919, s. 13, Expl. (i)—Explanation, whether can be read into definition of bond—Imposition of stamp duty and penalty after decision of case, legality of.*

Explanation (*i*) introduced to s. 13 of the Negotiable Instruments Act by Act VIII of 1919 cannot be read into the definition of a bond as contained in s. 2 (5) (*b*) of the Stamp Act so as to make an instrument which on the face of it is not payable to order, one payable to order by virtue of the said Explanation and thus to take it out of the said definition. For the purposes of the Stamp Act docu-

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ments, as they appear on the face of them have to be considered.

A Court has no jurisdiction after a case has been finally disposed of to pass an order under s. 35 of the Stamp Act directing a party to deposit stamp duty and penalty in respect of an insufficiently stamped document filed in the case. **C** KHETRA MOHAN SAHA *v.* JAMINI KANTA DEWAN, 54 C. 445; A. I. R. 1927 Cal. 472 **630**

——— **s. 35.** *See* STAMP ACT, 1899, s. 2 (5) (B) **630**

——— **ss. 36, 61**—*Document insufficiently stamped —Objection in appeal.*

The objection as to the inadmissibility of a document for want of sufficient stamp cannot be taken up for the first time in appeal. **L** HARI SINGH *v.* SAHIB SINGH, 28 P. L. R. 227; A. I. R. 1927 Lah. 371 **733**

——— **s. 44 (3)**—*Deficiency in stamp duty paid by party to suit—Amount paid not included in costs—Suit to recover amount paid, whether maintainable.*

Plaintiff instituted a suit on the basis of a mortgage and during the pendency of the suit it was discovered that the mortgage-deed was not sufficiently stamped. In order to obtain a decree in the suit plaintiff paid up the deficiency and the penalty. The amount paid by him was, however, not included in the costs of the suit and plaintiff instituted a subsequent suit to recover the amount paid by him from the defendant:

Held, that the case fell within the purview of s. 44 (3) of the Stamp Act and that the suit was barred by the provisions of that section. **A** RAM SINGH *v.* MAN SINGH, 25 A. L. J. 482 **737**

——— **Sch. I, Arts. 1, 5 (c)**—*Acknowledgment in writing containing promise to pay future interest—Stamp duty—Effect of such acknowledgment on barred items—Promise in writing to pay barred debt —Contract Act (IX of 1872), s. 25.*

On a statement of account sent by the plaintiff to the defendant, the latter made an endorsement acknowledging that the amount stated was due from him to the plaintiff and added the words "interest at annas 12 per cent. per mensem:"

Held, (1) that the addition of the promise to pay future interest was sufficient to take the endorsement out of Art. 1 of Sch. I of the Stamp Act and to render it liable to be stamped as an 'agreement not otherwise provided for' under Art. 5 (*c*) of the Schedule;

(2) that, although the endorsement could not save from limitation those items of account which were barred on the date of the endorsement, yet, it operated as a valid promise in writing to pay them under s. 25 of the Contract Act. **A** PRAHLAD PRASAD *v.* BHAGWAN DAS, 25 A. L. J. 403 **593**

——— **Sch. IA, Art. 46.** *See* MADRAS VILLAGE COURTS ACT, 1889, s. 53 **545**

Subrogation.

See COMPANIES **875**

See MORTGAGE **272**

Succession Act (X of 1865), ss. 234, 250—*Letters of Administration—Omission to cite necessary parties—Revocation—Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Minor defendant—Guardian* ad litem, *appointment of—Order, absence of, effect of—Guardian appearing and acting on behalf of minor, effect of.*

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Where a person who is named the guardian *ad litem* of a minor appears and takes part in the proceedings on behalf of the minor and properly looks after the interests of the minor, the minor must be held to have been effectively represented in the proceedings by such guardian, despite the absence of a formal order appointing such person as the guardian *ad litem* of the minor.

There is a distinction between cases of Wills and cases of intestacy in the matter of citations, for, in the former class of cases the proof of a Will in a majority of cases, if not in all, acts prejudicially to the legitimate rights of those who would inherit and be entitled to the properties in the absence of a Will, and omission to cite them is likely to affect such rights of theirs in their absence, while in the latter class of cases such omission only affects their preferential rights to administer the estate or prevents them from objecting to the personnel of the administrator or to like matters and it is not until there is any mal-administration that they are really affected. Therefore, in the case of a grant of Letters of Administration, the Letters will not be necessarily revoked because there was an omission to issue citations to certain parties who were interested, particularly if these latter have not applied for revocation.

Citations should always be issued to parties who are known to the Court to be interested or to claim any interest in the estate of the deceased. **C** RANMAYA GAORANGINI *v.* BETTY MAHBERT, 31 C. W. N. 160; A. I. R, 1927 Cal. 207 **177**

Succession Certificate Act (VII of 1889), s. 4—*Money due from Insurance Company under policy of insurance, whether debt—Succession certificate, whether can be granted.*

Moneys due from an Insurance Company to the estate of a deceased person under a policy of insurance are debts within the meaning of s. 4 of the Succession Certificate Act, and a Succession Certificate can be granted in respect of such moneys. **M** VITTAL RAO *v.* HANUMANTHA RAO, 25 L. W. 180; 52 M. L. J. 171; (1 27) M. W. N. 113; 38 M. L. T. 47; A. I. R. 1927 Mad. 359; 50 M. 412 **484**

Suits Valuation Act (VII of 1887), s. 11—*Under-valuation, objection to—Appeal—Appellate Court, duty of—Under-valuation affecting* forum *of appeal —Disposal of suit on merits, whether prejudicially affected.*

Under s. 11 of the Suits Valuation Act an Appellate Court is only required to record reasons if it holds that the suit was over-valued or under-valued and that the over-valuation or under-valuation has prejudicially affected the disposal of the suit on the merits, but it is not required to record reasons in writing for holding that the under-valuation or over-valuation has not prejudicially affected the disposal of the suit.

The disposal of a suit cannot be deemed to have been prejudicially affected on the merits within the meaning of s. 11 of the Suits Valuation Act, merely because of a change in the *forum* of appeal consequent upon the under-valuation or over-valuation. **A** MUSA IMRAN *v.* BHAGWAN DAS, A. I. R. 1927 All. 359 **546**

——— **s. 11**—*Under-valuation of suit—Appeal—Objection, absence of, effect of—Appeal, second—Objection to valuation, whether can be taken.*

A suit for an injunction was valued at Rs. 100 for

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the purpose of jurisdiction. The suit was dismissed by the trial Court and the plaintiff presented an appeal in the Court of the Senior Sub-Judge. No objection was taken by the defendant to the valuation of the suit or the appeal and the Appellate Court decreed the plaintiff's suit. In second appeal the defendant objected that as the rules required that a suit for an injunction should be valued at more than Rs. 100, the Senior Sub-Judge had no jurisdiction to hear the appeal:

Held, that s. 11 of the Suits Valuation Act which governed all cases of erroneous valuation was applicable to the case and that the defendant having failed to object to the jurisdiction of the Senior Sub-Judge to hear the appeal, he could not be allowed to raise the objection in second appeal. **L** KALU *v.* SADHA SINGH **166**

Thak maps.

Thak Maps are not conclusive and may be shown to be wrong. **C** MAYEUDDI *v.* MAHAMMAD RAZZAB ALI, A. I. R. 1927 Cal. 457 **507**

Transfer of Property Act (IV of 1882), ss. 6, 45.

See BENGAL TENANCY ACT, 1885, s. 5 **302**

——— **ss. 14, 40 (2)**—*Exchange—Contract for pre-emption—Liability of legal representatives—Uncertainty of contract—Rule of perpetuities—Contract Act (IX of 1872), ss. 32, 37.*

Held by the Full Bench.—An agreement between the parties to a contract of exchange that, if either of them desired or in fact attempted to transfer the properties to a third person, the other party should have the right to pre-empt, is valid in law and enforceable against the legal representatives of the parties.

Per *Walsh, A. C. J.*—Such an agreement creates an obligation, imposing a restriction on the use of land by each of the parties to the contract; there is no uncertainty about it.

Section 14 of the Transfer of Property Act which codifies the law of perpetuities, is applicable only to transfers of property and does not apply to mutual rights and obligations created by such contracts. **A** AULAD ALI *v.* ALI AUTHAR, A. I. R. 1927 All. 170; 25 A. L. J. 289 **683**

——— **s. 40.** *See* TRANSFER OF PROPERTY ACT, 1882, ss. 14, 40 **683**

——— **s. 41**—*'Reasonable care'—Omission to scrutinise title-deeds, effect of.*

The mere fact that a *bona fide* purchaser of property did not scrutinise the title-deeds thereof is not conclusive evidence of want of reasonable care within the meaning of s. 41, Transfer of Property Act, so as to disentitle him to the benefit of the section.

In India the mere omission by a purchaser to call for title-deeds does not constitute constructive notice.

The question whether a person has exercised reasonable care under s. 41 of the Transfer of Property Act is one which must be decided upon the particular circumstances of each case.

A criterion which would be reasonable in England cannot always be applied to circumstances in which sales take place in this country. **M** SUNDARAMMAL *v.* ARUNACHALA MUDALI, (1927) M. W. N. 114 **665**

——— **s. 52.** *See* C. P. C., 1908, s. 50 **582**

——— **s. 52**—Lis pendens—*Mortgage suit—Termination of* lis—*Transfer after preliminary decree, effect of—Possession of transferee whether adverse to mortgagee—Limitation Act (IX of 1908), Sch. I, Art. 144—Adverse posssession.*

In mortgage suits *lis pendens* continues until a final decree is made and the mortgagee or the auction-purchaser, as the case may be, is placed in possession.

A person claiming under a transfer during the pendency of a mortgage suit cannot prescribe a title against the mortgagee by adverse possession until the latter becomes entitled to actual possession by virtue of his purchase in execution of his mortgage decree. **A** SAMI NATH SINGH *v.* THAKUR PRASAD RAI, A. I. R. 1927 All. 309 **294**

——— **s. 53**—*Fraudulent transfer—Preference of some creditors, effect of—Price, inadequacy of.*

The mere circumstance that a debtor selects some of his creditors and makes payments of their debts out of the sale-proceeds of his property is no ground for imputing a fraudulent intention to the vendor and vendee, so as to bring the transaction within the scope of s. 53 of the Transfer of Property Act, especially where the price fetched is not alleged or proved to be grossly inadequate. **N** BALAYYA *v.* NANDLAL **46**

——— **s. 54.**

See PART PERFORMANCE **866**

See PRE-EMPTION **610**

——— **s. 54**—*Sale—Registered instrument, absence of—Mutation, effect of—Estoppel—Pre-emption, decree for—Interest conveyed, extent of.*

Mutation proceedings are not judicial proceedings in which title to, and proprietary rights in, immoveable property are determined. They are in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of several claimants for the occupation of certain denominations of immoveable property may be put into occupation of it with the greater confidence that the revenue for it will be paid.

A and *B*, who were owners of a certain property, mortgaged it to *C*. Subsequently *A* sold the whole of the property to *D* by means of a registered sale-deed and thereafter made an application to the Revenue Authorities that the property should be mutated in the name of *D*. *B*, who was owner of half of the property and who had not joined in the sale in favour of *D*, also made an application to the Revenue Authorities intimating that he had no concern with the property, and that *D's* name may be entered in the revenue papers. Later on, *E* filed a suit for pre-emption in respect of the sale effected by *A* and obtained a decree. Finally *B* instituted a suit against *C*, *D* and *E* for redemption of the mortgage effected by *A* and himself in favour of *C* on the ground that the sale by *A* alone in favour of *D* was ineffectual to convey to *D*. *B's* rights and interests in the property covered by the sale-deed and that, therefore, *E* could not under his decree for pre-emption acquire *B's* rights and interests in the mortgaged property:

Held, (1) that *B's* proprietary rights in the property could only pass to *D* by a registered instrument and that in the absence of such instrument, a mere mutation had not the effect of transferring *B's* rights in favour of *D*;

(2) that the only right and title that passed to *E* by virtue of the decree obtained by him in the pre-emption suit was the right and title conveyed to *D* by the sale-deed executed by *A* and that this was only

the right and title of *A* himself in the property covered by the sale-deed;

(3) that, therefore, *B* being still owner of half the property was entitled to maintain a suit for redeeming the property. A RAM SARUP RAI *v.* CHARITTER RAI, A. I R. 1927 All. 338 **270**

——— **s. 55**—*Vendor and purchaser—Vendor's lien—Pro-note executed by purchaser in favour of third person—Novation—Vendor's lien, whether extinguished.*

Where at the instance of a vendor, the purchaser executes as part consideration for the sale, a promissory note in favour of a third person and a new contract is effected between the purchaser and such third person, a complete novation is effected by the substitution of the vendee's liability, in place of the vendor's liability to the third person and there is, therefore, a contract to the contrary within the meaning of s. 55, Transfer of Property Act. The vendor's lien for unpaid purchase-money to the extent of the promissory note is thereby extinguished even if the payee under the pro-note is only a *benamidar* for the vendor, inasmuch as the latter is disabled from suing on the pro-note. M SWAMINATHA ODAYAR *v.* SUBRAMANIA IYER, 51 M. L. J. 856; A. I. R. 1927 Mad. 219; 25 L. W. 411; 50 M. 548 **10**

——— **s. 59**—*Limitation Act (IX of 1908), Sch. I, Arts. 142, 144, 148—Mortgage, invalid, effect of—Possession of mortgagee, nature of—Recitals in mortgage-deed, whether evidence—Adverse possession—Redemption—Limitation.*

Where a mortgage is not effected by a registered deed as required by s. 59 of the Transfer of Property Act, it is invalid, but nevertheless the recitals contained in the unregistered mortgage-deed are admissible in evidence for the purpose of explaining the nature and character of the possession of the mortgagee over the mortgaged property.

A mortgage of an occupancy holding is not permitted by law, but where a mortgagee of an occupancy holding enters into possession of the holding and continues in possession thereof for more than twelve years, he can only prescribe for a title as mortgagee and his possession cannot be regarded as being adverse to the mortgagor. If the mortgagor in such a case brings a suit for possession of the holding against the mortgagee within twelve years from the date of the execution of the mortgage, he can claim an unconditional decree for possession on the ground that the mortgage being of an occupancy holding is void in law. But after the expiry of twelve years the mortgagee obtains a valid title as such and the mortgagor can recover possession of the holding only by redemption. The period of limitation for a suit for redemption in such a case, however, is sixty years as provided by Art. 148 of Sch. I to the Limitation Act. A MAHA MANGAL RAI *v.* KISHUN KANDU, A. I. R. 1927 All. 311 **346**

——— **s. 59**—*Mortgage—Registered instrument, necessity of—Mere delivery of possession, effect of.*

The fact that a person is put in possession of property in lieu of some money due to him does not confer on him any title to possession of the property in the absence of a registered instrument of mortgage.

Where a Statute requires that a particular kind of transfer, as for instance a mortgage, shall be effected by a particular kind of instrument, its provisions must be enforced with stringency. A MADAN MOHAN LAL *v.* JAI NANDAN LONIA, A. I. R. 1927 All. 411 **733**

——— **ss. 61, 62**—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage—Usufructuary mortgage and lease back—Same transaction—Arrears of rent, whether payable on redemption—Separate suit, whether necessary—Usufructuary mortgage with personal covenant, nature of.*

K mortgaged three items of immoveable properties to *T* with possession, under a deed which contained also a personal covenant to pay the principal and interest due under the mortgage. On the same day another deed was executed by which *K* took the properties back on lease from *T* agreeing to pay a fixed yearly rent which was equivalent to the interest on the mortgage amount. In default of payment of the rent reserved it was to be recovered from the income of the villages leased and by means of the lessee's other properties besides the properties mortgaged. In a suit for redemption by an assignee of the mortgagor's interest:

Held, (1) that the mortgage-deed and the lease-deed should be read together as they formed parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest;

(2) that the mortgage in question was something more than a usufructuary one inasmuch as it contained personal covenants on the part of the mortgagor to pay principal and interest, being either an anomalous mortgage or a combination of a simple and usufructuary mortgage;

(3) that under the provisions of O. XXXIV, r. 1, Civil Procedure Code, all claims affecting the equity of redemption should be disposed of in one and the same suit and that, therefore, the mortgagee was entitled to be paid the arrears of rent due under the lease-deed, with interest thereon, along with the mortgage amount, and was not bound to institute a separate suit to enforce his charge therefor.

Section 62 of the Transfer of Property Act applies only to the case of usufructuary mortgages pure and simple; and is not in any way inconsistent with s. 61 of the Act. P C PANAGANTI RAMARAYANIMGAR *v.* MAHARAJA OF VENKATAGIRI, A. I. R. 1927 P. C. 32; 52 M. L. J. 338; (1927) M. W. N. 261; 50 M. 180; 25 L. W. 621; 29 Bom. L. R. 805; 45 C. L. J. 395; 31 C. W. N. 670; 26 L. W. 134 **86**

——— **s. 68.** *See* LIMITATION ACT, 1908, SCH. I, ART. 120 **728**

——— **s. 82.** *See* C. P. C., 1908, O. XXXII, R. 7 **338**

——— **s. 100.** *See* TRUSTS ACT, 1882, s. 6 **506**

——— **ss. 105, 107.** *See* REGISTRATION ACT, 1908, s. 17 **404**

——— **s. 109**—*Mortgage of property in the possession of tenant—Mortgagee's right to sue for rent—Attornment by tenant, necessity of.*

Under s. 109, Transfer of Property Act, a mortgagee of property which has been leased by the mortgagor possesses all the rights of the mortgagors and can maintain a suit for rent or for its equivalent, namely, damages for use and occupation against the tenants of the mortgagor who continue to remain in possession after the date of the mortgage even if the tenants have not attorned to him. L TIRKHA RAM-CHUNI LAL *v.* MAMAN, 28 P. L. R. 157; A. I. R. 1927 Lah. 188 **672**

——— **s. 111 (g)**—*Landlord and tenant—Denial of*

Transfer of Property Act—contd.

landlord's title—Forfeiture of tenancy—Denial, equivocal, effect of.

The denial of a landlord's title by a tenant in order to work a forfeiture under s. 111 of the Transfer of Property Act, must be an unequivocal and unambiguous denial.

Plaintiff instituted a suit in the Small Cause Court to recover rent of a house from the defendant. Defendant pleaded that the house did not belong to the plaintiff and the Court thereupon returned the plaint to the plaintiff. The plaintiff, then, instituted a suit for ejectment of the defendant on the ground that he had denied the plaintiff's title to the house. It was found that the site of the house belonged to the plaintiff and that the house itself belonged to the defendant:

Held, that the plaintiff not being the owner of the house itself there could be no question of the denial of his title by the defendant in the previous suit and that inasmuch as there was no specific denial by the defendant in the previous suit of the title of the plaintiff to the site of the house, the plaintiff, was not entitled to eject the defendant from the site. **A** SARDAR SINGH *v.* MAN SINGH **646**

——— **s. 116**—*Landlord and tenant—Lease of homestead land, nature of—Tenant allowed to continue in possession for several years after expiry of lease—Ejectment—Notice to quit, whether necessary.*

The word "*raiyati*" used in a lease does not necessarily indicate a *jote* within the meaning of the Bengal Tenancy Act.

A lease of homestead land situate within the limits of a Municipality to persons who are not agriculturists, is governed by the provisions of the Transfer of Property Act and not by the Bengal Tenancy Act. It is immaterial that the land is described as *bagan* in the Record of Rights.

Where for a long number of years a tenant is allowed to continue in possession of the demised premises after the expiry of his lease, an inference may legitimately be drawn that his possession is not that of a trespasser but of a person who must be treated as holding over and whose rights can be determined only on a notice to quit. **C** SAFAR ALI *v.* KHOSH BANU, 31 C. W. N. 282; A. I. R. 1927 Cal. 279 **614**

——— **ss. 122, 123**—*Registration Act (XVI of 1908), s. 47—Hindu Law—Gift, deed of, execution of—Adoption—Registration of deed after adoption, effect of.*

Where a donor of immoveable property has handed over to the donee an instrument of gift duly executed and attested and the gift has been accepted by the donee, the donor has no power to revoke the gift prior to the registration of the instrument.

While registration is a necessary solemnity in order to the enforcement of a gift of immoveable property, it does not suspend the gift until registration actually takes place. When the instrument of gift has been handed over by the donor to the donee and accepted by him, the former has done everything in his power to complete the donation and to make it effective. Registration does not depend upon his consent, but is the act of an officer, who, if the deed is executed by or on behalf of the donor and is attested by at least two witnesses, must register it if it is presented by a person having the necessary interest within the prescribed period. Neither death, nor express revocation by the donor, is a ground for refusing registration, if the other conditions are complied with.

The adoption of a son by a Hindu made after the execution and delivery of a deed of gift of immoveable property, but before registration thereof, does not render the deed void as against the adopted son. **P C** KALYANASUNDARAM PILLAI *v.* KARUPPA MOOPPANAR, A. I. R. 1927 P. C. 42; 25 A. L. J. 113; (1927) M. W. N. 149; 4 O. W. N. 197; 25 L. W. 336; 52 M. L. J. 346; 38 M. L. T. 87; 50 M. 193; 31 C. W. N. 509; 8 P. L. T. 327; 29 Bom. L. R. 833; 45 C. L. J. 435 **105**

——— **s. 123**—Applicability to Muhammadans. *See* MUHAMMADAN LAW **296**

Transfer of Property (Amendment) Act (XXVII of 1926)—*Act not retrospective.*

Transfer of Property (Amendment) Act XXVII of 1926 is not retrospective in its nature so as to apply to documents executed prior to its coming into force. **O** SHEO DUTT *v.* GANGA CHARAN **651**

Trust—*Execution of trust deed appointing trustee for fixed period—Revocation of trust by original owner—Subsequent sale to third person—Suit for possession by vendee, dismissal of, on ground of invalidity of revocation—Subsequent suit for recovery of income and accounts, maintainability of.*

A person executed a trust deed appointing another as his trustee and empowering him to manage the properties for a fixed period, to collect the income, pay maintenance to named persons and hand over the balance to the original owner. He then revoked the trust and executed a sale-deed to a third person of the lands comprised in the trust deed. A suit by the vendee for possession was dismissed on the ground that the revocation of the trust deed was invalid. In a second suit against the trustee for recovery of the net income from the properties:

Held, (1) that at the date of the sale-deed the vendor had no ownership or saleable interest in the property which was vested in the trustee, the revocation having been held to be invalid;

(2) that the interest of the *cestui que trust* which was only a minor interest could not in law be and was not in fact conveyed under the sale-deed which purported to transfer the absolute property and not any interest therein apart from it;

(3) that the vendee having repudiated the trust deed ought not to be allowed to claim any benefit thereunder. **M** SIVARAMAKRISHNA IYER *v.* SIVAKAMI ACHI, A. I. R. 1927 Mad. 498 **648**

———Income-tax. *See* INCOME TAX ACT, 1922, s. 4 (3) **255**

Trusts Act (II of 1882), s. 6—*Transfer of Property Act (IV of 1882), s. 100—Limitation Act (IX of 1908), s. 10—Deed of partition—Undertaking to pay money to others—Property allotted made liable in case of default—Charge, whether created—Trust, creation of—Suit to recover such money—Limitation.*

Property is nonetheless trust property because the trustee as well as the beneficiary enjoy a beneficial interest in it.

Where, in a partition between members of a family, one of the parties received property of a higher value in consideration of his undertaking to pay a certain sum of money to a widow and daughter in the family and the document further provided that in case he failed to do so, he and the properties allotted to his share should be liable for the amount, in a suit to enforce the obligation:

Trusts Act—concld.

Held, (1) that a charge was created and inasmuch as the obligation annexed to specific property arose out of a confidence reposed in and accepted by the owner, the person who undertook the obligation was a trustee and the party to whom the payment was due was a *cestui que trust*;

(2) that the suit was, therefore, governed by s. 10, Limitation Act. M NATAMAL KUTTI POKKER *v.* NATAMAL USSAN MAYAN, 38 M L. T. 162; 26 L. W. 51 **506**

——— **s. 88.** *See* CONTRACT ACT, 1872, ss. 19, 19A ETC. **932**

Utpat vritti. *See* C. P. C., 1908, s. 60 (1) **1008**

Under-proprietary rights—Sir *rights, whether necessarily comprise under-proprietary rights—Decision of Rent Court as to status of tenant*—Res judicata—*Oudh Sub-Settlement Act (XXVI of 1866), r. 10—Proof of under-proprietary rights—Oudh Courts Act (IV of 1925), s. 12, sub-s. (2)—Case certified as fit one for appeal, whether can be argued in its entirety.*

Where a case is certified as a fit one for appeal under s. 12, sub-s. (2) of the Oudh Courts Act, 1925, the appellant is entitled to argue the appeal on all the points and is not bound to confine himself to the points considered by the Judge in granting the certificate.

The mere fact that a man sets up *sir* rights does not necessarily mean that he claims under-proprietary rights.

The decision by a Rent Court that a certain person held lands as an under-proprietor is not *res judicata* in a subsequent suit in a Civil Court by the proprietor for a declaration that he was not an under-proprietor.

Under r. 10 of the Oudh Sub-Settlement Act, 1866, the defendants must prove (1) that they have formerly been proprietors, (2) that the lands in suit had been held by them or by some persons from whom they inherited at some time since 13th February, 1844, and (3) that the lands had been held by them as *sir* (or *nankar*) when they were in proprietary possession. O MAHMUD-UL-HASAN KIRMANI *v.* BALDEO SINGH, A. I. R. 1927 Oudh 183 **851**

U. P. Excise Act (IV of 1910), ss. 53, 63—*Search without warrant—Officer's duty to record reasons—Omission to record—Mere irregularity—Procedure relating to search—Code of Criminal Procedure, how far applicable—Irregularity of search, effect of, on conviction.*

It is the duty of a Police Officer before proceeding to make a search without a search warrant, under s. 53 of the U. P. Excise Act, to record his grounds for believing that the obtaining of a search warrant might afford the offender an opportunity of escaping or of concealing the evidence of the offence. But the omission to record such grounds is not an illegality but a mere irregularity, especially where the officer has clearly recorded his intention to make the search before proceeding to search.

In making a search without a search warrant under the U. P. Excise Act a Police Officer is not confined to the strict provisions of the Code of Criminal Procedure relating to searches but only to those provisions, in so far as they are applicable under the Act. As the procedure for making searches under the Code relates to making searches under a search warrant it cannot be applied in entirety to searches which are made without a search warrant.

U. P. Excise Act—concld.

Entering a house to be searched, by a ladder, is not an act explicitly forbidden by law, although it is not advisable to make an entry in such manner.

A man proved to have been in possession of an article against the law cannot plead as a defence that the search was irregular.

Courts should pass very severe sentences upon persons who pander to the unhealthy cravings of men by supplying them with intoxicating drugs. O ALI ABBAS *v.* EMPEROR, 29 O C. 374; A. I. R. 1927 Oudh 132; 1 Luck. 301; 28 Cr. L. J. 321 **705**

——— **s. 63.** *See* U. P. EXCISE ACT, 1910, ss. 53, 63 **705**

U. P. Land Revenue Act (III of 1901), s. 39 (2)—*Tenants-in-common—Right to partition—Jurisdiction of Civil Court.*

Section 39, sub-s. (2) of the U. P. Land Revenue Act is intended for the purpose of protecting the rights of the landlord and does not prohibit co-tenants from obtaining a decree for partition of their holding between themselves.

The principle that a joint occupancy tenant is entitled to sue for, and a Civil Court is competent to grant, a decree for partition of a joint occupancy holding, though, if the *zemindar* is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the *zemindar* and the occupancy tenants as they stood prior to the partition, applies also to a partition between statutory tenants-in-common. O RAM SHANKAR *v.* MANDANKANI PRASAD, 4 O. W. N. 177; A. I. R. 1927 Oudh 147 **570**

——— **ss. 40, 41, 42, 44**—*Annual Register, entries in, not conclusive evidence.*

Under s. 44 of the U. P. Land Revenue Act entries in Annual Registers are to be presumed to be true only until the contrary is proved, although 'decisions' in disputed cases falling under ss 40, 41 and 42 constitute conclusive evidence in respect of the subject-matter in dispute in proceedings in Revenue Courts. O THAKURA *v.* GOVINDA, 29 O. C. 115; A. I. R. 1926 Oudh 499; L. R. 8 A. (O.) 3 **223**

——— **s. 44**—*Entry in Record of Rights—Presumption of correctness, nature of.*

An entry in an annual Record of Rights must be presumed to be true under s. 44 of the U. P. Land Revenue Act but the presumption is rebuttable. A IRSHAD HUSAIN *v.* MAKUT MANOHAR, A. I R. 1927 All. 377 **626**

——— **s. 86**—*Cess and rent, distinction between—Cess not mentioned in* wajib-ul-arz, *whether can be recovered.*

The primary notion of a cess is a payment not for the benefit of the landlord but a payment for some purpose of public convenience such as sanitation, Police and the like.

A *wajib-ul-arz* contained a clause stating that certain persons were appointed *chaukidars* for the safety of the village, that their salaries would be contributed to by the *ryots* at a certain rate and that if this collection was short of the sum required, the *zemindars* of the village would make up the balance. It was further stated that no house rent was realised from the tenants. In the *wajib-ul-arz* prepared at the next subsequent Settlement it was stated that *chaukidara* dues were realised from the *ryots* in the village. In the third Settlement, however, there was no record of *chaukidara* dues being payable:

Held, (1) that the *chaukidara* dues mentioned in the

U. P. Land Revenue Act—concld.

first two *wajib-ul-arz* were in the nature of a cess and not in the nature of rent;

(2) that inasmuch as there was no provision in the *wajib-ul-arz* of the last Settlement for recovery of such dues, they could not be recovered in view of the provisions of s. 86 of the U. P. Land Revenue Act. A TIRKHA RAM *v.* CHHEY, L. R. 8 A. 99 Rev. **740**

——— **s. 119**—*Grove—Partition—Trees, separate award of, whether necessary.*

Section 119 of the U. P. Land Revenue Act does not contemplate that the partition officer should award the trees as distinct from the land of groves, though it may well be that co-sharers may remove certain trees from certain plots before the partition takes effect. A TILAK SINGH *v.* RAM TAHAL SINGH, L. R. 8 A. 71 Rev.; A. I. R. 1927 All. 424 **729**

U. P. Town Improvement Act (VIII of 1919)—*Decision of Tribunal—Appeal—President refusing leave—Chief Court, whether can grant special leave.*

Where the President of a Tribunal constituted under the provisions of the U. P. Town Improvement Act of 1919 has refused to grant a certificate in respect of a case decided by the Tribunal that it is a fit one for appeal, the Chief Court has no authority to grant special leave to appeal where the amount in dispute is less than Rs. 5,000. O BAHADUR ALI KHAN *v.* SECRETARY OF STATE FOR INDIA, 3 O. W. N. 142; A. I. R. 1926 Oudh 240; 1 Luck. 131 **474**

Valuation of suit—Decree in excess of pecuniary jurisdiction, validity of. *See* JURISDICTION **109**

Vendor and purchaser—Duty of vendor to tender conveyance. *See* CONTRACT ACT, 1872, ss. 64 65 ETC. **860**

——— Option to re-purchase, nature of. *See* SPECIFIC RELIEF ACT, 1877, ss. 21, 23 (*b*) **399**

——— *Sale-deed—Wrong item of property inserted by mistake—Suit for rectification time barred—Title of purchaser—Oral evidence to prove real item—Evidence Act (I of 1872), s. 92 proviso 1—Registration Act (XVI of 1908), s. 49—Absence of registered deed of sale, effect of—Part performance—Equity.*

Even though a remedy by way of rectification of an instrument is open to a party when through mutual mistake of the parties, an instrument in writing does not truly express their intention, yet, if, notwithstanding the mutual mistake, the property actually intended to be transferred has passed to the possession of the vendee, the vendee's title to the property cannot be challenged simply because the instrument has not been rectified within three years from the date of the discovery of the mistake by the vendee. It is always open to the vendee to show that there was a mistake in the instrument and that, as a matter of fact, the property in his possession was intended to be transferred to him, and the vendee is entitled to lead oral evidence to show the mistake in the instrument in view of the provisions of proviso 1 to s. 92 of the Evidence Act.

Where a vendor has got the consideration for the sale of a particular item of immoveable property and the transaction has been acted upon by the parties, the title of the vendee to the property sold cannot be defeated by the mere fact that a wrong item was shown in the sale-deed by mistake and that in consequence there was no registered document to evidence the sale of the item of property really intended to be sold.

Vendor and purchaser—concld.

When the actings and conduct of the parties are founded upon, as in the performance or part performance of an agreement, the *locus pœnitentiæ* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. A KESHO SINGH *v.* ROOPAN SINGH, A. I. R. 1927 All. 355 **568**

——— Sale of village—House and *kotha* whether pass to purchaser. *See* C. P. C., 1908, SCH. III, PARA. 11 **863**

——— *Suit by purchaser for possession—Purchaser found not entitled to recover possession—Claim for refund of purchase-money—Separate suit.*

A purchaser asking for re-payment of the purchase-money in a suit for recovery of possession of the property, on his claim for possession being found unsustainable, may be directed to raise the question in a separate suit, where the question whether the purchase was a truly speculative one or a purchase under such circumstances as would warrant a good title has been not specifically investigated in the Courts below. P C LAKSHMAN CHANDRA MANDAL *v.* TAKIM DHALI, 24 L. W. 328; 30 C. W. N. 1009; A. I. R. 1926 P. C. 118 **345**

Waqf—*Suit challenging waqf—Agreement surrendering rights in favour of mutwalli in return for payment of allowances, effect of—Waqf declared invalid, effect of.*

A *waqf* was declared of certain immoveable properties by their owners and the defendant was appointed *mutwalli* of the *waqf*. Certain members of the family of the *waqif* instituted a suit challenging the validity of the *waqf*. During the pendency of the suit an agreement was arrived at by the parties under which the plaintiffs specifically surrendered all their rights and interests in the properties in dispute in favour of the defendant, accepted the validity of the *waqf* and reserved to themselves the right to receive certain allowances charged upon the income of the *waqf* property and payable by the defendant as *mutwalli*. These allowances were to be continued in favour of the plaintiffs' heirs. Later on, the defendant refused to pay such allowances and on the matter being taken to Court, it was decided finally by the Privy Council that the *waqf* was invalid but that the allowances were nevertheless to be paid to the plaintiffs. Subsequently the plaintiffs mortgaged their interests in the *waqf* property and the mortgagees instituted the present suit against the defendant to recover possession of the shares of their mortgagors in the mortgaged properties:

Held, (1) that the interpretation by the Privy Council of the agreement arrived at during the pendency of the suit to challenge the validity of the *waqf* was binding upon the Courts in the present suit;

(2) that the effect of the agreement was to make the defendant the absolute owner of the properties in dispute subject only to a charge for the payment of the allowances specified in the agreement;

(3) that, therefore, the mortgagees had no title to the properties in dispute and their suit for possession must be dismissed;

(4) that nevertheless, however, the mortgagees were entitled to a decree for possession of the allowances payable to their mortgagors. C JANAKI NATH ROY *v.* HABIBULLAH SAHEB, 45 C. L. J. 151; A. I. R. 1927 Cal. 359 **413**

Waste land—Adverse possession—Onus of proof. *See* LIMITATION ACT, 1908, SCH. I, ARTS 142, 144 **51**

Will—*Bequest to two or more—Tenancy-in-common—Extinction of legatee's line—Reversion—Heir disinherited under Will, whether entitled to benefit of reversion.*

Where property is bequeathed to two or more persons jointly, the legatees acquire the property as tenants-in-common and not as joint tenants.

Where property bequeathed under a Will reverts to the testator's line on the extinction of the legatee's line, an heir of the testator cannot be deprived of the benefit of reversion on the ground that he had been originally deprived of any share by the Will. L DEVI DAS *v.* NIZAM DIN, A. I. R. 1927 Lah. 278 **949**

——— *Disposing state of mind—Practice—Probate appeal—Necessary parties.*

To prove that at the time of the execution of a Will the testator was in a disposing state of mind it is enough to show that his mental faculties were not impaired and that he knew what he was doing; it is not necessary to show that he was capable of appreciating the claims of those who were excluded by the Will from participation in the property where the Will is not an unnatural one.

All the relations whose names are given in an application for Probate are not parties to the proceedings, as the law does not require notice to them and are not, therefore, necessary parties to a Probate appeal. L TELU RAM *v.* BADRI NATH **162**

——— *Proof of execution—Presumption of due execution from circumstances—'All things must be presumed to have been rightly done.'*

Although the recollection of the witnesses is vague or has died away, in view of the familiar principle that all things are to be presumed to have been rightly done unless there is a reasonable ground for doubting it, a Will may be presumed to have been duly executed where it is clear that the testator himself fully appreciated what was required, it is shown that he knew all about the requirements, and the circumstances are all in favour of the due execution of the Will. A H. F. MAHONEY *v.* GEORGIANA DOMINICK, A. I R. 1927 Cal. 333 **675**

WORDS AND PHRASES:—

Building. *See* PENAL CODE, 1860, ss. 378 ETC. **120**
Charged. *See* PENAL CODE, 1860, s. 224 **988**
District. *See* C. P. C., 1908, ss. 3, 23 **331**
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Ensuing year. *See* CONTRACT **573**
Evidence. *See* CR. P. C., 1898, ss. 202, 346 **992**
Factory. *See* FACTORIES ACT, 1911, ss. 2 ETC. **235**

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Re-construction. *See* MADRAS DISTRICT MUNICIPALITIES, ACT, 1920, ss. 3, 317 **375**
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Workmen's Compensation Act (VIII of 1923), ss. 3, 4, 11 (6), 20, 30—*Injury caused by accident in course of employment—Disablement—Compensation, when can be awarded—Circumstances disentitling workman from compensation—Burden of proof—Appeal—Wrong interpretation of law, whether question of law.*

Section 4 of the Workmen's Compensation Act does not lay down that the disablement should be solely and directly attributable to the accident. The test is not whether the disablement is the direct or even probable result of the injury or the injury the natural cause thereof, but whether the disablement can be traced to the injury even as the unusual, but not unconnected result thereof. The requirement of the section is satisfied if the injury can be traced to the accident even as the unnatural cause thereof.

To claim exemption under s. 11 (6) of the Workmen's Compensation Act the employer must prove the circumstances mentioned in the section as disentitling the workman from claiming compensation.

Where the Commissioner appointed under s. 20 of Workmen's Compensation Act approaches the case from a wrong stand point and proceeds upon a wrong interpretation of the law, his decision is open to appeal under s. 30 of the Act, provided the conditions laid down in that section as to valuation are satisfied. C ASHUTOSH SEAL *v.* GOURIPORE CO. LTD., 31 C. W. N. 286; A. I. R. 1927 Cal. 286; 45 C. L. J. 244 **441**

Wrongful injunction—*Suit for damages, maintainability of.*

Although as a general rule an action does not lie for damages against a person for bringing a civil action, however malicious and unfounded it may be yet a suit can be maintained for damages for wrongfully obtaining a temporary injunction. C HAR KUMAR DE *v.* JAGAT BANDHU DE, 53 C. 1008; A. I. R. 1927 Cal, 247 **318**

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